FIXING MULTI-FORUM SHAREHOLDER LITIGATION

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This Article presents new empirical evidence demonstrating that serious intra-corporate disputes at public companies now attract lawsuits in multiple fora. No existing mechanism can reliably coordinate shareholder litigation in different court systems, and the resulting disorder generates uniformly negative consequences for shareholders. The multi-forum character of shareholder litigation can undermine its deterrent effect by aggravating the disjunction between settlement values and merit. At the same time, the multi-forum pattern can diminish the quality of U.S. corporate law over time by depriving incorporation states of important cases.

This Article proposes to fix multi-forum shareholder litigation by creating a clear and simple mechanism for coordinating similar cases in different court systems. This proposal would require federal courts to stay proceedings in shareholder litigation when a similar case is pending in the state of incorporation. It would also allow suits filed in states other than the state of incorporation to be removed to federal court, where they would be subject to the same stay of proceedings. Such a system would neutralize the ability of any plaintiff to file a case that could compete for settlement with a case in the incorporation state. The result is an ordered solution to the problem of multi-forum shareholder litigation that prioritizes the state of incorporation when suits are filed in competing fora but otherwise does nothing to restrict the venue options of shareholders.

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I. INTRODUCTION

Delaware has become a pariah in shareholder litigation, according to provocative research by John Armour, Bernard Black, and Brian Cheffins.[1] Over the past fifteen years, shareholders have spurned the Delaware courts and are now likely to file fiduciary lawsuits elsewhere.[2] To stanch the flow of cases from Delaware, commentators have argued that firms should adopt choice-of-forum provisions limiting where shareholders can file lawsuits.[3] The focus on Delaware in this research makes sense, given the importance of that state in U.S. corporate law, but it has caused commentators to misdiagnose the problem in shareholder litigation at public companies and to prescribe the wrong remedy.

This Article offers new empirical evidence that the pattern of case filings against all public firms looks like the pattern of filings against Delaware firms. It presents two sets of hand-collected data: derivative lawsuits over stock options backdating and class actions filed against target companies in the 250 largest public company mergers from 2009 to 2011. These data reveal that shareholders of all firms—regardless of incorporation state—often file lawsuits outside of the state of incorporation. Shareholders have not, however, abandoned incorporation states *en masse* for some superior alternative forum. Instead, they regularly file identical claims in more than one forum and then compete with each other for position in settling with defendants. A company facing allegations of self-dealing, for example, might be sued in its state of incorporation, in its headquarters state, and perhaps also in federal court. Practi-

1. John Armour, Bernard Black, & Brian Cheffins, *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1347 (2012) [hereinafter ABC, *Balancing Act*]; John Armour, Bernard Black & Brian Cheffins, *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEG. STUD. 605, 607 (2012) [hereinafter ABC, *Losing Cases*]; *see* Catherine Dunn, *Delaware Chancery Court Hears Cheers and Critiques at Columbia*, CORP. COUNS., Nov. 21, 2011 (attributing to Black "perhaps the day's most provocative claims" at a Columbia University conference on Delaware courts); Sean O'Sullivan, *Chancery Court Praised at NYC Meeting*, DELAWARE ONLINE (Nov. 14, 2011), http://www.delawareonline.com/article/20111113/NEWS/111130335/Chancery-Court-praised-NYC-meeting (describing a panel on Black's research as "controversial").

2. ABC, *Balancing Act*, *supra* note 1, at 1347 ("Delaware's share of shareholder suits against directors has dropped sharply over the last 15 years.").

3. *E.g.*, Joseph A. Grundfest, *Choice of Forum Provisions in Intra-Corporate Litigation: Mandatory and Elective Approaches* 8 (Rock Center for Corporate Governance at Stanford University, Working Paper No. 91, 2010) [hereinafter Grundfest, *Choice of Forum Provisions*] (advocating the adoption of intra-corporate forum selection clauses).

tioners have drawn attention to this type of multi-forum litigation,[4] and academic commentary has recently begun to grapple with it.[5] But the extent of the pattern has been unclear,[6] and some have assumed that it arises only in limited circumstances.[7]

The data presented in this Article shows that multi-forum litigation is pervasive, affecting more than half of all firms in both types of litigation, no matter where they are incorporated. Much of the out-of-Delaware trend in shareholder litigation thus is best seen not as something unique to firms incorporated in that state, but instead as part of the broader phenomenon of multi-forum shareholder litigation. And there is every reason to expect that multi-forum litigation will arise in any serious shareholder dispute.

The root cause of this multi-forum pattern lies in in the structure of shareholder litigation. Plaintiffs' attorneys compete with each other to win fee awards, and filing in a different court is an effective strategy for doing so. Consider a plaintiff's attorney who is debating whether to file what would be the fourth similar shareholder complaint in a particular forum. The attorney might not bother to file there because the odds of being appointed lead counsel—and winning a fee—are long. But that attorney has another option: file the complaint in a second forum. No

4. *E.g.*, Edward B. Micheletti & Jenness E. Parker, *Multi-Jurisdictional Litigation: Who Caused This Problem, and Can It Be Fixed?*, 37 DEL. J. CORP. L. 1, 4 (2012) ("[M]ultiple sets of plaintiffs will file multiple lawsuits in multiple locations related to the same deal. This tactical phenomenon has become known as 'multi-jurisdictional litigation,' and it now exists in nearly every deal litigation matter."); MARK LEBOVITCH ET AL., MAKING ORDER OUT OF CHAOS: A PROPOSAL TO IMPROVE ORGANIZATION AND COORDINATION IN MULTI-JURISDICTIONAL MERGER-RELATED LITIGATION 1 (2011) (prominent plaintiff-side firm describing the pattern as "all-too-familiar"); Amy Kolz, *Rigging the Game*?; *In Delaware, Shareholder Class Action Settlements Raise Questions About Coziness*, AM. LAWYER, Mar. 2011, at 1 [hereinafter Kolz, *Rigging*] (noting "an expectation that there will be [suits in] multiple forums" over M&A transactions); Dionne Searcey & Ashby Jones, *First, the Merger; Then the Lawsuit*, WALL ST. J., Jan. 10, 2011 (identifying three notable deals that attracted litigation, and all three faced cases in multiple fora); ASS'N OF THE BAR OF THE CITY OF N.Y. COMM. ON SEC. LITIG., COORDINATING RELATED SECURITIES LITIGATION: A POSITION PAPER 3 (2009) [hereinafter ABCNY, *Coordinating*] ("[T]he problem [of multi-forum litigation] is rife."); John L. Latham & Alex Reed, *Strategies for Mitigating the Hardships of Multi-Jurisdiction Stockholder Litigation*, *in* What All Business Lawyers Must Know About Delaware Law Developments 2009, at 558 (Practising Law Inst. ed., 2009) (litigators at Alston & Bird) (noting that multi-forum litigation has become "the norm rather than the exception").

5. *See* Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053 (2013) [hereinafter Griffith & Lahav, *Market for Preclusion*]; Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multijurisdictional Litigation*, 106 NW. U. L. REV. 1753 (2012) [hereinafter Thomas & Thompson, *Theory*]; John C. Coffee, Jr., *Foreword: The Delaware Court of Chancery: Change, Continuity—and Competition*, 2012 COLUM. BUS. L. REV. 387, 396 (2012) [hereinafter Coffee, *Foreword*]; Leo E. Strine, Jr., Lawrence A. Hamermesh & Matthew C. Jennejohn, *Putting Stockholders First, Not the First-Filed Complaint*, (John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 740, 2013) [hereinafter Strine et al., *Stockholders First*].

6. Thomas & Thompson, *Theory*, *supra* note 5, at 1788 n.192 ("There is no good data source on the level of multijurisdictional derivative litigation.").

7. *See* Coffee, *Foreword*, *supra* note 5, at 396 ("[E]ven though M&A litigation is a virtual certainty today in major transactions, the scale of the problem is much smaller than in the case of securities class actions. Fewer companies are affected."); Thomas & Thompson, *Theory*, *supra* note 5, at 1798 ("At any given point in time, however, there are only so many of these cases, and, hence, the number of deals that attract litigation (and lead to positive fee awards) is limited.").

mechanism can reliably coordinate cases in different jurisdictions,[8] and thus by filing in a second forum a plaintiff's attorney can secure control of the case *in that forum*, and with it a seat at the settlement table.[9] In addition, if the attorney can expedite proceedings in the second forum, the center of gravity in the litigation will shift, increasing the attorney's leverage with defendants and other plaintiffs' attorneys. This same reasoning would impel another attorney sitting on the sideline to file a case in yet a third forum. In this way, shareholder litigation spreads across multiple fora.

Judges and practitioners have uniformly criticized multi-forum litigation,[10] but academic commentary thus far has been equivocal about its consequences for shareholders.[11] Indeed, at first glance, multi-forum shareholder litigation looks like a market in the enforcement of fiduciary duties, where courts compete to offer the most shareholder-friendly interpretations of Delaware law or the most attractive procedures for pressing claims. This happy characterization wilts under scrutiny. Multi-forum litigation promises shareholders no benefits and threatens them with considerable costs: it can erode the usefulness of shareholder litigation and impair the development of corporate law in the U.S.

8. Transcript of Settlement Hearing at 31, *In re* Alberto-Culver Co. S'holder Litig., No. 5873-VCS, 2011 WL 9535207 (Del. Ch. Feb. 21, 2011) ("Look, I don't applaud the multiple forum stuff. I don't. I wish there was a cure for it."); *see also* Peter E. Kazanoff, *Multi-Jurisdictional Shareholder Challenges to M&A Transactions*, *in* M&A LITIGATION 2011, at 47 (Practising Law Inst. ed., 2011) ("[T]here is no systemic solution to the problem of parallel litigation challenging M&A transactions in multiple state courts.").

9. Kazanoff, *supra* note 8, at 42 (litigator at Simpson Thatcher & Bartlett LLP) ("Having a seat at the negotiating table with defendants is, of course, essential to the efforts of plaintiffs' attorneys to monetize their investments in contingency fee litigation.").

10. Chancellor Strine has suggested that multi-forum shareholder litigation represents a "systemic failure endangering the ability of representative shareholder litigation to produce net benefits to investors." Strine et al., *Stockholders First*, *supra* note 5, at 16. Both the defense bar and the plaintiff's bar have criticized it. *Panel: Delaware's World: Who Are Its Competitors*, 2012 COLUM. BUS. L. REV. 640, 666 (comments of plaintiff's lawyer Stuart Grant) [hereinafter Grant, *Delaware's World*] ("[M]ulti-jurisdictional litigation is a significant problem, I think not only for the Delaware courts."); Motion of Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Reversal, Louisiana Mun. Police Emps.' Ret. Sys. v. Pyott, 46 A.3d 313 (Del. 2012) (No. 380) ("[T]he issue of corporations being exposed to derivative lawsuits in multiple fora . . . increasingly burdens corporations and their boards, and ultimately their investors."); 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 10 (2012) ("One thing is clear. Action is needed now to eliminate the abusive litigation that is hurting shareholders . . . ."). Delaware courts have been the most insistent that the multi-forum litigation is problematic. *E.g.*, Transcript of Settlement Hearing at 19, *In re* Compellent Tech. Inc. S'holder Litig., No.. 6084-VCL (Del. Ch. Jan. 13, 2011) ("[Multi-forum litigation is] in the interest of plaintiffs' counsel, not in the interest of stockholders. Stockholders don't have any reason to want multiple forums."); Transcript of Courtroom Status Conference, at 18, Scully v. Nighthawk Radiology Holdings, Inc., No. 5890–VCL (Del. Ch. Dec. 17, 2010) ("We all know that the phenomenon of plaintiffs filing deal litigation in multiple forums is a continuing problem."); Hearing on Motion to Expedite at 16–17, *In re* RAE Sys., Inc., S'holders Litig., No. 5848-VCS (Del. Ch. Nov. 10, 2010) ("I believe in the value of the representative litigation process for investors. It is not in the interests of diversified investors to have . . . litigation in three different places. It doesn't make any sense. I defy anyone to explain how it's good for investors. It's not.").

11. Griffith & Lahav, *Market for Preclusion*, *supra* note 5, at 1059 (arguing that the current system has "overlooked benefits"); Thomas & Thompson, *Theory*, *supra* note 5, at 1819 (tentatively concluding that multi-forum litigation comes with "limited costs and benefits").

For the threat of shareholder litigation to deter misconduct, the value of the claims in settlement must bear some relationship to their underlying merit. The multi-forum character of shareholder litigation undermines this relationship in different ways. It increases the likelihood that weak claims will survive early procedural hurdles because no single court has the power to throw them out. In addition, it diminishes the incentive for any plaintiff's attorney to invest in claims because fee awards must be split with attorneys in other fora. And perhaps most importantly, the plaintiff's attorney in each forum cannot press for the strongest possible result in settlement because plaintiffs' attorneys in other fora may underbid him, and the predictable result is weaker settlement terms for the defendants.[12] However feeble shareholder litigation might be as a tool of corporate governance,[13] its multi-forum character aggravates its ineffectiveness by slackening the relationship between a claim's settlement value and its merit.

Multi-forum shareholder litigation also impedes the development of U.S. corporate law. A cardinal virtue of American corporate law is that it consists not of one monolithic code but instead of fifty competing alternatives. The vigor of this system depends on the courts of each state having the opportunity to shape the content and application of their law in important shareholder disputes. As Chancellor Strine has noted, depriving incorporation states of cases "diminishes the chance for appellate courts to weave a definitive and consistent tapestry out of their state's laws, and increases the possibility of unpredictability in the law's application."[14] Multi-forum litigation often means that important cases will proceed partly or entirely outside of the state of incorporation,[15] eroding the vitality of our state-based system for generating corporate law.

This Article proposes a legislative reform that would solve the problem of multi-forum shareholder litigation. The proposal would compel federal courts to stay shareholder proceedings in favor of any contemporaneous filing in the state of incorporation. Also, any contemporaneous lawsuits in non-incorporation states may be removed to federal court, where they would be subject to the stay. In this way, the proposal prioritizes shareholder litigation filed in the incorporation state. It would require federal legislation, and statutory language that would implement it appears in Appendix II.

12. The classic treatment of this phenomenon is John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370–72 (1995) [hereinafter Coffee, *Class Wars*].

13. *See* TOM BAKER & SEAN GRIFFITH, ENSURING CORPORATE MISCONDUCT: HOW LIABILITY INSURANCE UNDERMINES SHAREHOLDER LITIGATION 2 (2010) [hereinafter BAKER & GRIFFITH, ENSURING MISCONDUCT] (describing how the operation of directors' and officers' liability insurance can shield managers from financial liability for corporate misdeeds and thus undermine the deterrence function of shareholder litigation); Bernard Black et. al., *Outside Director Liability*, 58 STAN. L. REV. 1055, 1063–64 (2006).

14. Strine et al., *Stockholders First*, *supra* note 5, at 5.

15. The examples come from Delaware, but as this Article demonstrates, the point is general. ABC, *Balancing Act*, *supra* note 1, at 1363 ("Delaware now rarely exercises full control over corporate litigation, in the sense of being the sole forum. In many cases, it never sees the litigation at all.").

The design of this legislative reform draws inspiration from Elliott Weiss and John Beckerman's pioneering 1995 proposal to address dysfunction in federal securities litigation.[16] This proposal, like theirs,[17] harnesses the competitive virtues of plaintiffs' attorneys in service of social welfare. Each plaintiff's attorney has a powerful incentive to eliminate competitors in other fora, and the design of this proposal gives the power to seek the federal stay and to remove cases filed in other states to the plaintiff's attorney who controls the case in the incorporation state.[18] In this way, the proposal relies on that attorney's self-interest to guard against multi-forum litigation. This frees the attorney in the incorporation state to press for the strongest possible settlement in good cases without fear of being underbid and at the same time allows courts to eliminate weak cases quickly. These effects tighten the relationship between the merits of shareholder claims and their settlement values.

On a conceptual level, this proposal does two things: first, it creates a mechanism to coordinate proceedings when shareholders bring similar lawsuits in more than one forum, and second, it establishes a rule of priority in favor of the incorporation state. The creation of the mechanism is by itself a public policy improvement over the *status quo*, because *any* rule for selecting among the implicated fora—based on filing order, the value of the named plaintiffs' investments, the height of the named plaintiffs, etc.—would ameliorate the pathologies of multi-forum shareholder litigation. The more contentious issue is the proposed rule prioritizing the state of incorporation. That rule is normatively attractive because it would produce systemic benefits for U.S. corporate law by channeling important cases to the state of incorporation, using multi-forum litigation as a proxy for importance. This ensures that each state has sufficient opportunity to manage the content and application of its corporate law. Thus, the proposed priority rule would sustain our distinctive and valuable system of producing corporate law. Although there is some irony in calling on the power of the federal government to vindicate the virtues of our state system of corporate law, the proposal is designed to plug a hole in our federalist arrangement that impedes, rather than supports, jurisdictional competition.

This proposal supplies only a default arrangement, and it allows firms flexibility to reorder their affairs if they wish. A firm that likes the

16. Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2058 (1995) (proposing "new practices, consistent with current procedural rules, that courts could adopt to encourage institutional investors to become lead plaintiffs"). Congress adopted this approach in the Private Securities Litigation Reform Act of 1995. *See* 15 U.S.C. § 78u-4(a)(3) (2012); Elliott J. Weiss, *The Lead Plaintiff Provisions of the PSLRA After a Decade, or "Look What's Happened to My Baby*," 61 VAND. L. REV. 543, 543 (2008).

17. Weiss & Beckerman, *Let the Money Do the Monitoring*, *supra* note 16, at 2106 (arguing that under their proposal "[m]arket forces would be brought into play" because "plaintiffs' attorneys frequently would find themselves competing to be retained by institutional investors," and suggesting that this could improve the fee arrangements and filing decisions in securities litigation).

18. *See* section (d) in Appendix II.

coordination mechanism but not the priority rule may designate an alternate first-priority jurisdiction in place of the incorporation state by adopting a forum selection clause. In contrast, a firm that wishes to abandon the mechanism entirely may do so by shareholder vote, reverting to the current system where a shareholder may file a complaint in any court of competent jurisdiction. This proposal thus does not take away any of the freedom currently available to public companies to order their affairs. It merely switches the default fora for shareholder litigation in cases attracting numerous filings from any court of competent jurisdiction to the incorporation state.

This Article proceeds as follows: Part II outlines the role of shareholder litigation in corporate governance and the role of Delaware in shareholder litigation. Part III presents the data and shows that multi-forum litigation afflicts public firms no matter where they are incorporated. Part IV explains how competition among plaintiffs' attorneys drives multi-forum litigation. Part V argues that any benefits of multi-forum litigation are illusory and that such litigation threatens shareholders by undermining the deterrent effect of litigation and by diverting important cases from incorporation states. Part VI examines the shortcomings of all existing approaches. Part VII makes the case for my proposal to coordinate multi-forum shareholder litigation, outlines its design and procedural mechanics, and considers some of its weaknesses.

II. SHAREHOLDER LITIGATION IN CORPORATE GOVERNANCE

This Part briefly sets out the theoretical underpinnings of shareholder litigation as a tool of corporate governance and then traces the erosion of the traditional conception of Delaware courts in shareholder litigation.

A. Deterrence and Settlement

Corporate codes famously vest plenary authority in the board of directors.[19] The resulting arrangement leaves the welfare of shareholders dependent on the behavior of managers. Managers of course may work diligently in shareholders' interest, and an array of economic forces supply incentives for doing so.[20] But there is the ever-present risk that managers may fail to act in the interests of shareholders.[21] The great bulk of

19. *E.g.*, DEL. CODE ANN. tit. 8, § 141(a) (2013) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . . ."); Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984) ("A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation.").

20. *E.g.*, Frank H. Easterbrook, *Managers' Discretion and Investors' Welfare: Theories and Evidence*, 9 DEL. J. CORP. L. 540 (1984) (describing how capital markets, product markets, and the market for corporate control induce managers to look after the interests of shareholders).

21. Lucian Ayre Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 850 (2005) ("In publicly traded companies with dispersed ownership, the interests of management do not fully overlap with those of shareholders, and management thus cannot be automatically counted

corporate law is directed at minimizing the costs associated with this agency problem.[22] State law fiduciary duties are the principal substantive corporate law rules that limit director and manager opportunism, and shareholder suits—either derivative actions or direct claims—are the mechanism for enforcing those duties.[23] The threat of a fiduciary suit can deter management misconduct,[24] and this deterrence rationale is regarded as the chief justification for shareholder suits.[25]

At a public company, shareholders have no incentive to enforce a fiduciary duty in court because their holdings are, individually, too small to justify the costs of a suit.[26] To surmount this collective action problem, corporate law allows claims to be brought on behalf of the entire group of shareholders, and the costs of the claim can be spread across that same group when it confers some common benefit on them.[27] Thus, as a practical matter, shareholders do not hire attorneys; instead, attorneys, whose costs can be taxed against the recovery, hire shareholders. The plaintiff whose name is on the cover of the complaint is often little more than a figurehead.[28] Plaintiffs' attorneys decide whom to sue, when and where

on to take actions that would serve shareholder interests. As a result, agency costs that reduce shareholder value might arise.").

22. *E.g.*, John Armour, Henry Hansmann & Reinier Kraakman, *What is Corporate Law?*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 1, 2 (Reinier Kraakman et al., eds., 2d ed. 2009) ("[M]uch of corporate law can usefully be understood as responding to three principal sources of opportunism: conflicts between managers and shareholders, conflicts among shareholders, and conflicts between shareholders and the corporation's other constituencies, including creditors and employees. All three of these generic conflicts may usefully be characterized as what economists call 'agency problems.'").

23. Claire A. Hill & Brett H. McDonnell, *Fiduciary Duties: The Emerging Jurisprudence*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 133, 134 (Claire A. Hill & Brett H. McDonnell, eds. 2012) ("The main mechanism by which state corporate law today attempts to patrol the behavior of those running the corporation is the law of fiduciary duty. This law is enforced through shareholder actions, derivative or direct, against those alleged to have violated a duty to the corporation.").

24. Sean J. Griffith, *Uncovering a Gatekeeper: Why the SEC Should Mandate Disclosure of Details Concerning Directors' and Officers' Liability Insurance Policies*, 154 U. PA. L. REV. 1147, 1154–55 (2006) ("[T]he underlying issue [in various types of shareholder litigation] is the failure of the corporation to design a structure to constrain its managers from acting to benefit themselves at the expense of shareholders. Much shareholder litigation, in other words, arises as a result of managerial agency costs.").

25. BAKER & GRIFFITH, ENSURING MISCONDUCT, *supra* note 13, at 10 ("If shareholder litigation systematically fails to deter, it would fail to accomplish its underlying purpose and would have no reason to exist."). Shareholder suits may of course return funds to shareholders, compensating them for wrongs past, but the compensation rationale fails to withstand scrutiny. *See id*. at 5–8 (examining various critiques that "effectively destroy[] the compensation rationale as a justification for most shareholder litigation"); Hill & McDonnell, *supra* note 23, at 135 ("The threat of being sued for violation of one's fiduciary duty helps deter agents from taking advantage of their principals.").

26. Under the traditional American rule, each side bears its own costs. *See* Boeing Co. v. Van Gemert, 444 U.S. 472, 483 (1980) (Rehnquist, J., dissenting) (noting "the historic prevalence of the 'American rule,' which generally prevents a court from requiring the losing party to pay the prevailing party's attorney's fees").

27. *See* Goodrich v. E.F. Hutton Group, Inc. 681 A.2d 1039, 1044 (Del. 1996) ("[T]he [common fund] doctrine provides that 'a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.'") (quoting *Boeing Co. v. Van Gemert*, 444 U.S. at 478).

28. There is no direct corporate analog to the federal Private Security Litigation Reform Act (PSLRA), which presumptively vests control of federal securities claims in large holders. Even under

to sue, what claims to bring, how to litigate the claims, and on what terms to settle them.[29] Shareholders are thus confronted with yet another agency problem: plaintiffs' attorneys may not always act in their best interests.[30] The interest of plaintiffs' attorneys in shareholder litigation is a fee award, and this standard economic model of shareholder litigation focuses on the potential payoff to the plaintiff's attorney.[31]

Shareholder claims usually settle,[32] so settlement must be the mechanism through which deterrence happens. If settlement values reflect the strength of claims, then the reputational or financial cost associated with a settlement can deter wrongdoing. The crucial question is whether plaintiffs' attorneys have incentives to "price" claims accurately in settlement. The goal is to structure the incentives of plaintiffs' attorneys—fee awards—so that they bring strong claims and press them forcefully and decline to bring weak claims.[33] Doing so can allow shareholder litigation to work reasonably well at policing agency costs.

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the PSLRA there is no reason to think that the plaintiff with the largest holdings necessarily has much influence over the attorney.

29. Randall S. Thomas & Robert B. Thompson, *Empirical Studies of Representative Litigation*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW (Claire A. Hill & Brett H. McDonnell eds. 2012) 152, 154 ("[I]t has often been the attorney, and not the class representative, that has the largest economic interest in the suit and who we would therefore expect to be the key decision-maker in litigation.").

30. *Id*. at 155 ("[I]f suits were being driven too much by lawyer interests, representative litigation could result in the attorney initiating suits with little merit, settling strong suits for too little, and structuring the settlement so that the costs are not borne by the actual wrongdoers."); Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C.D. L. REV. 137, 151 (2012) ("This type of litigation is highly susceptible to agency costs because the interests of counsel will not always align with the interests of their purported clients, the shareholders."); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883 [hereinafter Coffee, *Entrepreneurial Litigation*] ("It is no secret that substantial conflicts of interest between attorney and client can arise in class action litigation. In the language of economics, this is an 'agency cost' problem.").

31. Coffee, *Entrepreneurial Litigation*, *supra* note 30, at 888; Reinier Kraakman et al., *When Are Shareholder Suits in Shareholder Interests?*, 82 GEO. L.J. 1733, 1736–37 (1994).

32. In merger cases, "litigation with respect to transactions is dismissed by the court 28.4% of the time. The other 71.6% of transaction litigations result in some type of settlement. Not one transaction is decided by a jury and appealed to a final judgment . . . ." Matthew D. Cain & Steven M. Davidoff, *A Great Game: The Dynamics of State Competition and Litigation* 16 (Working Paper, 2013) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984758; *see also* BAKER & GRIFFITH, ENSURING MISCONDUCT, *supra* note 13, at 38 (noting that "[t]rial . . . is virtually unheard of" in shareholder litigation, generally).

33. In ruling on a fee award, Vice Chancellor Laster observed as follows:

"[P]art of this, in my mind, desire to be a little bit more rigorous in fee awards is also to give people incentives from the plaintiffs' side to really price what cases are worthwhile to bring. You know, the reality is that not every deal merits a lawsuit. There are some deals that ought to be sued over because there's problems." Hearing on Plaintiffs' Counsel's Application for Attorneys' Fees and Expenses and Rulings of the Court at 63, *In re* Zenith Nat'l Ins. Co. S'holders Litig., No. 5296-VCL (Del. Ch. July 26, 2010). Chancellor Chandler has suggested a similar desire to tie fee awards to the strength of claims. In awarding a lower fee than the plaintiff's attorney applied for, he said:

> You got a result that was a beneficial result. It wasn't a home run result. It wasn't something like an increase in the price or something that is a clear home run or a triple. It wasn't a double. It was a single. And so I have to scale the request back to what I think is a reasonable rate of compensation for a single being hit. When you come in with a double or triple or home run, then you're going to get everything you ask for, and I'll be happy to award it to you despite what the defendants think. I think for singles I am going to stay in the range of single-land which is in that 200,000 to $300,000 range.

B. The Rise and Fall of the Traditional Understanding of Shareholder Litigation

How shareholder litigation happens often depends on *where* shareholder litigation happens. The classic conception of shareholder litigation is that it proceeds in the state of incorporation.[34] Delaware corporations work out their most complex internal disputes in the Delaware Court of Chancery.[35] Roberta Romano's landmark study of shareholder litigation affirmed this conventional wisdom: eighty percent of Delaware firms facing shareholder litigation had complaints filed in Delaware, and most Delaware firms—sixty-eight percent—were sued *only* in Delaware.[36] Given the expertise of that state's judiciary and the large proportion of public firms incorporated there, this classic conception was reassuring.

Recent work has undermined this account of shareholder litigation. The first sign of the shift was the surprising lack of public company derivative suits that Randall Thomas and Robert Thompson uncovered in their study of the Delaware Court of Chancery's docket.[37] They found approximately forty cases per year during 1999 and 2000. In contrast, they found eight times more class actions mounting fiduciary claims against proposed acquisitions,[38] which suggested that derivative litigation

Transcript of Settlement Hearing at 15, Kwait v. Berman, No. 5306-CC (Del. Ch. Aug. 16, 2010).

34. *E.g.*, Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1760 (2004) ("[W]hile derivative suits against public corporations do occur outside the state, the Delaware courts capture the bulk of derivative litigation against public companies."); Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 165 (2004) [hereinafter Thompson & Thomas, *New Look*] ("[The docket of the Delaware Court of Chancery] is the center of shareholder litigation in this country."); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1926 (1998) ("[T]he bulk of suits pursuant to Delaware corporate law are filed in the Delaware Court of Chancery, although they could be brought in federal or other state courts.").

35. ROBERT M. DAINES & OLGA KOUMRIAN, CORNERSTONE RESEARCH: RECENT DEVELOPMENTS IN SHAREHOLDER LITIGATION INVOLVING MERGERS & ACQUISITIONS 6 (2012) ("Traditionally, the Delaware Court of Chancery has been the venue of choice for litigation involving M&A targets incorporated in Delaware."); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 495–96 (1987) ("Although Delaware in no sense has a monopoly over litigation arising under its corporate law, an impressionistic glance at important corporate law cases over the past few years suggests that a substantial proportion of such cases—and presumably less important cases as well—are brought in Delaware.").

36. ROBERTA ROMANO, GENIUS OF AMERICAN CORPORATE LAW 41 (1993) [hereinafter ROMANO, GENIUS] ("[M]ost Delaware firms are in fact sued in Delaware."). The figures were not dramatically different for non-Delaware firms: 79% faced litigation with at least one filing in the incorporation state, though less often (42% of the time) were filings only in the incorporation state. *Id.* For a description of the study, see Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON & ORG. 55 (1991). Her study examined litigation involving a random sample of 535 public firms. *Id.* at 62. She found 68 shareholder suits filed in state courts from the late 1960s to 1987. Of those 68 suits, 35 involved Delaware corporations. Of Delaware firms, 24 were sued in the incorporation state only, 5 in incorporation state and others, and 6 only in other states. Of non-Delaware firms, 14 were sued only in the incorporation state, 12 in the incorporation state and others, and 7 only elsewhere. *Id.* at 41.

37. Thompson & Thomas, *New Look*, *supra* note 34, at 137 n.12 (noting that derivative suits represented only 14 percent of all fiduciary suits they found).

38. *Id.* at 167.

had "declined markedly in recent years."[39] In fact, derivative suits had shifted from Delaware to the federal courts.[40] Jessica Erickson's study of derivative litigation in federal courts between mid-2005 and mid-2006 uncovered 141 consolidated cases against public companies.[41] She concluded that "federal courts are now the center of a significant percentage of corporate litigation . . . ."[42] Contemporaneous observations of practitioners heralded a similar shift. In 2007, corporate litigator Ted Mirvis declared that the likelihood of a shareholder complaint being filed outside of Delaware had doubled in merger litigation,[43] demonstrating what he called an "Anywhere But Chancery" trend.[44]

The increase in out-of-Delaware filings appears to have started in the mid-1990s, according to recent work by John Armour, Bernard Black, and Brian Cheffins.[45] They present a mosaic of litigation data—reported corporate judicial opinions,[46] large M&A transactions,[47] and LBO litigation[48]—confirming that the overall number of shareholder lawsuits increased while the number filed in Delaware remained constant, resulting in a significant decline in Delaware's market-share of cases. Taken together with options backdating lawsuits,[49] these sources revealed a strong trend in moving public-company shareholder litigation away from Delaware.[50]

For sensible reasons, the recent work has focused on Delaware, legal home to a large proportion of public companies and the "Mother

39. Randall S. Thomas, *The Evolving Role of Institutional Investors in Corporate Governance and Corporate Litigation*, 61 VAND. L. REV. 299, 305 (2008).

40. Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY L. REV. 1749, 1763 (2010) ("[D]erivative suits have moved into the federal courts.").

41. *Id*. at 1766–67.

42. *Id*. at 1762.

43. Ted Mirvis, *Anywhere But Chancery: Ted Mirvis Sounds an Alarm and Suggest Some Solutions*, 7 M&A J., 17, 17 (May 2007). He based the claim on internal research done by his firm, Wachtell, Lipton, Rosen & Katz.

44. *Id*.

45. ABC, *Losing Cases*, *supra* note 1, at 607 (reporting on conversations with practitioners).

46. ABC, *Balancing Act*, *supra* note 1, at 1354 (reporting that Delaware courts issued around eighty percent of reported opinions in 1995 and only around thirty-one percent between 2005 and 2009).

47. In large M&A transactions, sixty-nine percent of lawsuits filed between 1994 and 2001 were filed in Delaware; after 2002, only thirty-one percent of suits were filed there. *Id.* At 1357. Similarly, Delaware was not often a forum. *Id*. at 1358 ("[T]hrough 2001, Delaware was always *a* forum . . . and often was the sole forum. From 2002 onwards, Delaware was rarely the sole forum. Indeed, from 2006 to 2009, Delaware was the sole venue exactly once, and, in almost half of litigated major takeovers, Delaware was not a forum at all.").

48. Id. at 1360 ("From 1997 to 2001, seventy-three percent of LBO suits involving Delaware companies were in Delaware. For 2002 to 2009, the equivalent figure was only forty-five percent."). The incidence of litigation exclusively in Delaware has also fallen. *Id*. at 18 ("[W]hile between 1997 and 2002, Delaware was the only forum in which LBO suits were filed in sixty-six percent of transactions with lawsuits, this figure dropped to twenty-six percent between 2003 and 2009. Between 2007 and 2009 only two LBOs involved 'Delaware only' litigation.").

49. Of 235 option-backdating-related lawsuits against 164 companies, only eleven percent of the cases were filed in Delaware. *Panel: Delaware's World: Who Are Its Competitors*, 2012 COLUM. BUS. L. REV. 640, 651 (comments of Bernard Black) [hereinafter Black, *Delaware's World*].

50. ("A strong out-of-Delaware trend currently characterizes corporate litigation involving publicly traded companies.").

Court of corporate law."[51] But in this pattern of litigation, is Delaware unique? Firms incorporated outside of Delaware have received little attention in recent work,[52] but half of all publicly-traded companies and thirty-six percent of Fortune 500 firms are domiciled outside of Delaware.[53] The breadth of the trend matters because a general pattern—as opposed to a Delaware-specific one—may have roots in common attributes of shareholder litigation and may carry different welfare implications.

III. THE PREVALENCE OF MULTI-FORUM SHAREHOLDER LITIGATION

This Part presents two hand-collected data sets on shareholder litigation. Together they show that shareholders of all public companies—not just Delaware firms—regularly file lawsuits outside of their incorporation state. They also show that shareholders commonly file competing cases in different fora. This multi-forum pattern in shareholder litigation is not unique to merger litigation[54] nor is it something unique to Delaware firms.

A. Data from Backdating Cases and Merger Cases

Two sets of data that I have collected by hand offer a picture of public-company shareholder litigation that transcends Delaware.[55] The first set consists of derivative suits against firms implicated in the 2006 stock options backdating scandal, and the second set consists of class action lawsuits filed against target firms in the 250 largest mergers announced during the three-year period from 2009 through 2011.[56]

In the backdating cases, the underlying allegations were roughly the same at each implicated company: that the directors improperly granted or received stock options where the strike price was based not on the closing price on the date of the actual grant, as required by most shareholder-approved stock option plans, but instead on the closing price on

51. Kamen v. Kemper Fin. Servs., 908 F.2d 1338, 1343 (7th Cir. 1990), *rev'd* on other grounds, 500 U.S. 90 (1991).

52. A notable exception is a study by Jennifer Johnson of merger-related class actions filed in 2010. Jennifer J. Johnson, *Securities Class Actions in State Court*, 80 U. CIN. L. REV. 349 (2011). She reports data on where suits are filed, broken down by firms' state of incorporation. Sixty-one percent of cases against Delaware firms were filed outside of Delaware; forty-six percent of cases against non-Delaware firms were filed outside of the incorporation state. *Id*. at 374–75. The extent of multi-forum litigation is not clear from the numbers she reports.

53. *See About Agency*, State of Delaware, http://www.corp.delaware.gov/aboutagency.shtml (last visited Jan. 1, 2014) (promoting the corresponding Delaware figures in each category).

54. Beyond mergers, the extent of the phenomenon has been unclear. Thomas & Thompson, *Theory*, *supra* note 5, at 1787 (noting that "we do not presently have good data about the size or existence of this potential problem" in derivative litigation).

55. Appendix I describes the data collection process.

56. For the sake of simplicity, I refer to all of these transactions as "mergers" even though they in fact involve a number of different formal structures: statutory mergers, acquisitions of a controlling block, tender offers, and so forth.

some past day.[57] Brought derivatively on behalf of the implicated firms, these lawsuits alleged that the directors' behavior violated their fiduciary duties and sometimes state disclosure rules or federal proxy disclosure requirements.[58] I found 629 derivative lawsuits bringing fiduciary claims over options backdating, and those claims involved 151 firms.

The merger cases generally involve a sale of the firm to a strategic buyer, a controlling shareholder, or a financial firm, such as a private equity group. In these cases, shareholders of the target firm mounted a fiduciary claim against the firm's directors that varied with context,[59] and the claims were always brought directly on behalf of the entire shareholder class. In the 250 largest mergers between 2009 and 2011, I found 1180 class actions challenging board behavior at the target company.

The suits in the two data sets of course differ in some important ways. The backdating suits were brought derivatively, the merger cases directly. In addition, the dynamics of litigation in an ongoing scandal like backdating may differ significantly from an end-game situation like a merger. For present purposes, however, they share crucial similarities. The core claim in both types of litigation is based on the same set of state-law fiduciary duties. Moreover, both types of claims presented circumstances that implicated important corporate law questions and also held out the possibility of high attorneys' fees. Both also are exempted from federal rules that govern securities litigation and class actions,[60] thus leaving plaintiffs' attorneys comparatively unconstrained in their strategic litigation decisions. For these reasons, these two data sets together offer a glimpse into the forum choices that plaintiffs' attorneys make in high-stakes cases.

B. The Out-of-State Filing Pattern Is General

The backdating and merger data show that shareholders of all firms—not just those incorporated in Delaware—filed lawsuits outside of the state of incorporation with regularity. The patterns in the two types of litigation are different, but the difference between Delaware and similar non-Delaware firms is one of degree, not of kind.

1. Backdating Cases

In the backdating cases, the incorporation state courts were generally unpopular among shareholders bringing suit, attracting only eleven

57. The suits all generally followed a front-page exposé in the *Wall Street Journal*. *See, e.g.*, Charles Forelle & James Bandler, *The Perfect Payday*, WALL ST. J., Mar. 18, 2006, at A1.

58. For an overview of the backdating scandal behind the lawsuits, see Jesse M. Fried, *Options Backdating and Its Implications*, 65 WASH. & LEE. L. REV. 853 (2008).

59. *See e.g.*, Kahn v. Lynch Commc'ns Sys., Inc., 638 A.2d 1110 (Del. 1994); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); Unocal v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

60. *See infra* note 280.

percent of all filings across all firms.[61] Table 1 reports the percentage of backdating suits that firms faced in the incorporation state courts, in the headquarters state courts, and in federal court, and the firms are separated in rows by incorporation type.[62]

TABLE 1
BACKDATING DERIVATIVE SUIT FILING FORUM PERCENTAGES, BY FIRM INCORPORATION TYPE

State of incorporation	*Percentage of suits filed in:*		
	Inc. state court	*HQ state court*	*Federal court*
Delaware	4%	40%	56%
Other, hq ≠ inc. state	21	33	46
Other, hq = inc. state	34	0	66

The first row shows the filing breakdown for Delaware firms, and this pattern is consistent with existing research.[63] Nearly all—ninety-six percent—of the backdating filings against Delaware firms were filed outside Delaware.

Non-Delaware firms differ in a crucial way from Delaware firms: they are highly likely to be incorporated in the state where they are headquartered.[64] Delaware firms, by contrast, are rarely headquartered in Delaware.[65] To facilitate a more useful comparison to Delaware firms, the second and third rows of Table 1 break down non-Delaware firms into two types: those incorporated and headquartered in different states and those in the same state. This distinction matters to shareholder-plaintiffs and their attorneys. For out-of-state incorporators, a shareholder can easily obtain jurisdiction in at least three fora: the incorporation state courts, the headquarters state courts, and federal court. But for a firm that is incorporated and headquartered in the same state, the shareholder-plaintiff has only two forum options: the incorporation (and headquarters) state or federal court.

The second row of Table 1 shows filings against non-Delaware firms that were incorporated and headquartered in different states. These are

61. As noted, Armour, Black, and Cheffins also examined backdating cases, and their numbers differ from mine. They found 234 cases involving 127 firms: 26 filings in Delaware, 115 cases filed in federal court, and 93 filed in another state. ABC, *Balancing Act*, *supra* note 1, at 1363.

62. Very rarely, shareholders filed in some non-incorporation, non-headquarters state. Those instances are treated as headquarters state filings.

63. Indeed, the filing patterns in backdating cases were one of the types of data that ABC examined in their study detecting the out-of-Delaware trend.

64. Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1572 (2002) ("Firms essentially incorporate in one of only two places: their home state or Delaware.").

65. In this backdating data, for example, all of the firms incorporated in Delaware are headquartered elsewhere.

the apt comparison to Delaware firms because shareholders of both types of firms have three forum options. Out-of-state incorporation is uncommon among non-Delaware firms, so the absolute number of this type of firm in the backdating cases is small—six firms, which attracted twenty-one complaints. For that reason, the second row should be interpreted with caution. The litigation pattern involving these firms, however, appears similar to the pattern involving Delaware firms. Nearly eighty percent of filings against these firms were filed outside of the state of incorporation. In other words, shareholders of these firms—like shareholders of Delaware firms—were motivated to file in the headquarters' state and in federal court and not in the incorporation state, although not quite to the same degree as for Delaware firms.

For non-Delaware firms headquartered and incorporated in the same state, shown in the third row of Table 1, the out-of-incorporation-state pattern is also evident, although in a different way. For these firms, of course, there is no separate headquarters state in which to file, which explains the empty cell in the third row. Nevertheless, shareholders overwhelmingly favored filing outside of the incorporation state. Federal courts attracted twice as many suits as the incorporation state courts.

2. Merger Cases

The merger data likewise show that the out-of-incorporation state filing pattern transcends Delaware. Table 2 reports the percentage of merger class actions filed in different court systems, again broken down by incorporation type.

TABLE 2
MERGER CLASS ACTION FILING FORUM PERCENTAGES, BY FIRM INCORPORATION TYPE

State of incorporation	*Percentage of suits filed in:*		
	Inc. state court	*HQ state court*	*Federal court*
Delaware[66]	43%	48%	9%
Other, hq ≠ inc. state	47	48	6
Other, hq = inc. state	81	0	19

One immediately obvious point is that the incorporation states here are more attractive and federal courts are less attractive than in the backdating cases. Backdating cases may have been unusually drawn to

66. Two of these Delaware-incorporated firms are located in Delaware. But removing them does not affect the results.

federal court because many brought complaints alleging federal proxy violation claims in addition to fiduciary claims.

The first row shows that more than half of the cases against Delaware firms were filed outside of Delaware, which is again consistent with the out-of-Delaware story. This is strikingly similar, however, to the filing pattern involving non-Delaware firms that were incorporated out-of-state, shown in the second row. They both have similar rates of incorporation state filings (forty-three percent versus forty-seven percent), headquarters state filings (forty-eight percent for both), and federal filings (nine percent versus six percent). The absolute numbers are larger here than in the backdating data: eighty-eight cases against fifteen firms.

Not surprisingly, the litigation patterns of firms incorporated in their home state are quite different. The incorporation state captures over eighty-percent of filings for these firms. A non-trivial amount of cases, however, are filed in federal court, the only other forum option for shareholders. Indeed, federal court appears more than twice as attractive for in-state firms than for out-of-state firms.

In sum, the backdating data and the merger data indicate that the litigation pattern others have identified regarding Delaware firms is a pattern common to all firms incorporated out-of-state. Even those firms incorporated and headquartered in the same state have a considerable proportion of suits filed outside of the incorporation state. In other words, shareholders of all firms regularly file suits outside of the incorporation state.

C. The Prevalence of Multi-forum Litigation

Multi-forum shareholder litigation was once comparatively rare,[67] but recent practitioner commentary suggests that, at least in battles over mergers, multi-forum litigation has become more common.[68] Delaware courts have also lamented the increasing frequency of filings in multiple fora, no doubt because they are uniquely situated at the hub of much multi-forum shareholder litigation.[69] Recent empirical work has documented a steep rise in the percentage of large M&A transactions attract-

67. In Romano's study of shareholder litigation, only fourteen percent of Delaware firms faced multi-forum litigation, as did thirty-six percent of non-Delaware firms. ROMANO, GENIUS, *supra* note 36, at 41 ("[T]here are significantly more exclusive filings in Delaware than in other incorporation states."). It is not clear whether filings outside of the incorporation state were in multiple fora or in just one.

68. In the words of one litigator, "With increasing frequency, participants in M&A transactions face virtually identical lawsuits in the jurisdiction in which the target corporation is headquartered, as well as the target's state of incorporation, most often Delaware." Kazanoff, *supra* note 8, at 41 (litigator at Simpson Thacher & Bartlett LLP). *See also supra* note 4.

69. Chancellor Chandler, for example, noted in a 2011 hearing that "multi-forum deal litigation . . . has become increasingly problematic in recent years as more and more of these cases are filed in multiple jurisdictions." *In re* Allion Healthcare Inc. S'holders Litig., No. 5022-CC, 2011 WL 1135016, at *4 (2011); *see also* Transcript of Courtroom Status Conference at 18, Scully v. Nighthawk Radiology Holdings, Inc., No. 5890-VCL (Del. Ch. Dec. 17, 2010) ("[Multi-forum litigation has] increased dramatically to the point where there's now a suit filed over virtually . . . every deal. Effectively now, you also get multiple suits over every deal.").

ing litigation.[70] The increasing levels of litigation in M&A transactions have coincided with a rise in the extent of multi-forum litigation.[71] Nevertheless, the extent of the phenomenon—particularly whether it is something unique to merger litigation—has been unclear.[72]

1. Multi-forum Litigation in Backdating and Merger Litigation

The backdating and merger litigation data I have collected offer insight on the issue. Multi-forum litigation was common in both types of litigation: sixty-four percent of backdating firms and sixty-six percent of merger firms were sued in two or more fora. For both types of litigation, Table 3 reports the percentage of firms that faced suits in multiple fora, grouping firms by the type of incorporation.

TABLE 3
PERCENTAGE OF FIRMS WITH MULTI-FORUM LITIGATION IN BACKDATING AND MERGER CASES,BY FIRM INCORPORATION TYPE

	Number of fora where each firm was sued			
	Backdating litigation		**Merger litigation**	
	One forum	*Multi-forum*	*One forum*	*Multi-forum*
Delaware	36%	64%	32%	68%
Other, hq ≠ inc. state	33	67	20	80
Other, hq = inc. state	39	61	45	52

Table 3 reveals that multi-forum litigation is pervasive. At least half of the firms in the backdating and the merger litigation—regardless of their incorporation type—faced multi-forum litigation. And in the incidence of multi-forum litigation, there seems to be little unique about

70. *See* Cain & Davidoff, *supra* note 32, at 35 (stating that approximately eighty-four percent of transactions over $100 million in 2009 and 2010 were challenged, which is an increase over prior years in percentage terms but not in terms of the absolute number of transactions attracting litigation); DAINES & KOUMRIAN, *supra* note 35, at 3, tbl. 2 (finding that over ninety-five percent of deals faced litigation in transactions valued at more than $500 million between 2010 and 2011).

71. Cain & Davidoff, *supra* note 32, at 15. ("Multi-state litigation has increased along with litigation rates generally. In 2005 an average of 2.2 complaints were brought when litigation occurred in a transaction. Multi-state litigation occurred in 8.3% of all transactions with litigation. By 2011 an average of 5 lawsuits were brought per transaction with litigation, and multi-state litigation occurs in fifty-three percent of all transactions with litigation."); DAINES & KOUMRIAN, *supra* note 35, at 7 ("The most striking trend in venue choice for M&A litigation is not a flight from or return to Delaware, but that challenges to the same deal in both Delaware and some other venue are now more common . . . ."); *see also* Quinn, *supra* note 30, at 148 (stating that 50 out of 97 Delaware firms in the study during 2009 and 2010 experienced multi-forum litigation).

72. Thomas & Thompson, *Theory*, *supra* note 5, at 1788 n.192 ("There is no good data source on the level of multijurisdictional derivative litigation.").

Delaware firms. Firms incorporated in Delaware experienced multi-forum litigation at rates roughly similar to non-Delaware out-of-state incorporators, both in backdating litigation and merger litigation. Again, the small raw numbers of firms in this category—six firms in the backdating data and fifteen in the merger data—is a point of caution. But in the merger litigation, the comparable non-Delaware firms experienced multi-forum litigation at a *higher* rate than Delaware firms. The third row shows that firms incorporated and headquartered in the same state experienced multi-forum litigation at lower rates than other firms in both sets of data, but even among these firms, multi-forum litigation was the predominant outcome.

These data suggest that multi-forum shareholder litigation is affecting all firms regardless of incorporation type. Plaintiffs' attorneys may be willing to file claims outside of the incorporation state, but they have not migrated *en masse* from incorporation states to superior alternative fora. Instead, the predominant pattern is that attorneys are filing competing cases in different fora.

2. How Widespread Is the Pattern?

Each of these data sets suffers from different limitations. Backdating litigation, for example, is not necessarily representative of derivative litigation generally because backdating cases were unusually meritorious. The merger litigation includes only the top 250 transactions by value,[73] an important but small slice of deal litigation, and only covers a period of economic recession. Together, though, the two data sets offer a large-scale picture of the filing patterns of shareholder-plaintiffs in cases where the plaintiffs' attorneys have a high expectation of settlement and thus a fee.

There is little reason to believe that the multi-forum pattern common to both of these two types of litigation is unique. Indeed, in a number of recent high-profile corporate disputes, the shareholder litigation has implicated multiple fora. In April 2012, after the *New York Times* published allegations of bribery at Wal-Mart's Mexico subsidiary, twelve different Wal-Mart shareholders sued the firm in three different places: Delaware (five complaints), Arkansas state court (two complaints), and federal court in Arkansas (five complaints).[74] Similarly, News Corp. was sued in federal court and in Delaware over 2011 allegations of hacking at one of its British tabloids.[75] Shareholder suits have been deliberately carved out of various federal litigation reforms, so multi-forum litigation is possible for any claims that fall into these collective carve-outs. As explained in more detail below, shareholder suits can be expected to ap-

73. For example, the smallest transaction was BCB Bancorp's $558 million acquisition of Pamrapo Bancorp.

74. Wal-Mart, Annual Report (Form 10-K), at 25 (March 26, 2013).

75. News Corp. Annual Report (Form 10-K), at 37–39 (Aug. 14, 2012).

pear in multiple court systems when the projected fee award becomes large enough to make the chance of participating in the settlement (and thus the fee) worth the costs associated with filing.

3. Levels of Litigation Activity in Each Forum

In both the backdating and merger data, the total number of complaints is roughly similar among Delaware firms and both types of non-Delaware firms.[76] In other words, the total level of litigation activity does not vary with incorporation type. For in-state incorporators, however, all litigation activity is packed into just two fora—the incorporation/headquarters state and federal court—and as a result, litigation activity in those fora is more intense than for out-of-state incorporators. Table 4 presents the percentage of firms in both the backdating and the merger cases that were sued in each forum type and the mean number of suits filed in that forum; it breaks the firms down by incorporation type as above. In each category, the mean number of suits reflects the mean only among firms that were sued (i.e., excluding firms with zero suits in that forum). For ease of reference, the columns reporting data are numbered.

TABLE 4: PERCENTAGE OF FIRMS SUED AND MEAN NUMBER OF SUITS IN BACKDATING AND MERGER CASES, BY FIRM INCORPORATION TYPE

	Backdating cases						**Merger cases**[78]					
	Inc. state		HQ state		Federal		Inc. state		HQ state		Federal	
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
	% sued	mean suits	*% sued*	mean suits	*% sued*	mean suits	*% sued*	mean suits	*% sued*	mean suits	*% sued*	mean suits
Delaware	*15%*	1.1	*69%*	2.3	*87%*	2.7	*71%*	2.9	*86%*	2.4	28%	1.5
Out-of-state	*50*	1.7	*33*	2.5	*83*	2.2	*93*	2.9	*86*	3.2	33	1.0
In-state	*66*	2.2	*0*	0	*73*	3.0	*100*	4.2	*0*	0	52	2.0

One notable feature of the data reported in Table 4 is that Delaware appears to be a relatively unpopular forum in which to litigate backdating cases and merger cases. In the backdating data (columns 1 and 2), only fifteen percent of Delaware firms were sued in Delaware, and nearly all of those firms attracted only one complaint each.[78] For

76. These results are reported in Appendix I, which offers additional descriptive statistics on litigation activity.

77. On this tabulation, two target firms that are incorporated in Delaware are categorized as "in state" firms because they were also headquartered in Delaware.

78. Seventeen Delaware firms were sued in Delaware. Sixteen attracted one complaint each, and one attracted two.

other types of firms, the incorporation state was a more attractive place to litigate backdating cases. This finding is consistent with the reports of practitioners.[79] Similarly, in the merger data, only seventy-one percent of firms with litigation attracted a complaint in the incorporation state, in contrast to the higher rates of incorporation state litigation in the other categories (column 7). These results suggest that, within the larger multi-forum litigation pattern, Delaware may be comparatively unattractive in ways that are consistent with the out-of-Delaware literature.[80]

A second striking feature of the data in Table 4 involves in-state incorporators, shown in the third row of data. As noted above, these firms generally have only two available venues in which a complaint may be filed: the incorporation state and federal court. Table 4 shows that the litigation activity in both of these fora was more intense for these firms than for others. In-state firms experienced the highest levels of incorporation state litigation—two-thirds of firms in backdating litigation (column 1) and all firms in the merger litigation (column 7). This could merely be a function of the fewer available options for litigation; firms must be sued *somewhere* in order to appear in the data, and these firms have fewer forum options. But in-state incorporators also attracted more complaints: 2.2 on average in backdating litigation (column 2) and 4.2 in merger litigation (column 8), again higher than other types of firms.[81]

In-state incorporators also appear unique in the incidence of litigation in federal court. The number of federal suits per firm is higher for in-state incorporators in both the backdating litigation (column 6) and the merger litigation (column 12). One potential explanation for this is that violations of the federal securities laws are more common at in-state firms, but there is no reason to believe that this is so. Another possible explanation is that lead counsel appointments are more uncertain in federal court, thus making a filing more attractive to more firms, but this explanation is not consistent with any existing findings or commentary. Perhaps a more plausible explanation is that the increased federal litigation has little to do with the merits of the federal securities claims but instead merely reveals that plaintiffs' attorneys are seeking an alternative forum in which to litigate shareholder claims. The unusually high level of incorporation state cases and federal cases involving these in-state

79. Grant, *Delaware's World*, *supra* note 10, at 669 ("For example, option backdating. The idea of putting that in front of a New York jury as opposed to having it heard in the chancery court is very, very palatable to a plaintiff, and probably very unpalatable to a defendant, despite the fact that former Chancellor Chandler and former Vice Chancellor Lamb have very, very strong views about the impropriety of backdating, spring-loading, all that.").

80. Brian Cheffins, John Armour, & Bernard Black, *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, 2012 COLUM. BUS. L. REV. 427, 441 & n.17 [hereinafter CAB, *Fragmentation*] (noting that "the out-of-Delaware trend reflects, to a substantial extent, factors that are unique to Delaware companies, or at least impact them more intensely" and their finding of "a statistically significant increase over time in the probability that litigation will bypass the state of incorporation for Delaware targets, but not for other away incorporators.").

81. In the merger litigation, the difference between in-state firms and Delaware out-of-state firms is statistically significant at the 1% level (p-value = 0.0047), but the difference between in-state firms and non-Delaware out-of-state firms is not significant at any standard level (p-value = 0.15).

firms suggests that the multi-forum litigation pattern exerts itself as strongly with these firms as with the out-of-state firms, albeit in a different way.

D. Empirical Analysis of Merger Cases

The merger cases are associated with transactional data—notably, deal size and equity premium—that permit deeper empirical investigation of what might affect the incidence of multi-forum litigation. The data on merger litigation not collected by hand comes from the ThomsonOne M&A database, and this subsection analyzes that data in greater detail. The data reveal that very little drives multi-forum litigation besides the number of lawsuits. Notably, foreign incorporation in Delaware is not associated with an increase in the incidence of multi-forum litigation.

1. What Might Explain Multi-forum Litigation?

A number of variables might explain the incidence of multi-forum litigation among target firms in the merger database.

Merger size. The size of the merger may drive multi-forum litigation. Larger transactions may attract more dissatisfied shareholders and may also offer a larger potential recovery for plaintiffs' attorneys who manage the cases. The two measures of transaction size used here are enterprise value, which represents the total merger consideration, and equity value, which represents the amount of merger consideration allocated to common stockholders. Table 5 breaks down the underlying transactions into equity value quintiles and shows the percentage of firms facing multi-forum litigation. The descriptive statistics for enterprise value are not reported but are similar to equity value.

TABLE 5: PERCENTAGE OF TARGET FIRMS EXPERIENCING MULTI-FORUM LITIGATION, BY QUINTILE OF TRANSACTION EQUITY VALUE IN 2011 DOLLARS

Equity value quintile (mean quintile value, in billions)	Percentage of firms with multi-forum litigation	Mean number of fora
5 ($11.4)	76%	2.0
4 (3.1)	82	2.1
3 (1.7)	48	1.5
2 (0.9)	63	1.7
1 (0.3)	58	1.3

As Table 5 reveals, larger transactions experience higher rates of multi-forum litigation and a larger number of implicated fora.

Equity premium. Multi-forum litigation may be more common in transactions where merger consideration for target shareholders represents a smaller premium over the market value. The three measures of merger premium used here are the merger price per share divided by the market price of each share one day, one week, and four weeks prior to the announcement of the merger. If the board has failed in its *Revlon* duties, the merger premium should be lower than it otherwise would be. A lower merger premium thus can be a crude but useful proxy for legal merit. Table 6 shows the percentage of firms with multi-forum litigation and the mean number of fora implicated for firms in each quintile of one day premium.

TABLE 6: MEASURES OF MULTI-FORUM LITIGATION, BY QUINTILE OF MERGER PREMIUM

One-day merger premium quintile (mean quintile premium value)	Percentage of firms with multi-forum litigation	Mean number of fora for firms in quintile
5 (78%)	63%	1.5
4 (44)	69	1.8
3 (33)	60	1.7
2 (24)	73	1.9
1 (5)	64	1.7

Table 6 suggests little association between multi-forum litigation and one day premium.[82]

Out-of-state incorporation. Firms incorporated and headquartered in different states might be more likely to experience multi-forum litigation than firms headquartered in their incorporation state. One straightforward reason is that out-of-state firms can be sued in more places—three instead of two. But an additional and more subtle reason may be that out-of-state incorporators are different in some unobserved way that might affect the likelihood of a fiduciary breach and thus perhaps the incidence of multi-forum litigation. For foreign-incorporated firms, the incidence of multi-forum litigation was higher than for in-state firms: sixty-nine percent, compared to fifty-two percent for in-state firms.[83]

Delaware incorporation. Delaware incorporation might also affect the likelihood that a firm experiences multi-forum litigation. I include an indicator variable that takes the value of 1 if the firm is incorporated in

82. The unreported results for one-week premium and four-week premium are equally equivocal.

83. The p-value of a chi-squared test for a difference between the two groups is significant at the 5% level ($p = 0.031$). In addition, the average number of implicated fora for each type of firm is different: 1.8 for foreign-incorporated firms and 1.3 for in-state firms. This particular difference is misleading though because the number of fora available for litigation is different for each group.

Delaware but headquartered in another state and 0 if otherwise.[84] As noted above, the incidence of multi-forum litigation at Delaware firms is in line with other out-of-state firms.

Business courts. Some states in recent years have established specialized commercial and business courts,[85] and they explicitly have the power to hear claims involving breach of fiduciary duty.[86] Some commentators have suggested that the states' goal in doing so was to compete with Delaware for litigation.[87] Recent empirical work has shown that states with business courts respond to the behavior of plaintiffs' attorneys in ways consistent with attempts to remain attractive as a venue for shareholder litigation.[88] When courts in a state attract fewer case filings, they fight back by awarding higher fees to plaintiffs' attorneys.[89] This is consistent with some practitioner commentary, which suggests that specialized business courts are in fact reluctant to stay litigation in favor of other proceedings elsewhere.[90] The variable used here for business court takes the value 1 if the target firm's headquarters state had established a specialized business court prior to the announcement year of the merger and 0 if otherwise.

A business court does not create an additional opportunity to file in a different forum because the plaintiff would be able to file in the courts of that state even without the business court. There is no clear *ex ante* prediction about the effect of business courts on multi-forum litigation. A business court might be a more attractive forum for plaintiffs' attor-

84. This treats the two firms that are both incorporated and headquartered in Delaware as non-Delaware firms. The reason is the substantial overlap between the Delaware incorporation variable and the out-of-state incorporation variable: all but two firms incorporated in Delaware are incorporated out-of-state. For this reason, the regressions below often use only the foreign-incorporated Delaware firms to estimate the Delaware effect.

85. John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915, 1915 (2012); Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147, 151 (2004) ("The creation of specialized business courts in the United States has expanded greatly in the last ten years."). Other states like California, Connecticut, and Arizona have established complex case divisions that regularly hear business disputes. *Id.*

86. *E.g.*, N.Y. SUP. CT. R. § 202.70(b).

87. Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 57 (2008) ("An obvious motivation for making local courts attractive to foreign litigants is to procure business for the local bar and for other purveyors of services in the host state, such as restaurants and hotels. Indeed, this incentive seems to be at work in New York."); Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2092–95 (2009) (noting that one of the motivations in establishing the court was to retain and attract litigation). Not surprisingly, Delaware courts do not acknowledge this motivation: "[N]o commercial court's creation was justified as providing a forum for stockholders of *foreign* corporations to litigate cases governed by *foreign* law." *In re* Topps Co. S'holders Litig., 924 A.2d 951, 963 n.43 (Del. Ch. 2007).

88. Cain & Davidoff, *supra* note 32, at 4–5 ("[S]tates with business courts and California, a state with a particular interest in commercial litigation, are responsive to the actions of entrepreneurial plaintiffs' attorneys.").

89. *Id*. at 5 (noting that these states offer "higher (lower) attorneys' fees when they have been capturing a relatively lower (higher) proportion of case filings in the past").

90. Mirvis, *supra* note 43, at at 17 ("We've just been unsuccessful in [getting stays outside of Delaware], because the non-Delaware courts have become much more accessible, many of them have . . . quote-unquote 'Chancery divisions' . . . and they are in the business and they will not stay themselves voluntarily.").

neys because of its increased expertise; or it might be less attractive because the expertise diminishes the uncertainty of the claims, which could reduce the attorney's bargaining power. In descriptive statistics, there are no significant differences in the incidence of multi-forum litigation between firms headquartered in business court states and other firms.[91]

Total litigation activity at a firm. The incidence of multi-forum litigation must, on some basic level, bear a relationship to the number of suits brought: without attracting at least two lawsuits, multi-forum litigation is impossible. As the number of complaints challenging the behavior of the target firm directors grows, attorneys might seek to avoid the congestion and file elsewhere, thereby increasing the number of implicated fora. Table 7 shows the incidence of multi-forum litigation for each quintile of total suits.

TABLE 7
MEASURES OF MULTI-FORUM LITIGATION, BY QUINTILE OF TOTAL COMPLAINTS

Quintile of number of complaints (mean number of suits)	Percentage of firms with multi-forum litigation	Mean number of fora for firms in quintile
5 (11.9)	95%	2.4
4 (6.5)	92	2.3
3 (4.5)	77	1.9
2 (3.0)	60	1.7
1 (1.3)	27	1.1

Table 7 shows a strong positive relationship between the total number of suits and both measures of multi-forum litigation.

2. The Determinants of Multi-forum Litigation

All of these factors may bear on the incidence of multi-forum litigation,[92] which, as suggested by the preceding discussion, could be measured in two different ways. One way is simply to ask whether the target has been sued in more than one court system. The second approach is more detailed and breaks down firms by the number of fora in which they are sued—zero, one, two, or three. To ensure the robustness of my results, I develop two types of models: logistic regression models where the dependent variable in all models is a dummy with a value of 1 if the firm is sued in more than one forum, and Poisson regression models where the dependent variable is always the number of fora in which the firm is sued.

91. This is so looking at only in-state firms, at only out-of-state firms, and at only out-of-state firms incorporated in Delaware.

92. The coefficients of each variable in a logistic regression are reported in Appendix I.

Table 8 presents the results of the regressions. The first four models are logistic regressions that use the multi-forum dummy as the dependent variable. The other four models are Poisson regressions that use the number of implicated fora as the dependent variable. For both the logistic and Poisson regressions, the basic model is shown in columns 1 and 4 and uses as independent variables equity value as a measure of merger size, the one-day measure of deal premium, the foreign incorporation dummy, and the dummy variable for being incorporated out-of-state and in Delaware. The model in columns 2 and 5 adds the business court dummy variable, and the full model in columns 3 and 6 adds the total number of suits as a variable.

TABLE 8: RESULTS OF LOGISTIC REGRESSION MODELS AND POISSON REGRESSION MODELS
* signifies p-value less than 0.1, ** 0.05, *** 0.01

	Logistic regressions *Dep. var. = multi-forum dummy*						Ordered logistic regressions *Dep. var. = number of fora implicated*				
	(1)	(2)	(3)	(4)	(5)		(6)	(7)	(8)	(9)	(10)
Equity value (log)	.423*** (.135)	.148*** (.136)	.422*** (.137)	-.007 (.169)	-.048 (.174)		.138*** (.041)	.134*** (.041)	.134*** (.041)	.047 (.048)	.044 (.046)
1-day premium	-.318 (.536)	-.355 (.538)	-.410 (.543)	-.080 (.659)	-.214 (.679)		-.164 (.195)	-.159 (.195)	-.162 (.196)	-.080 (.193)	-.086 (.193)
Out-of-state dummy		1.32* (.740)	1.29* (.749)	1.14 (.880)	1.02 (.890)			.347 (.216)	.342 (.217)	.358* (.216)	.343 (.216)
Business court dummy			-.404 (.300)		-.974*** (.373)				-.025 (.102)		-.080 (.103)
Del × Out-of-state	.270 (.329)	-.753 (.690)	-.779 (.699)	.058 (.810)	.117 (.824)		.143 (.117)	-.104 (.186)	-.103 (.186)	-.091 (.186)	-.091 (.186)
Total suits				.650*** (.109)	.695*** (.114)					.050*** (.012)	.51*** (.012)
Constant	-2.25 (1.26)	-2.54 (1.28)	-2.18 (1.31)	-2.68 (1.49)	-1.87 (.158)		-.373 (.420)	-.458 (.427)	-.438 (435)	-.195 (.428)	-.123 (.438)
observations	219	219	219	219	219		233	233	233	233	233
Pseudo r-squared	.045	.057	.064	.298	.323		.023	.027	.027	.052	.053

Both ways of measuring multi-forum litigation return broadly consistent results. The size of the transaction has a significant and positive effect on both predicted likelihood of multi-forum litigation and the predicted likelihood of having an additional forum implicated in all models without total suits as a variable. This is not a surprising result, given that settlement values and attorneys' fees likely increase with transaction size, and thus there is more for the plaintiffs' attorneys to fight over.

The sign on the deal premium coefficient in Table 8 is negative, as predicted, but is not significant in any models. Foreign incorporation also has no consistent or statistically significant effect in any of the models.

The presence of a business court in the headquarters state had a consistently negative impact on both measures of multi-forum litigation, though it is only significant in one model. This suggests that multi-forum litigation might be less likely if there is a business court in the headquarters state, a result that is inconsistent with the idea that attorneys flock to these courts. The opposite interpretation is also available: that states create business courts in an effort to attract litigation business that otherwise flows elsewhere. For that reason, the business court variable sheds little light on the incidence of multi-forum litigation.

Delaware incorporation does not have a statistically significant effect on measures of multi-forum litigation in any model, and the sign on the coefficient is negative in all models that also include an out-of-state dummy. That negative sign in many models might hint at an underlying unattractiveness of Delaware courts to plaintiffs' attorneys, who might be less likely to file for reasons others have explored.[93] But whatever effect Delaware has on litigation flows,[94] the insignificance of the coefficients in Table 8 suggests that Delaware has little impact on the incidence of multi-forum litigation.

The variable with the most consistent effect on the incidence of multi-forum litigation is the total number of lawsuits. The effect of that variable is positive and statistically significant in all models where it is included. The log odds coefficients reported in Table 8 do not admit of any intuitive interpretation, but marginal effects at the mean can be calculated to give a sense of the impact there. The marginal effect at the mean is large. The mean number of suits per target was 4.7, and the logistic regression model suggests that the marginal effect of one standard deviation measured in the number of suits filed against the target increases the likelihood of experiencing multi-forum litigation by ten percent.[95] When the total suits variable is included in both types of models, the significance of transaction size disappears, and the explanatory power increases considerably. This result suggests that whatever makes a transaction likely to attract litigation in the first place—larger deal sizes and, perhaps, lower merger premia—also makes it a likely candidate for multi-forum litigation. This finding is consistent with the idea developed in the next Part that multi-forum litigation is driven by attorneys competing for fee awards.

III. MULTI-FORUM LITIGATION AS COMPETITION AMONG ATTORNEYS

Multi-forum shareholder litigation is the result of a special litigation environment, dependent upon unique rules of jurisdiction, preclusion,

93. Armour, Black & Cheffins suggest that the pattern of out-of-state migration is stronger for Delaware firms than for others. CAB, *Fragmentation*, *supra* note 80, at 441 ("[T]he migration of litigation away from the state of incorporation is stronger for Delaware than for non-Delaware firms.").

94. *See supra* Part III.C.3.

95. The standard error of that estimate is 0.013, with an associated p-value of 0.000.

and attorney compensation.[96] Plaintiffs' attorneys compete to speak for the same group of shareholders and jockey for priority in settling claims with the defendants. Because there is no way for courts or litigants to force coordination of claims asserted in multiple jurisdictions, filing in a different forum is an effective way for a plaintiff's attorney to pursue control of shareholder litigation and a fee award.

A. Forum Selection by Plaintiffs' Attorneys

An attorney filing a shareholder suit must decide where to file—the incorporation state court, the headquarters state court (if different), or in federal court—and the relative attractiveness of each forum depends on many factors.[97] One factor that does not vary from one forum to another is the substantive law that will apply. Under foundational principles of conflicts of laws, the substantive law of the incorporation state governs disputes involving the internal affairs of a corporation, no matter where the claim is filed.[98] Thus, attorney forum selection has nothing to do with the substantive law of Delaware or any other incorporation state.[99]

Procedural rules, by contrast, can vary from one forum to another in shareholder claims, and this variation can have an important impact on the value of the claims and may have a strong influence on forum choices. For example, procedure in Delaware is said to be unfavorable to shareholder claims because it limits discovery early in cases and does not provide for jury trials.[100] Another court could have more permissive discovery rules, allow jury trials, or award high fees in settlement. This sort of variation in procedural rules might increase the value of a claim to a plaintiff's attorney.

Another source of variation from one forum to another is the characteristics of the presiding court. Courts may differ in their disposition toward shareholder suits. For example, Delaware courts have been accused of hostility toward shareholder claims,[101] and pressing claims in

96. Delaware-centric explanations are inadequate to account for multi-forum shareholder litigation, though they may be sufficient to make sense of the litigation patterns unique to that state. *See supra* Part III.C.3; ABC, *Delaware's Balancing Act*, *supra* note 1, at 1370–84; Grant, *Delaware's World*, *supra* note 10, at 667–70.

97. Cain & Davidoff, *supra* note 32, at 3 ("Entrepreneurial plaintiffs' attorneys constantly recalibrate the optimal jurisdiction in which to bring litigation. The result is a dynamic game where plaintiffs' attorneys react to prior court decisions to bring future litigation in the most favorable forum.") (citation omitted).

98. Edgar v. MITE Corp., 457 U.S. 624, 645 (1982) ("[O]nly one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands."); *see also* Larry E. Ribstein & Erin Ann O'Hara, *Corporations and the Market for Law*, 2008 U. ILL. L. REV. 661.

99. Quinn, *supra* note 30, at 148 ("Plaintiffs are willing to accept Delaware law, just not the Delaware courts. . . . Therefore, the current litigation trend is not a verdict on the substance of Delaware's corporate law.").

100. *See*, *e.g.*, *supra* note 96.

101. ABC, *Balancing Act*, *supra* note 1, at 1369 ("Several of the plaintiffs' lawyers we interviewed cited [the rhetoric deployed by Vice Chancellors Strine and Laster] to support their Delaware-skeptical views."); LEBOVITCH ET AL., *supra* note 4, at 1 n.3 ("Certain plaintiffs' lawyers avoid filing

courts that are more hospitable may make the claims more valuable to shareholders. Courts can also vary in their levels of experience with shareholder litigation. Delaware courts are of course highly experienced with corporate claims, as are some other courts.[102] An inexperienced court might go slowly and deliberately, reducing the leverage of the plaintiff's attorney. An inexperienced court also might be more likely to approve a large a fee award or misapply incorporation state law. As one prominent litigator explained, having non-Delaware judges apply Delaware law is like "taking Gallatoire's [sic] secret recipes and giving them to a Jack-In-The-Box short-order cook."[103] These effects would increase the value of claims to a plaintiff's attorney.[104]

All of these factors can cause the expected recovery on a claim to vary from one forum to another. But a payoff is only available to a plaintiff's attorney through a fee award, and the road to the fee gets complicated if multiple attorneys file similar claims. Within the same court system, these similar claims can be consolidated with comparative ease.[105] Once cases are consolidated, the million-dollar question is which attorney will be appointed lead counsel and gain control of the consolidated claims.[106] Being appointed lead counsel is supremely important for a

deal-related litigation in the Delaware Court of Chancery because of the perception that Delaware is less shareholder-friendly . . . ."); Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 Del. J. Corp. L. 57, 97 (2009) [hereinafter Stevelman, *Regulatory Competition*] ("[P]laintiffs and their counsel might reasonably be concerned that Delaware judges have an anti-plaintiff/pro-corporate bias. As 'race for the bottom' believers postulate, such bias would foreseeably result from the fact that corporate managers, and not shareholders, select the state of incorporation."). Even if this is true now, it was not always so. ROMANO, GENIUS, *supra* note 36, at 41 (1993) ("[P]laintiffs do not perceive it] to be undesirable to litigate in Delaware and instead take advantage of its valuable asset of legal capital.").

102. The Complex Case Division of the Santa Clara County Superior Court covers Silicon Valley and, according to one prominent corporate firm, "probably handles more Delaware corporate law issues than any court outside Delaware[]." *Restricting Shareholder Derivative Suits to Delaware: Stop, Look, and Listen*, WSGR ALERT (Wilson Sonsini Goodrich & Rosati), Jan. 2011, at 1.

103. Mirvis, *supra* note 43, at 17. Mirvis delivered his remarks in March 2007 at the 19th Tulane Corporate Law Institute in New Orleans, and Galatoire's is an "old-line national treasure in the French Quarter where . . . upper-crust, extravagantly dressed guests dine on superior Creole-French fare . . . ." ZAGAT: AMERICA'S TOP RESTAURANTS 2011, 193–94 (2010) (internal quotation marks omitted). Jackets are required for dinner. *Id*. at 194. Jack in the Box is a regional fast-food chain best known for a deadly outbreak of *E. coli* in 1993. *See* Lawrence K. Altman, *Lessons Are Sought in Outbreak of Illness from Tainted Meat*, N.Y. TIMES, Feb. 9, 1993, at C3.

104. *See* Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 Stan. L. Rev. 1267, 1269 (2006); Mirvis, *supra* note 43, at 17 (noting that plaintiffs' attorneys "perceive that there is greater settlement value outside of Delaware, that there's a greater vagary in the results, [and] that you never know what you're going to get").

105. *See* Robin J. Effron, *The Shadow Rules of Joinder*, 100 GEO. L.J. 759, 762–65 (2012) (discussing federal consolidation). States have similar rules. *See, e.g*., CAL. R. OF CT. R. 3.300(h).

106. Plaintiffs' attorneys can be creative in ways to cement their status as lead counsel. *E.g*., Order Disposing of Pending Motions for Consolidation and Lead Plaintiff Status, Stoll v. Ardizzone, No. 07-cv-00911-CM (S.D.N.Y. July 7, 2007) (grating consolidation of "two identical derivative suits, filed by the same law firm on behalf of two different shareholder clients, just weeks apart" but denying as moot a motion to appoint lead counsel because "there are no other plaintiffs' lawyers in the case").

plaintiff's attorney: the lead counsel gets the attorney's fee, and others may get nothing.[107]

B. The Strategic Decision to File in a Different Forum

For a plaintiff's attorney in search of a fee award, entering the competition to be appointed lead counsel may be a dead end. Filing in a different forum, however, can be an attractive alternative because it offers numerous routes to a potential fee.

Consider a hypothetical plaintiff's attorney contemplating filing a shareholder suit to challenge some transaction. Suppose that the headquarters state court is the most attractive place to litigate the claim, but two other plaintiffs' attorneys have already filed there. It may be impossible to gain control of the case in that forum, especially if it favors first-filers in appointing lead counsel, leaving the third attorney with no opportunity for a fee. But he can file a claim elsewhere, in either the incorporation state courts or in federal court; both might be less attractive in their procedural rules and customs, but their major virtue is that no cases have been filed there.

Suppose the third plaintiff's attorney files in federal court. He of course will have no control over the proceedings in the headquarters state, but he can fragment the litigation challenging the transaction and gain control of at least one piece of it.[108] Under current law, the attorney in any forum can settle the claims with the defendants.[109] Such a settlement typically releases the defendants from liability for all claims that could possibly be asserted by any class member.[110] In this way, a settlement in federal court between the third attorney and the defendants would preclude the plaintiffs' attorneys' claims in the headquarters

107. *E.g.*, Louisiana Mun. Police Emps. Ret. Sys. v. Pyott, 46 A.3d 313, 337 (Del. Ch. 2012), *rev'd*, No. 380, 2013 WL 1364695 (Del. 2013) ("A plaintiffs' firm only can obtain a fee if it first obtains a result. A firm cannot obtain a result if a competitor gains control of the case.").

108. Transcript of Hearing for Plaintiffs' Motion for a Preliminary Injunction at 20, *In re* Compellent Techs., Inc. S'holder Litig., No. 6084-VCL (Del. Ch. Jan 13, 2011) ("[W]hen everybody is filing in the same forum, you're not guaranteed to get control of a case. But if you then go and file in another forum, you do have control of that case and then the defendants have to deal with you. You may get control of the entire action but, at a minimum, you get control of a piece of the litigation for purposes of the fee negotiations."); *see also* CAB, *Fragmentation*, *supra* note 80, at 429–30 (noting that plaintiffs' lawyers "file lawsuits involving Delaware public companies outside Delaware so as to gain an advantage in pursuit of the coveted role of lead counsel in corporate litigation"); Thomas & Thompson, *Theory*, *supra* note 5, at 1768; Kazanoff, *supra* note 8, at 42 (litigator at Simpson Thatcher & Bartlett LLP) ("Having a set at the negotiating table with defendants is, of course, essential to the efforts of plaintiffs' attorneys to monetize their investments in contingency fee litigation."); *New Challenges and Strategies for Designating Delaware as the Exclusive Jurisdiction for Intra-Corporate Disputes*, LATHAM & WATKINS LLP, CORPORATE GOVERNANCE UPDATE, May 2011, at 4 ("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.").

109. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 371 (1996).

110. *See id*. at 371–72.

state.[111] The power to settle all potential claims with the defendants—a power vested concurrently in the lead plaintiff's attorney in each forum—is a necessary condition for multi-forum litigation to flourish.

The only way defendants can coordinate shareholder litigation across jurisdictions is by seeking to stay litigation in all but one forum.[112] A court in one forum may invoke various discretionary doctrines like *forum non conveniens* to stay proceedings in favor of a similar action filed elsewhere.[113] A plaintiff's attorney filing in federal court could partially insulate himself against a stay motion by adding, say, a proxy disclosure claim.[114] A federal court may be reluctant to stay the litigation under any discretionary doctrine because only federal courts have jurisdiction over such securities claims.[115] Sometimes defendants' stay motions succeed in coordinating cases.[116] But sometimes they fail,[117] in which case the parties must coordinate the proceedings themselves by agreement.

The plaintiff's attorney in federal court has various options to monetize the power to settle. The lead plaintiffs' attorneys in each forum might agree among themselves who will negotiate the settlement with defendants and how they will split the fee.[118] In the alternative, the defendants may negotiate a global settlement and a prearranged fee split.[119]

111. The non-settling plaintiff's attorneys in a fiduciary class action cannot generally opt-out of a settlement. *See In re* Celera Corp. S'holder Litig., 59 A.3d 418, 432–33 (Del. 2012). Even if they could opt-out, for purposes of recovering a sizeable attorneys' fee, opting-out is an unattractive strategy because settlement values are low for just one plaintiff. The value of the claim to the plaintiff's attorney depends on the ability to aggregate claims over the entire shareholder class, and only one plaintiff's attorney can do that. Opting-out is of course not even possible in derivative claims.

112. *See* Latham & Reed, *supra* note 4, at 541.

113. Defendants can move for a stay of proceedings, move to dismiss litigation in foreign states on grounds of *forum non conveniens*, or file a declaratory judgment in the home state about what law ought to apply. *See* Stevelman, *Regulatory Competition supra* note 100, at 104. Courts have wide discretion in staying litigation where another court is considering the same claims. *E.g.*, McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co., 263 A.2d 281, 282 (Del. 1970) (granting stay where an earlier-filed suit is "pending in another State between the same parties and involving the same issues"); *see also* Will v. Calvert Fire Ins. Co., 437 U.S. 655, 664 (1978) ("[T]he decision whether to defer to the concurrent jurisdiction of a state court is, in the last analysis, a matter committed to the district court's discretion.").

114. Thomas & Thompson, *supra* note 5, at 1763 ("Over time, federal securities law has broadened to take in more and more of corporate internal affairs, so that more behavior is covered by the two overlapping systems, and participants may be able to pursue one action instead of another for strategic reasons.").

115. 15 U.S.C. § 78aa (2006).

116. Shields v. Murdoch, 891 F. Supp. 2d 567, 584–85 (S.D.N.Y. 2012) (declining to stay a consolidated federal case in favor of a Delaware case filed four months earlier that, at the time, had a pending motion to dismiss); *In re* Bank of Am. Corp. Sec. Litig., 757 F. Supp. 2d 260, 345–46 (S.D.N.Y. 2010) (declining to stay federal case in favor of parallel derivative proceeding in Delaware).

117. *See, e.g.*, Calleros v. FSI Int'l., Inc., 892 F. Supp. 2d, 1163, 1170–71 (D. Minn. 2012) (abstaining from exercising federal jurisdiction in favor of earlier-filed state complaint alleging same fiduciary violations); *In re* Novell, Inc. S'holder Litig., No. 10–12076–RWZ, 2012 WL 458500, at *9 (D. Mass. Feb. 10, 2012) (granting motion to stay in favor of Delaware action). For more cases, see Part IV.B.

118. Thomas & Thompson, *Theory*, *supra* note 5, at 1799 ("[T]he older firms are forced to negotiate with the newer ones over the allocation of attorneys' fees in any settlement.").

119. Defense attorneys recommend that defendants seek to settle cases in all fora. Latham & Reed, *supra* note 4, at 553 ("In the event counsel are unsuccessful in their attempts to stay or dismiss parallel litigation, they should endeavor to craft a single, global settlement that will have the practical effect of resolving all outstanding litigation.").

Lastly, the third attorney might be able to convince the federal court to expedite proceedings, shifting the center of gravity in the litigation from the headquarters court to federal court and giving the third attorney more leverage in settlement negotiations.

The risk for the third attorney is that the defendants may reach a settlement agreement with the *other* plaintiffs' attorneys, in the headquarters state, that releases all of the claims asserted in the federal complaint. This leaves the federal plaintiff's attorney empty-handed, but he has one remaining option: he could appear at the fairness hearing in the headquarters state to formally object to the settlement in hopes of derailing it.[120] An objection threatens the settling attorney because it could disrupt his fee award. Even in this scenario, however, the plaintiff's attorney in federal court can insist on some payment to forego any objection he might make to the settlement.

In these ways, filing in a second forum offers numerous avenues for a plaintiff's attorney to win a fee that might be unavailable by filing an additional complaint in the first forum. Similar reasoning would induce some other plaintiff's attorney to file in a third forum if one is available. Other plaintiffs' attorneys might file in hopes of competing for position as co-lead plaintiff. Each plaintiff's attorney trades off the attractiveness of the forum against the likelihood of getting control of the case in that forum. In equilibrium, no plaintiff's attorney has sufficient incentive to file an additional case in any forum. In this way, litigation spreads across multiple fora.

C. Other Necessary Conditions for Multi-forum Litigation

The competition between plaintiffs' attorneys in different fora can thrive only under certain conditions. One is fragmentation in the plaintiff's bar, which has increased over time.[121] In an earlier era, a goliath among the plaintiffs' bar may have able to impose discipline that would prevent competition. With the demise of large plaintiffs' firms that specialized in federal securities litigation, many smaller firms emerged.[122] As others have shown, the plaintiffs' bar is now flush with small players who are willing to directly compete in shareholder litigation with established

120. On the objection, see Part V.B.1.c.

121. CAB, *Fragmentation*, *supra* note 80, at 431. They suggest three reasons for increased competition among plaintiffs' attorneys: (1) firms break up and split off easily; (2) easier to get appointed than in securities suits; and (3) obstacles to filing outside declined. *Id*.

122. *Id.* at 431 (noting that "over the past 10 to 15 years [there was] a proliferation of experienced, well-resourced lawyers and firms able to litigate thoroughly major shareholder suits, and to bring these suits in multiple venues").

firms by filing in new fora.[123] Some of the new splinter firms specialize in bringing stockholder litigation outside of Delaware.[124]

Another necessary condition for multi-forum litigation is that multiple courts must be willing to proceed with cases. Plaintiffs' attorneys will only be interested in filing in a second forum if that forum might move ahead with the case in such a way for the plaintiff to win a fee. The emergence of specialized business courts that are more willing to proceed with cases may have made shareholder litigation outside of the domicile state more attractive to plaintiffs' attorneys.

V. THE UNDESIRABILITY OF MULTI-FORUM SHAREHOLDER LITIGATION

Others have suggested that multi-forum litigation imposes few costs and may confer some benefits on shareholders.[125] Future empirical work could shed greater light on these issues, but this Part presents theoretical analysis indicating that multi-forum litigation promises no benefits for shareholders or society and comes with substantial costs. Multi-forum litigation sets plaintiffs' attorneys in competition with one another to settle with the defendants, sapping meritorious claims of their deterrent effect. At the same time, screening weak cases through dismissal is more difficult because defendants must achieve dismissal in *all* fora. Further, incorporation states can be deprived of important cases with which to shape the content of their corporate law, diminishing the distinctive and successful American system of producing corporate law.

A. The Illusory Benefits of Forum Selection by Plaintiffs' Attorneys

As noted earlier, the attributes of a forum—its procedural rules, general disposition, and experience—can affect the value of shareholder claims. Perhaps plaintiffs' attorneys seek out the forum with the optimal mix of attributes to maximize the value of the claims, and courts attract filings by catering to the needs of shareholders. Such competition might force incorporation state courts—Delaware, especially—to balance the interests of shareholders against their supposed tendency to favor defendants in fashioning corporate law and procedure.[126]

123. CAB, *Fragmentation*, *supra* note 80; Thomas & Thompson, *Theory*, *supra* note 5, at 1783 ("The addition to the plaintiffs' bar of new small firms may be driving a broader geographical search for lawsuits.").

124. Transcript of Settlement Hearing at 19, *In re* Compellent Tech. Inc. S'holder Litig., No. 6084-VCL (Del. Ch. Jan. 13, 2011) ("When Lerach Coughlin, the predecessor to Robbins Geller, split off from Milberg, they said, as their business plan, we are going to sue elsewhere. We're not going to sue in Delaware. It was widely known among those of us who did this type of work . . . .").

125. Griffith & Lahav, *Market for Preclusion*, *supra* note 5, at 1057–59 (arguing that the current system has "overlooked benefits"); Thomas & Thompson, *Theory*, *supra* note 5, at 1819 (tentatively concluding that multi-forum litigation comes with "limited costs and benefits").

126. Stevelman, *Regulatory Competition*, *supra* note 100, at 64 ("Shareholder-plaintiffs' option to be heard in alternative forums, under alternative procedural rules, creates a ballast against excessive partisanship in Delaware's own adjudication.").

There are strong grounds for skepticism of this account of forum selection. Plaintiffs' attorneys—not shareholders—select where to file fiduciary claims,[127] as noted earlier, and the interests of plaintiffs' attorneys can diverge substantially from the interests of shareholders.[128] Plaintiffs' attorneys wish to maximize their fee award, and recent empirical work has shown that in selecting fora, plaintiffs' attorneys are sensitive to past fee awards and settlement rates in merger litigation.[129] To be sure, fee awards are generally proportional to shareholder recoveries, and thus plaintiffs' attorneys' incentive might sometimes be to maximize the settlement value. At the same time, there remains the persistent risk that plaintiffs' attorneys may select fora in ways that help themselves at the expense of shareholders. A plaintiff's attorney may seek out a forum that, say, awards handsome fees for settlements that produce only cosmetic corporate governance reforms for shareholders. Certain attributes of a forum might appeal to a plaintiff's attorney—permissive pleading requirements, irrevocable appointments of lead counsel, and generous fee awards—but might also disserve the interests of shareholders.[130]

In shareholder litigation, the two potential forces that could constrain opportunism are judges and plaintiffs,[131] but neither can do so ef-

127. Cain & Davidoff, *Great Game*, *supra* note 32, at 7 ("In the case of corporate litigation . . . the states would compete to attract entrepreneurial plaintiffs' attorneys who make the litigation decision rather than managers who make the corporate chartering decision.").

128. Thompson & Thomas, *New Look*, *supra* note 34, at 148 ("[T]he entrepreneurial attorney's interests can diverge from those of the clients. If class counsel have tremendous discretion to run the litigation, they may do so in a manner that maximizes their benefit, even at the expense of the interests of their putative clients."); *see also supra* note 30.

129. Cain & Davidoff, *Great Game*, *supra* note 32, at 4 ("[W]hen attorneys face a choice in where to bring litigation, they respond to settlement rates in one particular state by moving to other state jurisdictions to file. In other words, attorneys are responsive to the incentives provided by differential settlements (which have a second-order impact on fee awards) across multiple jurisdictions.").

130. Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Eptstein v. MCA, Inc., 73 N.Y.U. L. REV. 765, 775 (1998) ("In the class action context, . . . forum shopping takes a different, and more sinister, form. It entails the ability of class counsel to commence an action in a forum that is most favorable to *counsel's own* (rather than the class members') interests, such as a forum in which judges are predisposed to exercising little scrutiny of class action settlements.").

131. Debates over the merits of forum shopping by agents in other areas focus on the extent to which economic forces constrain agent opportunism. In the debate over Delaware and the market for corporate law, some contend that market forces are strong enough to compel managers to select an incorporation state with shareholders' interests in mind, and thus states will compete to supply the most shareholder-friendly corporate law. *E.g.*, Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977). Others argue that market forces are too feeble to bind managers to shareholders' interests, and managers will incorporate in whatever state offers corporate law most conducive to self-dealing. Lucian Ayre Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992); William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L. J. 663 (1974). In bankruptcy, the debate over venue competition divides in a similar way. One line of scholarship argues that "case placers"—managers and bankruptcy professionals—have complete discretion in where to file for bankruptcy, and bankruptcy courts compete for filings by serving their interests, not necessarily the interests of estate creditors. LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 17–18 (2005). The District of Delaware was the leader in the competition during the 1990s, though other courts adopted that court's innovations. *Id.* at 25–77, 123–37. Others have a more sanguine view of venue competition in bankruptcy, arguing the discretion of case placers is limited by DIP financiers,

fectively. Any judicial attempts to police the agency costs between plaintiffs' attorneys and shareholders will backfire and drive litigation elsewhere.[132] Consider the developments supposedly driving the exodus of cases from Delaware courts: they dismiss more cases than do other courts,[133] they replace inactive lead counsel,[134] and they scrutinize, and in some circumstances slash, negotiated fee awards in settlement.[135] These are direct attempts to patrol litigation agency costs, but a plaintiff's attorney can easily avoid them by filing elsewhere.[136] Thus, courts are limited in their ability to constrain litigation agency costs.

The named plaintiffs also could monitor the performance of plaintiffs' attorneys, but plaintiffs have almost no control over their attorneys in contingency-fee shareholder litigation.[137] Unlike federal securities litigation, which gives priority to shareholders with large ownership stakes,[138] plaintiff's holdings are usually not a factor in lead plaintiff appointments in state fiduciary litigation outside of Delaware.[139] Indeed, plaintiffs sometimes do not even have contact with—let alone control over—the plaintiffs' attorneys.[140] Neither judges nor plaintiffs, then, can ensure that plaintiffs' attorneys act in the interests of shareholders, which leaves the door open for opportunism in forum selection.[141]

creditors' ability to vote on plans or reorganization, and the open auction process in sales. Kenneth Ayotte & David A. Skeel, Jr., *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 456–58 (2006). For a reply on the issue of market constraints, see Lynn M. LoPucki & Joseph W. Doherty, *Delaware Bankruptcy: Failure in the Ascendancy*, 73 U. CHI. L. REV. 1387, 1414–17 (2006).

132. Quinn, *supra* note 30, at 143 ("The out-of-Delaware litigation strategy appears to be, first, an effort by plaintiffs' counsel to skirt attempts by the Delaware judiciary to more closely monitor agency costs associated with shareholder lawsuits . . . .").

133. *See* Cain & Davidoff, *Great Game*, *supra* note 32, at 6.

134. *See, e.g.*, *In re* Revlon, Inc. S'holders Litig., 990 A.2d 940, 957 (Del. Ch. 2010).

135. *In re* Cox Communications Inc., S'holders Litig., 879 A.2d 604, 642 (Del. Ch. 2005) (awarding a fee of $1.275 million, not the $5 million sought); ABC, *Balancing Act*, *supra* note 1, at 1370–71.

136. ABC, *Balancing Act*, *supra* note 1, at 1370–72 (reporting that "interviewees told us that Delaware courts scrutinize fee requests closely, but elsewhere judges routinely approve fee awards, at least if the defendant does not object" and that cases in which Delaware courts have scrutinized fee awards prompted speculation that fee reductions by Delaware judges could encourage lawyers to file elsewhere").

137. Coffee, *Entrepreneurial Litigation*, *supra* note 30, at 884–86.

138. Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4 (2012).

139. Delaware is an exception, at least since 2000. *See In re* Del Monte Foods Co. S'holder Litig., No. 6027–VCL, 2010 WL 5550677, at *6 (Del. Ch. Dec. 31, 2010) (describing a factor in appointment of lead plaintiff as "whether the economic stake of the particular proposed plaintiff, given the plaintiff's circumstances, is likely to lead to meaningful monitoring and reduced agency costs); *see also* TCW Tech. Ltd. P'ship v. Intermedia Commc'ns, Inc., No. 18336, 18289, 18293, 2000 WL 1654504, at *4 (Del. Ch., Oct. 17, 2000).

140. *See* Declaration of Shawn A. Williams in Support of Motion to Consolidate Actions and to Appoint Kathryn L. Champlin Lead Plaintiff and Appoint Lerach Coughlin Stoia Geller Rudman & Robbins LLP Lead Counsel at 1, Champlin v. Balakrishnan, No. C-06-2811-MHP (N.D. Cal. Nov. 21, 2006) (explaining why the plaintiffs' attorneys were not able to obtain an affidavit from their client about the value of stock owned by the client and noting that attorneys "attempted to contact [the plaintiff] by telephone on multiple occasions without success").

141. Coffee, *Foreword*, *supra* note 5, at 397 ("From a public policy perspective, competition among states for M&A 'fiduciary breach' litigation may present the clearest case in which competition does produce a 'race to the bottom.'").

Moreover, each plaintiff's attorney is trying to select a forum that maximizes his chance of being appointed lead counsel. The rules for appointing lead counsel vary from one forum to another. Delaware courts, for example, designate lead counsel based on the quality of pleadings, the attorney's energy, the plaintiff's economic stake,[142] and the attorney's past performance as lead counsel.[143] For firms that are disadvantaged by these criteria, the more attractive option may be a filing in one of the many states that continue to privilege the first-filed complaint.[144] Thus, the optimal forum for each plaintiff's attorney depends not only on the attributes of each potential forum but also on the filing decisions of other plaintiffs' attorneys who might compete for lead counsel.

If complaints are filed in all possible fora, then by definition, at least one plaintiff's attorney will have filed in the most shareholder-friendly forum. Perhaps the best argument that can be made for the multi-forum character of shareholder litigation is that it functions as a competitive mechanism that allows the case to proceed in the forum with the most vigorous plaintiff's attorney or in the most shareholder-friendly forum. The trouble is that there is no reason to be confident that the claims will proceed in the best forum, even if it could be identified. The process by which parties resolve multi-forum litigation is unpredictable and responds to factors that have nothing to do with the suitability of the forum from the shareholders' perspective.[145] In sum, there is little reason to suspect that the forum choices of plaintiffs' attorneys—either individually or together—will generate benefits for shareholders.

B. The Costs of Competition Between Fora

Multi-forum litigation weakens the connection between merits and settlements and thus undermines the deterrent effect of shareholder litigation. A distinct but equally troubling consequence is that it could deprive incorporation states of important cases, which can have negative systemic consequences for the production of corporate law.

1. Deterrence Undermined

Sean Griffith and Alexandra Lahav have favorably described multi-forum shareholder litigation as a "market for preclusion."[146] Plaintiffs' attorneys are competing sellers, each offering the preclusive effect of a broad settlement release. The defendant group is the buyer, offering a

142. *TCW Tech.*, 2000 WL 1654504, at *4.

143. *E.g.*, Transcript of Settlement Hearing at 19, *In re* Compellent Tech. Inc. S'holder Litig., No. 6084-VCL (Del. Ch. Jan. 13, 2011) ("[T]he key factor for me, when we have these leadership disputes, is what your track record is generating tangible benefits for stockholders.").

144. ABC, *Balancing Act*, *supra* note 1, at 1376.

145. *See supra* Part IV.B.

146. Griffith & Lahav, *Market for Preclusion*, *supra* note 5, at 1057–58.

settlement that includes attorneys' fees.[147] The virtue of this system, in their view, is that it "provides a reliable price-discovery mechanism for shareholder claims, allowing low-value claims to settle quickly and cheaply while higher-value claims are litigated more aggressively."[148] This is an appealing story, but there is little reason to believe it bears much resemblance to how multi-forum litigation actually works. There are in fact strong reasons to believe the opposite: that multi-forum litigation systematically distorts settlement values of shareholder claims in three ways. First, no individual court can completely eliminate any claim, increasing the settlement value of weak claims. Second, plaintiffs' attorneys can be forced to split fees, diminishing their incentive to invest in claims. Third, the pendency of cases in multiple fora offers defendants the opportunity to negotiate a settlement with the least-demanding plaintiff's attorney, undermining the settlement value of strong claims.

a. Greater Difficulty Eliminating Weak Claims

Multi-forum litigation may increase the settlement value of weak claims by increasing the likelihood that they survive to the point where defendants are willing to settle. The early stages of shareholder litigation present a variety of predictable procedural disputes: plaintiffs may seek to expedite discovery or to enjoin a transaction, and defendants may move to stay the proceedings or to dismiss the complaint. These early procedural obstacles are crucial opportunities for courts to screen shareholder suits based on merit. For a plaintiff's attorney with a strong case, the court may issue an injunction, sharply increasing its settlement value. By contrast, a court may decline to expedite weak claims, or it may stay or dismiss them, lowering or eliminating their settlement value. Such motions also give courts the opportunity to air their estimates of the claims' merits, which aids the parties in reaching and pricing the settlement. This ability to discriminate between strong and weak claims helps connect settlement values to the merits of a claim.

With multi-forum claims, this screening function is diminished because no single court has the power to throw out meritless suits. Consider a shareholder complaint that faces a motion to dismiss. Suppose a court will dismiss the claims with some probability p. With only one forum, the likelihood of surviving the motion to dismiss is $1 - p$. With multi-forum litigation, the claims must be thrown out in *each* forum to achieve the same screening result.[149] Imagine that two courts each face a

147. *Id*. at 1057 ("[P]arties seek to trade the preclusive effect of a judgment in exchange for compensation.").

148. *Id*. at 1058.

149. In commentary by defense counsel, this risk is styled as one of inconsistent judgments. *See* U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 10, at 9 ("[A]n adverse decision in just one of many courts could upset the deal."); Marc A. Alpert & Patrick J. Narvaez, *Continuing Challenges to Exclusive Forum Bylaw Provisions*, CORPORATE PRACTICE NEWSWIRE (Chadbourne & Parke LLP), Sept. 2012, at 24 "[Multi-forum litigation] creates a risk of inconsistent outcomes"); Frank Aquila & Anna Kripitz, *From the Experts: Forum-Selection Provisions in Delaware*, CORPORATE COUNSEL

motion to dismiss identical claims. If the courts' decisions are not perfectly correlated, the likelihood that the claims will survive the motion to dismiss in at least one forum increases. The extent of the increase depends on the correlation between the courts' decisions. The effect is smaller if the decisions are positively correlated—that is, one court is more likely to dismiss claims given that another court has already done so. If the decisions of each court are independent, however, the multi-forum effect grows. Imagine a weak claim with a probability of dismissal in one forum of 0.8. If three fora are implicated and the court's decisions are independent, the likelihood of dismissal drops to $0.8^3 = 0.512$. This drop in the likelihood of dismissal increases the *ex ante* settlement value of the claim.[150]

Some practitioner commentary suggests that plaintiffs' attorneys deliberately seek out courts that are unfamiliar with corporate law and whose decisions might not be more unpredictable.[151] For example, the decisions of inexperienced non-Delaware courts may be uncorrelated with those of expert Delaware courts.[152] A court might be reluctant to dismiss an exciting and high profile corporate dispute,[153] and courts that are less experienced with corporate law claims may not have the expertise or confidence to screen out weak shareholder claims.

Multi-forum litigation thus diminishes the likelihood that claims will be screened out in early procedural stages, increasing the settlement value of weak claims and the incentive to file them.[154] The litigation and settlement costs associated with these weak cases constitute a deadweight loss for shareholders.[155] It also makes litigation less of a proxy for suspi-

(Am. Legal Media), Aug. 27, 2012, at 1 ("These duplicative actions unduly burden corporations and their shareholders by increasing the costs of litigation and the likelihood of unfavorable and/or inconsistent judgments.").

150. A mathematical example: Suppose the likelihood of dismissal p is .8 – this weak claim has an 80% chance of dismissal by one court but if the claim survives dismissal it has a settlement value to the plaintiff's attorney of $400,000. The claim in one forum thus has an expected value of $80,000 (.2 * $400,000). If the claims are pending in two fora, however, likelihood of dismissal $p < .8$ (because the decisions are not perfectly correlated). If the two courts' decisions are completely independent, the overall $p = .8 * .8 = .64$. In this situation, the expected value of the claims rises to $144,000. If three independent fora, the likelihood of dismissal drops to $.8^3 = .512$, and the expected value of the claims rises to $195,200.

151. Mirvis, *supra* note 43, at 17 (noting that plaintiffs' attorneys "perceive that there is greater settlement value outside of Delaware, that there's a greater vagary in the results, that you never know what you're going to get").

152. Strine et al., *Stockholders First*, *supra* note 5, at 75–76. ("[C]ourts unfamiliar with the deep structure of a body of law run a high risk of getting that law wrong, or at least wrong in the sense of incorrectly predicting how the courts of the state supplying the governing law would apply the law."). A classic example is the "deepening insolvency" doctrine, which some courts adopted but Delaware did not. *Id.* at 75.

153. Black, *Delaware's World*, *supra* note 49, at 649 ("What Delaware is doing is facing a nuisance suit on every deal case. . . . But it can be a nice important case to a local judge. So the local judge may be more friendly to those cases than Delaware in a variety of ways, and the plaintiffs' lawyers will respond.").

154. Of course, for any individual plaintiff's attorney, the incentive to file depends on the likelihood that *his* case will be the one that survives to settlement.

155. Quinn, *supra* note 30, at 152. ("From the point of view of shareholders and society, the mutiforum litigation strategy raises settlement costs of marginally valuable lawsuits and thus represents a deadweight loss to society.").

cious behavior and thus diminishes any reputational penalty associated with engaging in behavior that attracts a shareholder suit. This too diminishes the deterrence value of shareholder litigation.

There is a flip-side, of course, to this argument. If the cases are strong, the presence of multi-forum litigation holds out hope of *improving* the lot of shareholders by protecting the claims from hostility or a mistake by a single court. Shareholders have more than one bite at the apple in the good cases too, ensuring that they survive early procedural obstacles. As explained below, other pathologies of multi-forum litigation threaten to overwhelm this effect.

b. Diminished Incentive to Prosecute Strong Claims

Multi-forum litigation can weaken the incentive for plaintiffs' attorneys to invest in strong claims, relative to a one-forum baseline. When multi-forum claims settle, the ultimate settlement will often compensate the lead attorneys in each jurisdiction. They jockey with each other for a larger slice of the fee by, for example, asserting federal claims, filing in a different court, seeking to enjoin a transaction, or moving for expedited discovery. Thomas and Thompson refer to multi-forum shareholder litigation as "fee distribution litigation."[156] In their view, this phenomenon is chiefly a contest among plaintiffs' attorneys, and there is little at stake beyond which attorney gets what slice of the fee.[157]

The division of attorneys' fees has deeper consequences, however, that diminish the *ex ante* incentives for attorneys to prosecute claims. In multi-forum disputes, the settlement must of course compensate the attorneys who are actively prosecuting the claims. But it must also compensate the lead attorneys in other venues for *not* competing to prosecute the claims, essentially paying them the option value of their case and their objections at settlement. The example of GlenAyre Technologies illustrates how settlement fee awards in one forum compensate attorneys in other fora. Accused of backdating stock options, GlenAyre faced derivative litigation in New York state court and in federal court.[158] In late 2007, the federal claims were dismissed.[159] In early 2008, the state court action settled, and the terms included no relief for the company but a fee award of $775,000 for the plaintiffs' attorneys.[160] The state judge made an unusual request of the plaintiffs' attorneys: explain what will happen to the fees. According to the state plaintiffs, they had agreed to give $100,000 of the $775,000 to the federal plaintiffs' attorneys,[161] whose case

156. Thomas & Thompson, *Theory*, *supra* note 5, at 1797.
157. *Id*. at 1800.
158. Gusinsky v. Bailey, No. 603126/06, 2008 WL 4490008, at *1 (N.Y. Sup. Ct. Sept. 17, 2008).
159. *Id.* at *3 n.5.
160. *Id.* at *3.
161. Gusinsky v. Bailey, Letter from Lee D. Rudy to Justice Herman Cahn, filed Sept. 18, 2008.

had been dismissed.[162] Thus, the fee in the state case compensated the state attorneys for pursuing their case and also the federal plaintiffs for *not* pursuing their case.[163]

The arrangement in GlenAyre appears quite pedestrian compared to the fireworks associated with a multi-forum dispute involving Maxim Integrated Products. Maxim faced derivative backdating claims in federal court, California state court, and the Delaware Court of Chancery. The California proceeding had been stayed in favor of the federal case, where co-lead counsel was the former Lerach Coughlin firm. The Delaware plaintiffs, meanwhile, were in mediation with Maxim and its insurers, working towards a settlement and release.[164] An initial draft of the settlement contemplated the inclusion of plaintiffs' attorneys from both federal court and Delaware, but that was never consummated. The final stipulation settled only with the Delaware attorneys, and an ugly and rare public dispute between plaintiffs' attorneys followed.[165] The federal plaintiffs objected to the settlement in Delaware, and the initial draft settlement agreement revealed why: the initial draft contemplated an additional settlement payment of around $9 million in Maxim stock for the federal plaintiffs' attorneys.[166] The final settlement agreement did not include this payment to the federal plaintiffs' attorneys. The federal plaintiffs' objection failed, but the ferocity of the dispute suggests the abnormality of the circumstances. The more common outcome is to include everyone in the settlement to avoid the risk that plaintiffs' attorneys from the other fora might attempt to upset it.

Fees for additional attorneys in multi-forum settlements can come from a limited number of sources. The defendants could increase the total size of the settlement; this incremental fee presumably could have otherwise gone to shareholders or to the prosecuting attorneys. If the size of the settlement is fixed for practical purposes, the fees for additional attorneys could come out of the shareholder's pocket, in the form of a reduction in the non-fee portion of the settlement.[167] Alternatively, it could come out of the prosecuting attorney's pocket, in the form of a reduction in the fee that goes to the active attorneys. These all look like lost opportunities for a larger fee to the prosecuting attorney, which ex-

162. The slice for the federal attorneys would be reduced proportionally if the overall fee were reduced, essentially giving the federal attorneys a thirteen percent interest in the state fee award.

163. The threat that the federal plaintiffs had was, presumably, to object to the settlement or perhaps to intervene in the New York case and seek appointment as lead counsel.

164. *See* Ryan v. Gifford, No. 2213-CC, 2009 WL 18143, at *3 (Del. Ch. Jan. 2, 2009).

165. According to litigators, a challenge by one plaintiffs' attorney of a settlement by another is "an unusual and difficult move." Kolz, *Rigging*, *supra* note 4, at 13.

166. *Ryan*, 2009 WL 18143, at *12.

167. *See* BAKER & GRIFFITH, ENSURING MISCONDUCT, *supra* note 13, at 103 ("[S]hareholder claims typically settle within the limits of available coverage. . . . Damages will be effectively capped at typical policy limits.").

plains why prominent plaintiffs' attorneys are eager to find a solution to multi-forum litigation.[168]

Splitting fees in this way has important welfare implications for shareholders because it diminishes each attorneys' *ex ante* incentive to invest in prosecuting the claims. To the extent that each attorney's ultimate payoff is diminished, each will invest less in identifying malfeasance, investigating claims, drafting complaints, and developing a detailed record through discovery. Given any particular settlement amount, shareholders could obtain greater vigor from the prosecuting attorneys in the absence of plaintiffs' attorneys entitled to compensation in other fora.[169] In strong cases, this hurts shareholders in a straightforward way by making it less likely that plaintiff's attorneys will invest the optimal amount in the claims, diminishing their deterrent effect. In weak cases, though, this effect could mitigate the increased settlement values described in the prior subsection, although it might mean only that attorneys will limit their investment in weak cases to doing nothing more than necessary to file claims and survive early procedural stages.

c. The Reverse Auction

The most threatening consequence of multi-forum shareholder litigation is that it inhibits the ability of any plaintiff's attorney to press for a tough bargain in settlement. The plaintiff's attorney in each forum offers defendants the same thing: a general release. As described earlier, a settlement with the plaintiff's attorney in one forum generally precludes the claims asserted in another forum. Defendants naturally will settle with the plaintiff who offers the most attractive settlement terms. No plaintiff's attorney can risk holding out for the strongest possible settlement because he may be underbid by the plaintiff's attorney in another forum, leaving the hold out empty-handed.[170] This is what John Coffee has termed the "reverse auction."[171] According to Coffee:

> [Litigation in multiple fora] allows the defendants to pick and choose the plaintiff team with which they will deal. Indeed, it signals to the unscrupulous plaintiffs' attorney that by filing a parallel, shadow action in state court, it can underbid the original plaintiffs' attorney team that researched, prepared and filed the action. The

168. LEBOVITCH ET AL., *supra* note 4, at 8 (proposing that plaintiffs in Delaware publish a nationwide notice of class and invite competing applications for lead counsel status, in the hopes that other courts might defer to such an open process).

169. Or shareholders could of course obtain a higher recovery given any particular settlement amount.

170. Transcript of Settlement Hearing, at 24–25, *In re* Compellent Tech. Inc. S'holder Litig., No. 6084-VCL (Jan. 13, 2011) ("[I]t's . . . frankly, advantageous for defendants to have multiple actions. The vast majority of these cases settle. And if one case is being pushed hard, you can go to the other plaintiff.").

171. Coffee, *Class Wars*, *supra* note 12, at 1370–72.

net result is that defendants can seek the lowest bidder from among these rival groups and negotiate with each simultaneously.[172]

This does not have to be an explicit gambit by the defendants. It is sufficient that all plaintiffs' attorneys merely know of the existence of the others. Each will limit his settlement demands simply because he knows that others are making competing offers. The structure of the negotiations between the defendants and the various lead plaintiffs creates downward pressure on the settlement value that inures to the benefit of defendants.[173] Defendants, for example, might strategically decide to share information with one set of plaintiffs' attorneys in hopes of allowing those attorneys to proceed faster to a friendly settlement.[174] The result of the reverse auction is settlements that are weaker in ways that systematically help defendants and injure shareholders.[175] In merger litigation, a settlement might require additional disclosures of questionable value instead of an increase in the purchase price. In a derivative case, a settlement might make cosmetic governance changes to the firm instead of requiring repayment of ill-gotten gains by defendants.

The reverse auction operates as another practical limitation on what plaintiffs' attorneys will invest in prosecuting the case. The crucial accomplishment for each plaintiff's attorney is winning the lead counsel appointment. Once appointed, the incentive to invest in prosecuting the claims falls sharply because the reverse auction limits the settlement value.[176] Plaintiffs' attorneys may thus decline to hire experts and investigators, take depositions, review documents received in discovery, and so forth.[177] The result is underinvestment in developing meritorious shareholder claims, further diminishing the likelihood that the settlement values reflect merit.

172. *Id*. at 1371–72.

173. Kazanoff, *supra* note 8, at 43 (litigator at Simpson Thatcher & Bartlett LLP) ("[T]he existence of shareholder lawsuits in multiple jurisdictions also may present attractive settlement options for defendants.").

174. Transcript of Oral Argument on Motion to Stay at 44, Lousiana Mun. Police Emps.' Ret. Sys. v. Pyott, 46 A.3d 313 (Del. Ch. 2012) (No. 5795-VCL) (statement of V.C. Laster) ("[O]ne of the tactics defendants like to use—I'm not saying it's illegitimate; it's just a tactic defendants like to use—is to give procedural and scheduling advantages to the plaintiffs whom they view as weaker, and correspondingly slow down the plaintiffs they view as stronger.").

175. Coffee in fact recently speculated that the reverse auction might be at work in multi forum litigation. Coffee, *Foreword*, *supra* note 5, at 394 ("At worst, this can lead to what I have elsewhere called the 'reverse auction,' in which the defendants seek to settle . . . for the lowest amount. The frequency of such 'reverse auctions' in this context is an uncertain empirical question that need not be pursued further in this introduction. But it suggests that deeper public policy issues lie beneath the surface here. . . .").

176. *In re* Revlon, Inc. S'holders Litig., 990 A.2d 940, 945–46 (Del. Ch. 2010) ("A controller made a merger proposal. A series of actions were filed with a brief flurry of activity until the leadership structure was settled. Real litigation activity then ceased. With repeat players in place, events were set to unfold on cue.").

177. Coffee, *Foreword*, *supra* note 5, at 397 (noting that in multi-forum litigation "rival teams will realize that if they invest significantly in an action, they may only cause the defendant to settle the case more cheaply with others who had invested less. The less one invests in the action, the more cheaply one can settle it profitably").

Anecdotal evidence suggests that the reverse auction is common in multi-forum shareholder litigation,[178] and two recent high-profile cases illustrate the risks of the reverse auction. The first involves NightHawk Radiology, whose merger attracted class actions in Arizona state court and in the Delaware Court of Chancery. At an early hearing, Vice Chancellor Laster observed that the plaintiffs did not have colorable disclosure claims but had alleged a litigable challenge to the sales process.[179] The defendants thereafter settled with the plaintiffs in Arizona, on terms that called only for additional disclosures—the claims Laster had said were not colorable.[180] On learning of the settlement, Laster noted that he had "serious concerns . . . that what was going on here was collusive forum shopping" by the defendants.[181] The defense attorneys, he suggested, "were not so unwise as to discuss an explicit *quid pro quo*" with the Arizona plaintiffs' lawyers, but he was "confident that their interests were highly aligned in shifting this case to Arizona, away from my supervision . . . ."[182] Defendants, he said, can readily secure such "cheap" settlements by "play[ing] multiple plaintiffs against each other to create the reverse-auction effect."[183] The NightHawk settlement attracted unwanted attention in Delaware, but other lawyers saw nothing out of the ordinary in what the defense attorneys did.[184] "By attempting to settle with the shareholders' counsel in the alternative jurisdiction," said one uninvolved lawyer, the NightHawk attorneys "did nothing different than what any other defense lawyer would have done."[185] The reverse auction was also at work in recent litigation over Bank of America's ("BoA") acquisition of Merrill Lynch. In Delaware, shareholders brought derivative actions against BoA's board; shareholders made the same fiduciary claims in federal court but also included federal proxy disclosure claims. The defendants made an initial offer to settle with the Delaware attorneys for corporate governance changes.[186] The Delaware plaintiffs rejected the offer, insisting that they would only consider a settlement with a cash component so large that it exceeded the defendants' D&O insur-

178. *E.g.*, Kolz, *Rigging*, *supra* note 4, at 1 (describing the "expectation" of litigators in multi-forum cases that "corporate defendants, wary of any litigation risk, push for a quick, and cheap, settlement with the most willing party.").

179. On a motion to expedite proceedings, Vice Chancellor Laster "made clear that . . . there were meaningful, litigable" claims relating to the process of the sale. Transcript of Courtroom Status Conference at 3, Scully v. NightHawk Radiology Holdings, Inc., No. 5890-VCL (Del. Ch. dismissed Dec. 8, 2011).

180. *Id.* at 4.

181. *Id*. at 5.

182. *Id.* at 24.

183. *Id*. at 19.

184. The court ordered a special master to look into the conduct of defense counsel. Brief of Special Counsel at 1, Scully v. NighHawk Radiology Holdings., Inc., 5890-VCL (Del. Ch. dismissed Dec. 8, 2011).

185. David Marcus, *Multiforum Mayhem*, THE DEAL, Jan. 21, 2011.

186. Individual Defendants' Memorandum in Opposition to Plaintiffs' Motion for Injunctive Relief and Expedited Discovery and in Support of Cross-Motion to Stay Litigation at 9, *In re* Bank of Am. Corp. Deriv. Litig., No. 4037-CS (Del. Ch. Apr. 24, 2012).

ance policy limit,[187] estimated to be $500 million.[188] Settlement discussions with the Delaware plaintiffs died there.

A few months later, the federal plaintiffs approached the defendants, indicating their willingness to settle for governance changes and a much smaller financial component. When the Delaware plaintiffs learned of these negotiations, they tried to get back in the picture, urging a global settlement on the defendants.[189] But the defendants ultimately finalized a settlement exclusively with the federal plaintiffs, under which the D&O insurer would pay $20 million to the Bank and the board would create a new committee to oversee M&A transactions.[190] The federal plaintiffs applied for a $13 million fee award. In urging the federal court to approve the settlement, the defendants explicitly disclaimed any type of reverse auction process,[191] insisting that they gave the Delaware plaintiffs ample opportunity to make an offer.[192] The irony of that argument is that this is precisely the litigation dynamic that drives the reverse auction and suggests that it was at work in the settlement.[193] If the Delaware plaintiffs had made their own settlement offer, they could have attracted the interest of the defendants only by underbidding the federal plaintiffs.

The BoA example illustrates the risks of the reverse auction, but the conclusion of that litigation also reveals some potential safeguards: the power of attorneys to object and the scrutiny that judges can apply to settlements in shareholder litigation.[194] In combination, these can upset a sweetheart settlement between the defendants and an especially pliant plaintiff's attorney. In the BoA case, the Delaware plaintiffs intervened in the federal action and challenged the settlement,[195] attracting sympathetic coverage in the *New York Times*.[196] The federal court voiced pre-

187. *Id*.

188. Jonathan Stempel, *BofA Merrill Deal Would Cost Directors Zero-Filing*, REUTERS, Apr. 27, 2012, http://www.reuters.com/article/2012/04/27/bankofamerica-merrill-lawsuit-idUSL2E8FRM4V20120427.

189. *See Individual Defendants' Memorandum*, *supra* note 186, at 17 (plaintiffs suggested that settlement discussions "should be simultaneously conducted jointly with Plaintiffs' counsel in both the Delaware and New York Derivative Actions").

190. *Id.* at 19.

191. *Id.* at 27 ("There are, in short, no indications whatsoever of the kind of 'reverse auction' charged by Delaware Plaintiffs.").

192. *See id*.

193. *See* Declaration of Professor Geoffrey Miller in Support of Objection of the Laborers Nat'l Pension Fund and Nancy Rothbaum to Final Approval of Proposed Settlement of the Consol. Derivative Action at 11, *In re* Bank of Am. Corp. Secs., Derivative, and Emp. Ret. Income Sec. Act (ERISA) Litig., No. 09-MD-2058 (PKC) (S.D.N.Y. 2013) ("[I]n my opinion, the Proposed Settlement presents 'red flags' of an improperly collusive 'reverse auction' in which Defendants pit the respective groups of Plaintiffs' counsel against one another for the opportunity to secure a settlement at an optimal cost to Defendants.").

194. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1536 (2004) ("The rights of class members to opt-out and object may be seen as a market check on the propensity of counsel to serve their own interests over those of the class.").

195. *See* Individual Defendants' Memorandum, *supra* note 185.

196. *See* Gretchen Morgenson, *Bank of America Accord in Lawsuit is Challenged*, N.Y. TIMES, Apr. 21, 2012 (noting that the settlement was "struck privately" by the New York attorneys "for $20

liminary skepticism and encouraged the defendants to meet with the objectors "to discuss revisions to the proposed settlement,"[197] and the parties quickly reached a new agreement. This time the Delaware attorneys were part of the settlement, and the court approved its terms right away.[198] The new settlement recovered $62.5 million, of which $24.65 million could go to the plaintiffs' attorneys.[199] The revised settlement was a significant improvement for shareholders. The cash component more than tripled; this tightened the relationship between the merits and settlement values, strengthening the deterrent effect of litigation at the margin.[200] The revision also delivered more cash to shareholders: they would have received around $7 million under the initial settlement, net of attorneys' fees, but the revised settlement should deliver at least $37 million.

In the presence of a motivated and knowing objector, a court can be an effective check on the reverse auction. In general, judicial scrutiny is not regarded as a strong source of discipline in shareholder litigation.[201] The litigants know the merits of the claims far better than the court, and when the plaintiff and the defendant join together to argue that the settlement is fair, a judge cannot often be expected to conclude otherwise.[202] Things might be different when an objector brings deficiencies in the settlement to the attention of the court. In a reverse auction, objecting is the plaintiff attorney's only viable strategic alternative to offering the low

million even though damages in the case could reach $5 billion" and examining in detail the reasons the Delaware attorneys claimed the settlement "grossly inadequate and the result of collusion").

197. Order, *In re* Bank of Am. Corp. Secs., Derivative, and Emp. Ret. Income Sec. Act (ERISA) Litig., No. 09-MD-2058 (PKC) (S.D.N.Y. Jan. 4, 2013) ("[T]he court has not yet been persuaded of the fairness, reasonableness and adequacy of a settlement of the derivative claims against [former CEO Kenneth Lewis] in exchange for corporate governance reforms of unquantifiable value and $20 million in cash, some, most or all of which will be consumed by plaintiffs' attorneys' fees.").

198. *See* Order and Final Judgment, *In re* Bank of Am. Corp. Secs., Derivative, and Emp. Ret. Income Sec. Act (ERISA) Litig., No. 09-MD-2058 (PKC) (S.D.N.Y. Jan. 24, 2013).

199. Lead Plaintiffs' Memorandum of Law in Support of Motion for Attorneys' Fees and Reimbursement of Expenses at 1, *In re* Bank of Am. Corp. Secs., Derivative, and Emp. Ret. Income Sec. Act (ERISA) Litig., No. 09-MDL-2058 (PKC) (S.D.N.Y. Feb. 8, 2013) (requesting about $13.4 million in fees and expenses); Memorandum of Law in Support of Delaware S'holder's Application for Attorneys' Fees and Reimbursement of Expenses at 2, *In re* Bank of Am. Corp. Secs., Derivative, and Emp. Ret. Income Sec. Act (ERISA) Litig., No. 09-MDL-2058 (PKC) (S.D.N.Y. Feb. 11, 2013) (requesting about $9.25 million); Memorandum of Law in Support of Objector Matthew Pinsly's Counsel's Motion for an Award of Attorneys' Fees and Expenses at 1, *In re* Bank of Am. Corp. Secs., Derivative, and Emp. Ret. Income Sec. Act (ERISA) Litig., No. 09-MDL-2058 (PKC) (S.D.N.Y. Feb. 11, 2013) (requesting $2 million).

200. The original settlement amount of $20 million was funded entirely by D&O insurance, and given the D&O insurance coverage limits, the entire revised settlement of $62 million was likely still funded by insurance proceeds. The higher amount, though, is at least closer to the limit and ought to suggest to defendants that stronger claims can edge closer to the insurance limitation, thus posing a stronger threat of personal liability.

201. *See, e.g.*, FRANKLIN A. GEVURTZ, CORPORATION LAW 458 (2d ed. 2000) ("[T]he lack of opposition seriously undercuts the ability of judicial approval to protect the corporation from poor settlements."); James D. Cox, *The Social Meaning of Shareholder Suits*, 65 BROOK. L. REV. 3, 12 (1999) ("Few settlements . . . are rejected" by courts); Coffee, *Class Wars*, *supra* note 12, at 1348 ("[C]ourts have little ability or incentive to resist the settlements that the parties in class action litigation reach.").

202. *See* Coffee, *Class Wars*, *supra* note 12, at 1348 n.14.

bid in settlement negotiations.[203] According to litigators, objecting is "an unusual and difficult move."[204] Multi-forum litigation, however, may be relatively fertile ground for objections because the incentive to object is at its greatest when the reverse auction is at its worst: when a jilted plaintiff's attorney sees another attorney settling the claims at a large discount.[205] A plaintiff's attorney who is cut out of a settlement has both the incentive and the in-depth knowledge of the claims to explain precisely to the court why the settlement undervalues them. In other words, one aspect of multi-forum litigation (the objection threat) can partially ameliorate a problem created by another aspect of multi-forum litigation (the reverse auction).

In the operation of multi-forum litigation, however, there is little reason to expect that the threat of objections would systematically mitigate the effect of the reverse auction.[206] In objecting, the motivation of a plaintiff's attorney is to participate in the fee award, not necessarily to secure a better result for shareholders.[207] The likely result of the objection threat is not that settlement values will be forced up to reflect discounted trial values. Instead, the likely result is that would-be objectors are given some bounty to forego the objection. Indeed, one of the benefits of the so-called "global" settlement—where defendants simultaneously settle with plaintiffs' attorneys in all fora—is that it mollifies all persons in a position to mount a serious objection.

Some practitioners have suggested that defendants can increase their leverage against a hold-out plaintiff's attorney by negotiating exclusively with the plaintiffs in a different forum.[208] In the BoA case, the defendants did just that: they negotiated exclusively with the federal plaintiffs and later tried on multiple occasions to get the Delaware attorneys to join what could have been a global settlement. The defendants and the federal attorneys might have offered to bring the Delaware attorneys into, say, a $40 million settlement that gave $13 million to the federal attorneys and $13 million to the Delaware attorneys. This would have averted the objection, saved the D&O insurer money, posed less reputa-

203. On objectors and the bounty, see Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009). Opting-out of the settlement is not a viable strategy for a plaintiffs' attorney because fiduciary class actions do not generally allow class members to opt-out in Delaware. Moreover, there is no opportunity to secure a large fee on a non-class claim.

204. Kolz, *Rigging*, *supra* note 4, at 13; *see* Eisenberg & Miller, *supra* note 194, at 1546 (noting that objection rates are "trivial").

205. Griffith & Lahav, *Market for Preclusion*, *supra* note 5, at 1085 ("Multijurisdictional merger litigation [is] an especially ripe environment for objectors.").

206. For their part, Griffith and Lahav express doubt that judicial review and the threat of an objection can constrain the reverse auction. *Id.* at 1094 (acknowledging that "there is reason to believe that these mechanisms often do fail").

207. Vice Chancellor Laster described the consequence of one plaintiff firm's objection as follows: "they immediately settled it for a piece of the fee award . . . ." Transcript of Settlement Hearing at 21, *In re* Compellent Tech. Inc. S'holder Litig., No. 6084-VCL (Del. Ch. Jan. 13, 2011).

208. Micheletti & Parker, *supra* note 4, at 20 n.75 ("Though ''global peace' is almost always preferred by defendants, pursuing a settlement in just one forum, without making it known to plaintiffs in all forums that global peace is desired, may mitigate the concern that one plaintiff or group of plaintiffs will 'hold out' from discussions as a way to increase their leverage in fee negotiations.").

tional and financial risk for the defendants, and given more to the Delaware attorneys than they ultimately received; however, it would have been worse for shareholders. And there is every reason to think that this less attractive result is the standard in multi-forum litigation. What makes the Bank of America case unusual is that the bargaining broke down, with the Delaware attorneys outside the settlement looking in. The prosaic nature of settlements in most multi-forum litigation suggests that they take care of all persons in a position to object, and not in ways that benefit shareholders.

Another potential but unlikely counterweight to the reverse auction is agreement among plaintiffs' attorneys. The lead attorneys in each forum could agree with each other to present a united front against the defendants and split the fees they recover in the ultimate settlement. Such an arrangement could completely prevent the reverse auction and further allow the plaintiffs' attorneys to take advantage of their unique local knowledge to press the claims and settle in whichever forum they believed to be most attractive. The straightforward problem with this approach is that the plaintiffs' attorneys are in a prisoners' dilemma: their dominant strategy is to defect. The defendant group is a monopsonist, and breaking a cartel among the plaintiffs' attorneys would be relatively easy. Defendants can try to dismiss each complaint, making the plaintiffs' attorney in each forum reluctant to agree to split fees with an attorney whose complaint is at risk of being thrown out. Moreover, the defendants can always make offers to plaintiffs' attorneys in one forum that include higher fees than the agreed-upon split among the plaintiffs' attorneys. Perhaps some kind of pan-fora contractual arrangement could bind the plaintiffs' attorneys together,[209] but this might interact in peculiar ways with each court's procedures for appointing lead counsel and for approving fees. A court might be hesitant to appoint as lead counsel someone who had committed to sit on the sidelines or was in the habit of doing so. Thus, those likely to make such an agreement might never be appointed lead counsel. Additionally, the active attorney might be forced to disclose in a fee request that a portion of the requested fee would go to attorneys in other jurisdictions and that those attorneys were being compensated for *not* prosecuting their claims. Such a portion of a fee might be quite vulnerable; if judges declined to approve them, the inter-forum plaintiff agreement would not be viable.

The preceding analysis of the likely consequences of multi-forum litigation is nothing more than a standard economic analysis of the dynamics of settlement. It is not and does not purport to be an empirical demonstration of the shortcomings of multi-forum litigation, and future empirical work may reach more sanguine results about the pattern. But this theoretical analysis is at least consistent with some recent empirical findings in the merger context from Matthew Cain and Steven Da-

209. This would basically be an auction of the claims. Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 Tex. L. Rev. 469 (1987).

vidoff.[210] They found that multi-forum litigation became much more common from 2005 to 2010, from 8.3% of transactions to 46.6%.[211] Over the same period, the median attorneys' fee rose by over 30%, from $450,000 to almost $600,000,[212] and the proportion of settlements recovering anything beyond additional disclosure fell from 33.3% to 19.5%.[213] In other words, the rise of multi-forum litigation in the M&A context was associated with higher attorneys' fees and weaker results in settlement.[214] In view of the strong theoretical grounds to suspect that multi-forum litigation undermines the deterrent effect of shareholder litigation and the absence of any reason to think that it promotes deterrence, the empirical burden should sit squarely on those who would preserve the current arrangement.

Developing Corporate Law

A second and distinct threat posed by multi-forum litigation is that it may deprive incorporation states of important cases with which to shape the content of their corporate law. The singular virtue of corporate law in the United States is that it is organized not as a single national code but as fifty alternative sets of corporate laws that compete with one another.[215] Delaware is the undisputed victor, although the competition may not be terribly vigorous.[216] As Michal Barzuza has shown, however, the market for incorporations has segmented,[217] and different states follow different strategies. Nevada, for example, has adopted a corporate code that "free[s] officers and directors from virtually any liability arising from the operation and supervision of their companies."[218] At the other end of the spectrum, North Dakota has adopted what is purportedly the most "shareholder-friendly" code in the country.[219]

210. *See* Cain & Davidoff, *supra* note 32, at 3.

211. *Id*. at 35 tbl.1. Over the same period, the number of deals fell but litigation became much more common: 39.3% of deals in 2005 faced litigation while 87.3% did in 2010. *Id*.

212. *Id.* at 16, 38 tbl. 2. The Cornerstone study found an average attorney's fee in 2011 of $1.2 million. DAINES & KOUMRIAN, *supra* note 35, at 12. This likely overstates the fees because the study found fee data for less than half of the settlements. *Id.* Perhaps this is because the authors did not look beyond securities filings, which are biased towards disclosing larger fee awards. *Id*.

213. Cain & Davidoff, *supra* note 32, at 38 tbl.2. Another recent study highlights the prevalence of disclosure-only settlements. DAINES & KOUMRIAN, *supra* note 35, at 9, 11. Sixty-seven percent of 2011 merger cases settled, and only five percent of the settlements included any payment to shareholders. The vast majority of settlements involved only additional disclosures. *Id.*

214. Coffee, *Foreword*, *supra* note 5, at 397.

215. The classic statement is ROMANO, GENIUS, *supra* note 36, at 1.

216. Lucian Ayre Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L. J. 553, 553 (2002); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 684 (2002).

217. Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935, 938 (2012).

218. *Id.*

219. *See id.* at 971.

Corporate law develops through a common law process,[220] and all incorporation states have a strong interest in passing on important disputes involving firms incorporated there.[221] Other courts are more than fit to apply the law of a different state in garden-variety disputes,[222] but only the incorporation state courts may offer authoritative guidance that benefits all firms incorporated there.[223] In the incorporation state, a court can use cases with novel legal issues or complex fact patterns to update or clarify the state's corporate law.[224] In addition, courts regularly go beyond the facts of a particular case to supply norms of conduct for corporate actors in the future.[225] They can also establish what constitutes appropriate settlement values and levels of attorneys' fees for particular types of claims.

As the litigation data presented earlier suggest, Delaware and other incorporation states may lose out on important cases through multi-forum litigation.[226] When stock options backdating first became front-page news in the spring of 2006, it was important for Delaware to develop its approach on what were novel issues of its corporate law. The overwhelming majority of cases against Delaware corporations were filed outside Delaware,[227] and thus the Chancery Court had very little opportunity to make fine-grained distinctions. Not until February of 2007 did Delaware have the chance to give some indication of how backdating fit with its law.[228]

The problem for incorporation states is that precedent is never created.[229] In sufficiently large numbers, this process would undermine Del-

220. E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992-2004?: A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1411 (2005) ("The 'flesh and blood' of corporate law is judge-made. It is the common law formulation of principles of fiduciary duties articulated on a case-by-case basis.").

221. *E.g.*, *In re* Topps Co. S'holders Litig., 924 A.2d 951, 959 (Del. Ch. 2007) ("The important coherence-generating benefits created by our judiciary's handling of corporate disputes are endangered if our state's compelling public policy interest in deciding these disputes is not recognized . . . .").

222. Ryan v. Gifford, 918 A.2d 341, 349 (Del. Ch. 2007) ("In many instances, this Court has recognized without hesitation that sister state courts and federal courts are capable of applying Delaware law and providing complete justice to parties.").

223. *See* Armstrong v. Pomerance, 423 A.2d 174, 177 (Del. 1980) ("While courts of other jurisdictions may apply and enforce existing Delaware law, the development of Delaware law is quite properly the duty and responsibility of the Delaware Courts.") (emphasis omitted).

224. Again, the examples come from Delaware, but the point is general. ABC, *Delaware's Balancing Act*, *supra* note 1, at 1348 ("Some of these cases [that are filed outside Delaware] will present opportunities to develop new precedents which will be missed by Delaware courts, thus compromising Delaware's [ability to ensure the] responsiveness [of its precedents] to new events.").

225. *See* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016 (1997).

226. Black, *Delaware's World*, *supra* note 49, at 649 ("Delaware is increasingly losing corporate law cases involving Delaware companies. . . . Less provable, but likely, is that some of those lost cases are important cases that Delaware ought to care about losing."); Cain & Davidoff, *supra* note 32, at 20 ("[L]itigation is more likely to be brought in larger transactions and transactions where a breach of fiduciary duties is more likely"—management buyouts and deals with go-shop provisions.). Such cases may be most likely to result in an opinion establishing substantive corporate law.

227. *See* Appendix I.

228. *See* Ryan v. Gifford, 918 A.2d 341 (Del. Ch. 2007).

229. Strine et al., *Stockholders First*, *supra* note 5, at 72–73 ("Unnecessarily deciding a case implicating a foreign jurisdiction's commercial law robs the market of authoritative precedent, which gives

aware's preeminence,[230] but the point is much more general and has nothing to do with protecting Delaware. The cause for concern is the danger to the system of generating corporate law—not the position of the current market leader. Foreign proceedings can degrade the case law of incorporation states generally, and Delaware in particular, by constricting the volume of important cases in incorporation states.[231]

VI. THE LIMITED APPEAL OF EXISTING APPROACHES

A number of potential approaches could coordinate multi-forum shareholder litigation, but each of them suffers from shortcomings. Some approaches cannot do enough to address the problem; others would do too much.

A. Incremental Improvements on the Status Quo

One potential way to coordinate multi-forum litigation is to bring its shortcomings to the attention of judges in the hope that they will better police it.[232] For example, a court could give greater scrutiny to multi-forum settlements in hopes of counteracting the reverse auction,[233] as some Delaware courts have done.[234] This is an unlikely solution, however, because courts generally have little incentive to scrutinize settlements.[235] Shrewd plaintiffs' attorneys would be sure to file cases more often in courts that decline to apply much scrutiny, and defendants could assist in shifting settlement to more lenient courts. Once a case reaches a settlement posture, if there are multiple courts where the settlement could be presented, the defendants have just as much of an interest as the plaintiffs' attorneys in selecting a forum that will not scrutinize the terms.

important guidance in future transactions. Parties need a single, definitive answer, not only to resolve whatever dispute they may have but also to shape future commercial dealings.").

230. ABC, *Balancing Act*, *supra* note 1, at 1349 ("[T]he depth and clarity of Delaware corporate law could be compromised if case flow were to shrink.").

231. Black, *Delaware's World*, *supra* note 49, at 652 ("No case law gets developed. Not that it gets developed somewhere else really—it just does not get developed."); Grant, *Delaware's World*, *supra* note 10, at 666 ("Delaware clearly is losing its opportunity to develop Delaware law.").

232. Griffith & Lahav, *Market for Preclusion*, *supra* note 5, at 1116–25 (encouraging judges to be more attentive to plaintiffs' potential motivations, to evaluate the strength of claims quickly, and to empower objectors).

233. *See* Elliot J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 VAND. L. REV. 1795, 1861 n.196 (2004) ("If the court concludes that a settlement is the product of tacit collusion between plaintiffs' attorneys and defendants, it probably should refuse to approve the settlement.").

234. De Angelis v. Salton/Maxim Housewares, Inc., 641 A.2d 834, 838, 841 (Del. Ch. 1993), rev'd, Prezant v. De Angelis, 636 A.2d 915 (Del. 1994) (applying "heightened scrutiny and an enhanced standard of review" in circumstances where there is a risk that "a defendant will negotiate a 'low-ball' settlement with an unscrupulous or lax plaintiff in one forum to circumvent a vigorously pursued case in another forum").

235. *See supra* notes 201–02.

Another approach is to reinvigorate the various doctrines that permit one court to defer to another.[236] A recent proposal on this front comes from Leo Strine, the sitting Chancellor of the Delaware Court of Chancery, Lawrence Hamermesh, and Matthew Jennejohn.[237] Strine and his co-authors offer a two-pronged recommendation to alter litigation dynamics: change the traditional *forum non conveniens* factors and reformulate the internal affairs doctrine in the *Restatement (Second) of Conflict of Law*.[238] Together their proposals would reduce the discretion of judges in contemporaneously-filed proceedings and create a presumption that the incorporation state filing should proceed.[239] The aspiration of their proposal is on target, but its chief problem is that it lacks teeth. The authors would rely on non-incorporation states to adopt their proposed changes, and there is little reason to think they would do so in view of the benefits obtained by attracting litigation. Moreover, their proposal would not address shareholder claims in federal courts. Thus, the proposal holds out little hope as an avenue for curbing the pathologies of multi-forum shareholder litigation.

B. Judicial Coordination

Another method for dealing with multi-forum litigation that has a prominent Delaware backer is to encourage judges to coordinate with each other. Former Chancellor Chandler wrote that his "preferred approach . . . is for defense counsel to file motions in both (or however many) jurisdictions where plaintiffs have filed suit, explicitly asking the judges in each jurisdiction to confer with one another and agree upon where the case should go forward."[240] Chancellor Chandler noted that this approach is "one (if not the most) efficient and pragmatic method to deal with this increasing problem" and one that "worked for me in every instance when it was tried."[241] Other informal means of judicial communication can coordinate cases in multiple jurisdictions. Vice Chancellor Laster, for example, has in hearings clearly telegraphed his views where a subsequent judge would decide a similar issue,[242] and he once ordered the

236. *E.g.*, Will v. Calvert Fire Ins. Co., 437 U.S. 655, 664 (1978) ("[T]he decision whether to defer to the concurrent jurisdiction of a state court is, in the last analysis, a matter committed to the district court's discretion.").

237. Strine et al., *Stockholders First*, *supra* note 5, at 8.

238. *Id.* at 8–9, 87–101 ("Rather than simply being one factor among many, [the proposal] would give greater weight to the represented shareholders' choice of law when determining whether a given forum is appropriate in a parallel litigation situation.").

239. *Id.* at 3–4 ("[W]here lawsuits are filed contemporaneously in parallel forums, the courts should give effect to the parties' expressed choice of the law that is to govern their relationship—in the corporate context, the law of the chosen state of incorporation—by applying a rebuttable presumption that the litigation should proceed in the courts of that state.").

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

241. *Id.*

242. *E.g.*, Settlement Hearing and Rulings of the Court, *In re* Burlington N. Santa Fe S'holder Litig., No. 5043-VCL, 2010 WL 4268999 (Del. Ch. Oct. 28, 2010). Fee applications for the same settlement were pending before Laster and a different judge in Texas. Laster awarded $450,000, which

court to deliver a transcript of the Delaware proceedings to another court.[243]

This type of informal communication between judges has attracted some support among academic commentators. Thomas and Thompson tentatively support it because of its flexibility and low cost.[244] Likewise, Griffith and Lahav would make judicial output in Delaware more easily accessible and empower judges to contact each other without waiting for the parties to make a motion.[245]

It is difficult to estimate the success of this sort of communication because it occurs in private. One small study, though, came to promising conclusions.[246] The shortcoming of the informal approach is that it requires the cooperation of defendants and all participating judges,[247] and both groups might be reluctant to participate, especially when it matters. Defendants may wish to retain the strategic advantage of selecting the forum where the case will proceed as opposed to allowing judges to work it out.[248] And in strong cases, defendants may be particularly reluctant to

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he called "the award for all of the benefits conferred by the litigation effort undertaken by all of the plaintiffs' counsel in this case." *Id.* at 67. He then made the following series of observations:

> I am not going to try to tell Judge Womack what to do. . . . It is up to her to determine whether a final order that this Court enters is res judicata as to class members in a nonopt-out class where I have made the determinations that I've made. . . . I will say, simply to make my intentions clear, that if there were a follow-on fee application in this Court, it would be my view that under Delaware law it would be barred and precluded by res judicata. But that is a Delaware forum view, and it's not binding on Judge Womack, who has to apply Texas law in this situation as to how she approaches the binding effort—the binding effect for res judicata purposes.

Id. at 68.

243. Transcript of Courtroom Status Conference, at 25, Scully v. Nighthawk Radiology Holdings, Inc., No. 5890–VCL (Del. Ch. Dec. 17, 2010) ("[T]o ensure that the Arizona Court is informed [of VC Laster's misgivings with a settlement agreement that would be presented to a court in Arizona for approval], I will enter an order directing the Register in Chancery to provide a copy of this transcript and other materials from this case to the Court."); *see also* Status Conference at 10–11, *In re* Burger King Holdings, Inc., No. 5808–VCL (Del. Ch. Jan. 19, 2011). In *Burger King*, complaints had been filed in Delaware and Florida, and the settlement was going to be presented for approval in Florida. Vice Chancellor Laster ordered that the litigants present to the Florida judge a copy of the hearing transcript, in which Laster noted that the disclosures would "price in the 400 to 500,000 range, and that Delaware case law . . . would routinely price in the [same] range." *Id.* at 9. Doing so would ensure that "the possibility of forum shopping and jurisdictional arbitrage is minimized." *Id.* at 10. The Florida judge nevertheless awarded $1 million in attorneys' fees. See here: http://www.sec.gov/Archives/edgar/data/1352801/000095012311027965/g26522e10vkt.htm.

244. Thomas & Thompson, *Theory*, *supra* note 5, at 1805 ("If, as we suggest here based on current empirical evidence, multijurisdictional litigation is a much less costly problem than some lawyers claim, then this low-cost and easily reversible solution is the best one to implement at this time.").

245. Griffith & Lahav, *supra* note 5, at 1132–35.

246. C. Barr Flinn & Kathaleen St. J. McCormick, *The Delaware Court of Chancery Endorses One Forum Motions as a Solution to Multi-Jurisdictional Litigation*, YOUNG CONAWAY STARGATT & TAYLOR, LLP, 2011, at 3 (finding that cases subsequently proceeded only in one forum in 15 out of 16 cases where Savitt motions were filed in Delaware).

247. The academic proponents of judicial cooperation see this problem clearly. Griffith & Lahav, Market for Preclusion, *supra* note 5, at 1131 n.329 ("We recognize that sometimes judges will take a territorial approach to these cases or be interested in retaining them because they involve large transactions or prominent litigants."); Thomas & Thompson, *Theory*, *supra* note 5, at 1804 ("[O]ne can easily imagine that not all judges, nor all attorneys, will be willing to participate in this process.").

248. Micheletti & Parker, *supra* note 4, at 18 ("[D]efendants (and their counsel) are, in essence, divesting themselves of tactical decision-making regarding the forum . . . .").

consolidate multi-forum litigation because that would foreclose the possibility of engaging in a reverse auction.

Even if the defendants do ask judges to confer and select the forum, courts may be unwilling to let cases go.[249] Outside of Delaware, high-profile corporate disputes are a rarity, and courts may be disinclined to lose out on the opportunity to preside over large or interesting shareholder cases.[250] These lawsuits bring valuable litigation business to the local bar, and a judge may hesitate to pass on them, perhaps out of loyalty to the local community.[251] Practitioners report, for example, that specialized business courts outside of Delaware are in fact reluctant to stay litigation in favor of other proceedings elsewhere.[252] The leading example is the high-profile dispute between Delaware and New York over the Topps litigation. The day after a private equity firm announced that it was buying Topps, a company incorporated in Delaware and headquartered in New York, a shareholder filed a class action complaint in New York state court that challenged the fairness of the transaction.[253] The next day, a similar complaint was filed in Delaware. The defendants sought a stay in Delaware, but the court denied the motion, reasoning that "the Delaware courts are better positioned to provide a reliable answer about Delaware corporate law in emerging areas like the ones presented by this dispute."[254] With the Delaware court vowing to proceed, the defendants sought a stay in New York.[255] The case was filed in the Commercial Division, and the court bristled at the idea of staying its case.[256] It emphasized that it was "a specialized commercial court that has been successfully handling complex commercial and corporate litigation since its inception in 1993" and was explicitly empowered to hear "fiduciary duty claims arising out of corporate restructuring . . . and disputes concerning the internal affairs of business organizations . . . ."[257]

249. Strine et al., *Stockholders First*, *supra* note 5, at 79 n.217 (One-forum motions are of "little utility" because they are "unnecessary where a foreign court is predisposed to defer to the forum whose law is at stake and useless where a judge is determined to keep the case").

250. Coffee, *Foreword*, *supra* note 5, at 393 n.22 ("[H]aving never before seen a billion-dollar lawsuit or litigation involving major public corporations that is attracting press attention, the out-of-state judge may be fascinated with the case (as the author has observed in some actual cases) and may be in no hurry to resolve it.").

251. Strine et al., *Stockholders First*, *supra* note 5, at 24–25 ("More likely is the possibility that a judge may be broadly loyal to her institutional setting—the bar in which she practiced and which she continues to inhabit—and may wish to avoid disappointment and resentment that might arise from dismissing litigation that is remunerative to that bar. Another possibility is that a judge may find class and derivative litigation intellectually and reputationally more rewarding than a more standard diet of routine civil or criminal cases.").

252. Mirvis, *supra* note 43, at 17 ("We've just been unsuccessful in [getting stays outside of Delaware] because the non-Delaware courts have become much more accessible, many of them have . . . quote-unquote 'Chancery divisions' . . . and they are in the business and they will not stay themselves voluntarily.").

253. *In re* Topps Co., Inc. S'holder Litig., 859 N.Y.S.2d 907, at *1 (N.Y. Sup. Ct. 2007). Three additional suits were filed in New York, which were consolidated.

254. *In re* Topps Co. S'holders Litig., 924 A.2d 951, 964 (Del. Ch. 2007).

255. *In re* Topps, 859 N.Y.S.2d 907, at *1.

256. *See id.* at *4 (denying defendant's motion for a stay in favor of Delaware, noting that "the only connection with Delaware is that Topps is presently incorporated in that state.").

257. *Id*.

The New York judge refused to stay, declaring that he was "prepared to and fully capable of applying Delaware law where it applies."[258] After an appellate court stayed the New York case, the claims were resolved in Delaware.[259]

More recently, a similar dispute developed between Delaware and the New York Commerical division over the NYSE EuroNext litigation. On December 20, 2012, Intercontinental Exchange announced its agreement to acquire NYSE EuroNext.[260] In the succeeding weeks, shareholders filed eight complaints in the Delaware Court of Chancery, four in New York Commercial Division, and one in federal court.[261] In February, the Chancery court scheduled expedited proceedings in its consolidated case.[262] On March 1, the New York Court refused to stay proceedings there in favor of Delaware, noting, among other things, that New York's nexus to the litigation militated against a stay.[263] The defendants appealed, and two weeks later the Appellate Division stayed the New York proceeding. Both of these incidents suggest the difficulties of coordinating cases through stay motions.[264]

Another problem for this approach is shareholder litigation in federal court. As suggested earlier, a federal court may be unwilling to stay a complaint that alleges federal securities claims alongside state fiduciary claims because the securities claims can only proceed in federal court. The BoA litigation, for example, proceeded for over two years in both Delaware and federal court because neither court was "willing to give an inch on jurisdiction."[265]

Judicial coordination and one-forum motions no doubt can be helpful mechanisms in certain situations for handling multi-forum litigation, but because they are likely to fail in the most important cases, they do not represent a comprehensive solution to the problem.

258. *Id*. at *7; *see also id*. at *6 ("Shareholder derivative and shareholder class actions concerning Delaware companies are not an unknown phenomena is [sic] the Commercial Division. . . . Indeed this court is frequently called upon to apply the laws of Delaware.") (citations omitted).

259. *See* ABCNY, *Coordinating*, *supra* note 4, at 6.

260. *IntercontinentalExchange to Acquire NYSE Euronext For $33.12 Per Share in Stock and Cash, Creating Premier Global Market Operator*, NYSE.COM (Dec. 20, 2012), http://www.nyse.com/press/1356002940085.html.

261. *See* NYSE Euronext, Annual Report (Form 10-K), at 83 (Feb. 26, 2013).

262. *See id.*

263. *In re* NYSE Euronext S'holders/ICE Litig., 965 N.Y.S.2d 278, 283 (N.Y. Sup. Ct. 2013) ("[T]he *forum non conveniens* factors of hardship to defendants, residence of the parties, jurisdiction, and New York's nexus to the litigation militate in favor of litigating this action in New York. Additionally, the Commercial Division of this court and the federal district courts in this state routinely apply Delaware corporate law when the litigation involves the internal affairs of Delaware companies that do business in New York.").

264. Delaware courts, in particular, are unwilling to cede control of important disputes involving internal affairs of Delaware firms. Vice Chancellor Laster suggested, in a multi-forum dispute involving Delaware and Minnesota, that if the Minnesota court failed to stay proceedings there, "what you're likely to get from me is Topps II." Transcript of Settlement Hearing at 29, *In re* Compellent Tech. Inc. S'holder Litig., No. 6084-VCL (Del. Ch. Jan. 13, 2011).

265. Alison Frankel, *Can Strine and Castel Resolve Forum Fight in BofA Derivative Deal?*, REUTERS (Apr. 30, 2012), http://blogs.reuters.com/alison-frankel/2012/04/30/can-strine-and-castel-resolve-forum-fight-in-bofa-derivative-deal/.

C. Fighting for Turf

Incorporation states could fight harder for control of cases. Delaware courts, for example, might announce that they will categorically refuse to defer to any other state in multi-forum litigation involving a Delaware corporation. A credible signal from Delaware that their courts will never give way might make attorneys hesitant to file elsewhere. A recent decision by a Delaware court was perceived by some as having this sort of effect. The Court of Chancery allowed a derivative suit to proceed in Delaware even though a federal court had already dismissed the claims with prejudice.[266] The rule was itself forum-neutral: a Rule 23.1 dismissal in one jurisdiction could not foreclose litigation in any other forum.[267] Indeed, the court suggested a broader rule that in derivative litigation, dismissals in other jurisdictions for demand refusal could not foreclose litigation in Delaware.[268] This might make Delaware a more attractive place to litigate or at least make rushing to another jurisdiction less attractive,[269] and the Chamber of Commerce characterized the opinion as an effort to "mitigate the epidemic of multi-forum derivative litigation that corporations increasingly confront."[270] The Delaware Supreme Court later reversed the decision on appeal.[271]

More to the point, Delaware courts have declined to stay Delaware actions in favor of earlier filed complaints in other states.[272] They have also mused about certifying a plaintiff class with such speed that other states would feel compelled to back down.[273] In litigation over a merger involving Compellent Technologies, for example, where cases had been

266. Lousiana Mun. Police Emps.' Ret. Sys. v. Pyott, 46 A.3d 313, 359 (Del. Ch. 2012), *rev'd*, No. 380, 2013 WL 1364695 (Del. 2013).

267. *Id.* at 323.

268. *Id*. ("[U]ntil a Rule 23.1 motion has been *denied*, a derivative plaintiff whose litigation efforts are opposed by the corporation does *not* have authority to sue in the name of the corporation. Consequently, at the time of the first Rule 23.1 dismissal, other stockholders are not in privity with the stockholder plaintiff in the first derivative action, and a decision *granting* a Rule 23.1 dismissal cannot have preclusive effect. The dismissal remains persuasive authority, but it is not preclusive.").

269. In seeking an interlocutory appeal on the denial of dismissal, the defendants characterized the opinion as "candid in seeking to change, along several vectors, the incentives faced nationwide by Delaware corporations and their shareholders—especially those who choose to vindicate their rights in courts outside of Delaware." Defendant's Application for Certification of Interlocutory Appeal at 17, Lousiana Mun. Police Emps.' Ret. Sys. v. Pyott, 46 A.3d 313 (Del. Ch. 2012) (No. 5795-VCL).

270. Motion of Chamber of Commerce of the United States of America to File Brief as *Amicus Curiae* in Support of Reversal at 2, Lousiana Mun. Police Emps.' Ret. Sys. v. Pyott (Del. 2012) (No. 380).

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

272. *E.g.*, Rosen v. Wind River Sys., No. 4674-VCP, 2009 WL 1856460 (Del. Ch. June 26, 2009) (Vice Chancelor Parsons refusing to stay Delaware proceedings in favor of earlier-filed California suit); *In re* Topps Co. S'holders Litig., 924 A.2d 951 (Del. Ch. 2007) (Vice Chancelor Strine declining to stay in favor of first-filed action in New York); Biondi v. Scrushy, 820 A.2d 1148 (Del. Ch. 2003) (Vice Chancellor Strine refusing to stay Delaware proceedings in favor of earlier-filed derivative action in Alabama).

273. *E.g.*, Hearing on Motion to Expedite at 9, *In re* RAE Sys., Inc., S'holders Litig., No. 5848-VCS (Del. Ch. Nov. 10, 2010) ("I have to do what is right for the class. I've said to people before, and I will say, there is no reason why a motion for class certification couldn't be brought on, frankly, jointly by the parties here, and certify a class. It creates a situation. Could another court—would my California colleague certify a class in the face of an already certified class? I think probably not.").

filed in Minnesota and in Delaware, Vice Chancellor Laster certified a class quickly.[274]

This strategy would not work to curb multi-forum litigation, for Delaware or any other state, because other states that wish to retain litigation could match the incorporation state's resolve in declining to stay cases filed there or in certifying plaintiff classes. This would neutralize the effect of the incorporation state's strategy.

D. Enticing Cases Back to the Incorporation State

Part of the problem for Delaware is that the state is increasingly seen by plaintiffs' attorneys as an unfriendly forum.[275] To the extent that Delaware—or any other state—attempts to impose discipline on shareholder litigation, it risks sending cases to other fora.[276] One straightforward strategy to lure cases back—thereby partially ameliorating the multi-forum problem—is to reverse course.[277] Delaware courts might award attorneys' fees without scrutinizing the contents of the settlement, allow discovery early in a case, make easy and irreversible designations of lead counsel, and lionize the entirety of the plaintiffs' bar.

This strategy has numerous problems for Delaware or for any other state. Any state adopting it might suffer a reputational penalty in the market for incorporations.[278] Another shortcoming of this strategy is that other states could match it, which would leave the competitive position of the incorporation state unimproved. The most serious problem with this strategy, though, is that it moves in directions that are manifestly unhelpful for shareholders. The attributes of prosecuting shareholder claims in Delaware and other states that plaintiffs' lawyers find unattractive are precisely those that are most helpful in minimizing the agency costs of shareholder litigation.[279]

E. Altering the Delaware Carve-Out

Two major federal reform acts included an exception known as the "Delaware carve-out," which prevented their application to shareholder litigation.[280] There are two ways that Congress might change this rule to

274. *See* Transcript of Settlement Hearing at 27, *In re* Compellent Tech. Inc. S'holder Litig., No. 6084-VCL, (Del Ch. Jan. 13, 2011).

275. *See* Grant, *Delaware's World*, *supra* note 10, at 667–80.

276. Coffee, *Foreword*, *supra* note 5, at 390 ("Discouraging litigation in Delaware (even non-meritorious litigation) only increases the migration of cases out of Delaware.").

277. Stevelman, *Regulatory Competition*, *supra* note 100, at 124 ("If plaintiffs or defendants commonly anticipate that they will achieve more favorable results by litigating out of state, then Delaware judges may have to adjust their own decision making in order to diminish the incentive for such claims emigration.").

278. ABC, *Losing Cases*, *supra* note 1, at 43 ("[C]orporations could begin to forsake Delaware as their incorporation destination on the basis that the state was too litigation-friendly.").

279. *See supra* Part V.A.

280. Securities Litigation Uniform Standards Act, 15 U.S.C. § 77p(d)(1)(A), (f)(2)(B) (providing an exception to general prohibition on maintaining state securities claims in state court for class action of derivative and class action litigation based on common law of state of incorporation); Class Action

address the problem of multi-forum litigation. The first option is to eliminate the Delaware carve-out, which would force all shareholder claims into federal court.[281] This would, of course, solve the multi-forum problem because federal courts have little difficulty coordinating related cases.[282] But it would be a dramatic, unwelcome, and unnecessary change for U.S. corporate law.[283] Shareholders would be deprived of the expertise of courts like Delaware, and state courts would have no opportunity to develop their own common law of corporations. Federalizing shareholder litigation would constitute an abandonment of our unique arrangement of producing corporate law,[284] a price far too high.[285]

A more limited approach would be to alter the Delaware carve-out to explicitly forbid the maintenance of shareholder claims outside of the state of incorporation,[286] which would mark a return to an earlier understanding of the internal affairs doctrine.[287] Traces of this approach appear in the legislative history of the Securities Litigation Uniform Standards Act (SLUSA),[288] but with good reason, courts have declined to read the statute's language in this way.[289] Such a statutory change would make multi-forum shareholder litigation go away, and for that reason this is an attractive solution. Its sole shortcoming is that it would go further than necessary. Shareholder litigation outside of the incorporation state is not

Fairness Act, 28 U.S.C. § 1332(d)(9)(B) (2006) (providing an exception to federal court jurisdiction over certain class actions that solely involves a claim "that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized").

281. Some who have considered this issue have assumed that the solution to multi-forum litigation would be to eliminate the Delaware carve-out and federalize shareholder litigation. Quinn, *supra* note 30, at 161 ("By eliminating the Delaware carve-out and essentially federalizing shareholder litigation in its entirety, Congress could staunch the out-of-Delaware trend.").

282. Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514, 519–20 (1996) ("Because the federal-court system—despite being organized in districts and circuits with their own personnel, local rules, bodies of precedent, and so on—is at its core a unitary jurisdiction, the problems of conflict and overlap have been handled quite effectively.").

283. ABC, *Balancing Act*, *supra* note 1, at (noting that federalizing corporate law would "radically reorient the corporate litigation landscape").

284. *See* ROMANO, GENIUS, *supra* note 36.

285. Thomas & Thompson, *Theory*, *supra* note 5, at 1809–10.

286. ABCNY, *Coordinating*, *supra* note 4, at 9 (endorsing the idea of a federal rule requiring all deal-related litigation to be brought in the state of incorporation).

287. *See* Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33 (2006); *see also* Rogers v. Guar. Trust Co., 288 U.S. 123, 130 (1933) ("It has long been settled doctrine that a court—state or federal—sitting in one State will as a general rule decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another state but will leave controversies as to such matters to the courts of the state of the domicile."); Verity Winship, Bargaining for Exclusive State Jurisdiction 25 (April 2012 draft) ("The doctrine was once considered jurisdictional, serving as a 'forum derogation' concept that promoted decision of domestic corporate law by the originating state.").

288. H.R. CONF. REP. No. 105-803, at 13–14 & n.2 (1998) ("It is the intention of the managers that the suits under [the Delaware carve-out] be limited to the state in which issuer of the security is incorporated . . . ."); S. REP. No. 105-182, at 6 (1998) ("[T]he Committee expressly does not intend for suits excepted under this provision to be brought in venues other than in the issuer's state of incorporation . . . .").

289. Gibson v. PS Group Holdings, Inc., No. 00–CV–0372 W(RBB), 2000 WL 777818, at *6 (S.D. Cal. June 14, 2000) ("Nothing in this language suggests that Congress intended to restrict the venue of preserved class actions to the issuer's state of incorporation.").

by itself a problem.[290] A single filing outside of the incorporation state will not undermine the deterrent effect of shareholder litigation. And a single claim is unlikely to be terribly important (or else it would have attracted more plaintiffs' attorneys), so allowing the litigation to proceed anywhere does not pose a systemic threat to American corporate law. A more tailored approach to multi-forum litigation would be superior to altering the Delaware carve-out.

F. Forum Selection Clauses

The most prominent approach to dealing with multi-forum shareholder litigation is for companies to adopt forum selection clauses in their organizational documents.[291] The mandatory version of these clauses requires litigation to proceed in a particular forum, usually the incorporation state, which is usually Delaware. The elective version gives the board power to force any litigation to a particular forum but does not require it to be filed there. In 2010, Vice Chancellor Laster endorsed the general idea: "[I]f boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes."[292]

Forum selection clauses are an attractive means of eliminating multi-forum litigation at a particular firm. But two related reasons call into question the viability of forum selection clauses as a solution to multi-jurisdictional litigation: first, there are serious questions about their enforceability, and second, they are not widely adopted.

Exclusive forum provisions may not be effective.[293] The only forum selection clause to be tested in practice failed. Oracle Corporation adopted such a clause in its bylaws and relied on it in seeking dismissal of a federal derivative action, but the court refused to enforce it,[294] though the outcome might have been different had shareholders adopted the clause as an amendment to the charter.[295] Most companies that have

290. Thomas & Thompson, *Theory*, *supra* note 5, at 1799 (noting the importance of "preserv[ing] the traditional jurisdictional and venue rules for forum selection that apply in all other areas of the law").

291. Verity Winship, *Bargaining for Exclusive State Court Jurisdiction*, 1 STAN. J. OF COMPLEX LITIG. 51, 101 (2012) ("The main solution proposed has been the adoption of forum selection clauses in corporate charters and bylaws.").

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

293. Alpert & Narvaez, *supra* note 148, at 24 (noting "uncertainty as to whether such provision will ultimately be enforceable"). For a forceful argument that exclusive forum provisions will be enforced in practice, see Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325 (2013).

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

295. *Id.* at 1175. ("Certainly were a majority of shareholders to approve such a charter amendment, the arguments for treating the venue provision like those in commercial contracts would be

adopted forum selection clauses have done so by amending the corporate bylaws and not by amending the corporate charter, which requires a shareholder vote.[296] Only twelve firms have adopted forum selection clauses through a shareholder vote.[297] Recent lawsuits in Delaware have challenged the board's power to adopt a forum selection clause without shareholder approval.[298] Even if Delaware (and other incorporation states) conclude that boards may validly adopt exclusive forum by-laws without a shareholder vote, there is still a bigger question: whether courts outside of the incorporation state will enforce them, particularly if they were adopted only by board resolution.[299] This concern is particularly acute with California courts,[300] and a prominent defense firm indicates that "the legal validity of [forum selection clauses] remains questionable."[301] They may also be useless to affect complaints in federal court that allege both federal securities violations and state law fiduciary duty violations.

A related problem with exclusive forum provisions is that they are not widely adopted. For one thing, managers may not want them; as potential defendants, they may be reluctant to precommit to one forum because they wish to preserve future benefits of the reverse auction.[302] Elective provisions may go unenforced in strong cases for the same reason.[303] Even if managers wish to adopt them, investors may dislike limitations on their choice of forum. Proxy advisory firms continue to oppose forum selection clauses, although the number of firms designating an exclusive forum is rising.[304] Glass Lewis & Co., for example, recommended voting against them in 2012 because "[s]uch clauses may effectively discourage the use of shareholder derivative claims by increasing their asso-

much stronger, even in the case of a plaintiff shareholder who had personally voted against the amendment.").

296. Aquila & Kripitz, *supra* note 148, at 1.

297. *Id*.

298. *E.g.*, Verified Complaint, Boilermakers Local 154 Ret. Fund v. Curtiss-Wright Corp., No. 7219 (Del. Ch. Feb. 6, 2012) (challenging the board's power to bind shareholders to a particular forum through adoption of a bylaw). Ten of the twelve firms implicated removed the provisions from their bylaws after the complaints were filed. Alpert & Narvaez, *supra* note 148, at 25.

299. Alpert & Narvaez, *supra* note 148, at 25 ("[I]ssues of enforceability are heightened when the exclusive forum provision has been adopted by a company's board of directors without shareholder approval.").

300. Grundfest, *Choice of Forum Provisions*, *supra* note 3, at 23 ("The major risk in California is that California courts will decide that, as a matter of public policy, a choice of forum clause is unenforceable if it designates the state of incorporation."); *see also* Grundfest & Savelle, *supra* note 326.

301. *Restricting Shareholder Derivative Suits*, *supra* note 101, at 1.

302. Griffith & Lahav, *Market for Preclusion*, *supra* note 5, at 1115 ("In a world where parties are free to participate in a well-working market for preclusion, we expect few firms to adopt mandatory forum-selection provisions.").

303. *See* Coffee, *Foreword*, *supra* note 5, at 396 ("[I]t is open to argument whether Delaware corporations truly want M&A suits outside of Delaware precluded, as multiple forums may enhance their ability to settle favorably with one of the weaker teams of plaintiffs suing them.").

304. By late 2012, over two hundred firms had designated Delaware as the exclusive forum for shareholder litigation, compared to eighty-two in early 2011. Aquila & Kripitz, *supra* note 148, at 1; Claudia H. Allen, *Forum Shopping and Exclusive Forum Clauses: "Anywhere But Delaware" or Only in Delaware?*, 9 Corp. Accountability Rep. (BNA) No. 23, at 1 (2011).

ciated costs and making them more difficult to pursue."[305] ISS's view remains unfavorable on them for 2012, but ISS has indicated that it will evaluate them on a case-by-case basis, taking into account the governance and litigation history of the company.[306] Though there are some signs of emerging support for exclusive forum clauses,[307] the evidence is far from conclusive.[308] In view of shareholder apprehension, forum selection clauses are unlikely to be widely adopted anytime soon.[309]

Forum selection clauses are a promising but limited mechanism for addressing multi-forum litigation.[310] The proposal outlined below is not a mutually-exclusive alternative to forum selection clauses; indeed, it envisions a continued role for them.

VII. COORDINATING SHAREHOLDER LITIGATION IN MULTIPLE JURISDICTIONS

Under the current system, each plaintiff's attorney does precisely what our system of shareholder litigation is set up to do: identify potential malfeasance, enforce the duties of directors, and try to earn a living in the process.[311] The incentives facing plaintiffs' attorneys drive multi-forum litigation, but they can be changed to stop it.

I propose in this Part a simple set of rules that would coordinate claims in parallel proceedings and prioritize litigation in the state of incorporation. Appendix II offers statutory language to implement this proposal. The proposal puts the lead attorney in the incorporation state in the best possible position to press strong claims and also puts incorporation state courts in the best position to weed out meritless claims.

305. GLASS LEWIS & CO., PROXY PAPER GUIDELINES: 2012 PROXY SEASON 34 (2012). In 2013, Glass Lewis softened its position slightly. It will continue to recommend against them but may consider recommending in favor of an exclusive forum provision if the issuer has a good reason, shows evidence of past abuse, and otherwise has good governance. *Id*. at 2.

306. ISS, U.S. CORPORATE GOVERNANCE POLICY 2012 UPDATES 13 (2011).

307. Aquila & Kripitz, *supra* note 148, at 2. ("The 2012 voting results seem to suggest that shareholders are beginning to support forum-selection charter provisions—and perhaps even board-adopted bylaws—since, despite ISS's recommendation, shareholders did not approve the shareholder proposals seeking to repeal such bylaws when given the opportunity to do so this year.").

308. *Id*. ("[I]t is too early to predict whether unilaterally adopted provisions will receive consistent shareholder support going forward.").

309. Bill Kelly, *ISS Revisits Policy on Exclusive Forum Provisions*, DAVIS POLK BRIEFING: GOVERNANCE (Nov. 21, 2011), http://www.davispolk.com/briefing/corporategovernance/61589/ ("The new guidelines make ISS's position on any particular company's proposal less predictable than before, and to that extent further complicate the decision tree for companies considering whether to adopt an exclusive forum provision and, if so, whether to submit it for shareholder approval. We may need to see another proxy season's results before this becomes more clear.").

310. Brian Quinn has proposed a smart solution for easing adoption by firms: having Delaware amend its code to supply an off-the-shelf forum selection clause for corporate charters. Quinn, *supra* note 30, at 182–89. As John Coffee has noted, this kind of explicit endorsement by Delaware could strengthen the case for enforceability. Coffee, *Foreword*, *supra* note 5, at 400.

311. Quinn, *supra* note 30, at 143 (noting that multi-forum litigation is "a natural response to the competitive pressures of the plaintiff's bar"); *New Challenges and Strategies*, *supra* note 107, at 4 ("[T]here is no reason or incentive for plaintiffs to file solely in Delaware or any other single forum.").

A. A System for Resolving Interforum Disputes in Shareholder Litigation

As a threshold matter, this proposal would apply only to public companies and "shareholder claims"—those that implicate the relationships between shareholders, directors, and officers of the company.[312] This definition covers common types of shareholder fiduciary litigation, including derivative challenges to self-interested transactions and class claims to enjoin mergers, as well as more pedestrian corporate proceedings like books and records requests and appraisal actions. Notably, the definition does not cover claims asserting only violations of the federal securities laws. The proposal requires federal legislation, but it would leave the Delaware carve-out untouched and operate in concert with it.

To coordinate shareholder litigation across all state and federal courts, my proposal has three basic parts: the first would stay federal cases in favor of cases in the state of incorporation; the second would allow cases in other states to be removed to federal court, where the stay would apply; and the third would prevent any other attorneys from settling shareholder claims asserted in the incorporation state.

1. Stay in Federal Court

The first piece of the proposal is a stay imposed on shareholder litigation in federal court. Any party may move to stay the federal proceedings if within thirty days of the filing of the federal complaint, a similar complaint is filed in the state of incorporation, and the court must grant the stay. This proposal emphatically gives up on the first-to-file rule; a federal complaint could be stayed in favor of a state complaint filed a month later. Forum is the touchstone of this proposal, and timing is comparatively unimportant.

The 30-day window is designed to give plaintiffs' attorneys enough time to formulate their complaint in the state of incorporation but not so much that they can strategically undermine proceedings elsewhere. There is nothing magic about thirty days. The proposal is intended to apply only to contemporaneous filings, and thirty days serves as a rough proxy for that and also lines up with the time period in which defendants can remove cases,[313] where similar interests are at stake. If no complaint is filed in the incorporation state within the thirty-day period, the federal plaintiff can proceed securely.

"Similar" means that the federal complaint brings any claim that is also brought in a state action arising out of the same general set of

312. For the precise definition of "covered shareholder action," see subsection (a)(2) in Appendix II. Note that it explicitly excludes circumstances where the issuer is the plaintiff, (a)(2)(B) and applies only to breaches of fiduciary duties by directors and senior officers. The goal of these limitations is to avoid sweeping in employment litigation between the firm and former employees.

313. 28 U.S.C. 1446(b)(1) (2012) (stating the thirty-day requirement for removal).

facts.[314] If any claim in the federal action is also brought in the incorporation state, the entire federal proceeding will be stayed, not just the particular claims that are also asserted in the incorporation state proceeding. Thus, a federal complaint that alleges a violation of Section 14(a) of the Exchange Act and also violations of state fiduciary duties could be stayed in its entirety if a complaint is filed in the state of incorporation that alleges similar fiduciary duty violations. Plaintiffs wishing to avoid this result in federal court could of course decline to plead state fiduciary claims in their complaint.

The stay would be lifted under two circumstances.[315] The first is when judgment has been entered in the proceeding in the state of incorporation. The other is if the court in the state of incorporation decides not to proceed with the case and stays it in favor of the federal case, in which case the federal proceeding could be reanimated. The distinction between a stay and dismissal in this context is, to some observers, illusory.[316] In fact, dismissal would be a fine result in many circumstances—that is the point. In the state of incorporation, the case will be resolved through trial, settlement, or dismissal with prejudice, and that judgment can be used to dispatch the remaining federal case. It is only for the sake of prudence that shareholder litigation in federal court ought to be stayed instead of being dismissed. Doing so allows the federal plaintiffs to maintain their place in the queue if something goes awry in the incorporation state case or if the incorporation state court returns control of the proceedings.

2. Removal of Other State Cases

The second part of the proposal addresses shareholder claims filed in courts of non-incorporation states: shareholder litigation may be removed from states other than the incorporation state to federal court if a similar claim has been filed contemporaneously either in a federal court or in the courts of any other state. Once removed, the suit would be consolidated with any existing federal court litigation and thereafter be vulnerable to the same stay that applies to shareholder litigation filed in federal court.[317] If the stay is dissolved and no similar shareholder litigation has been filed in federal court, the case could be remanded to the state court where it was filed for further proceedings.

The lynchpin of this coordination scheme is a statutory change to ensure that the federal courts always have subject matter jurisdiction to hear the removed shareholder claims. A typical shareholder claim is not removable to federal court in most circumstances because there is rarely

314. *See* section (a)(7) in Appendix II.

315. *See* section (b)(2) in Appendix II.

316. *See* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4247 (2007) (noting that the distinction is "extremely artificial" and "when the federal court orders a stay because of a pending state court proceeding, it is in practical effect a dismissal of the federal action").

317. *See* section (c) in Appendix II.

complete diversity among the parties.[318] Ensuring that federal courts have jurisdiction for removal requires expanding diversity jurisdiction. Federal district courts would have jurisdiction over removed shareholder litigation if at least one plaintiff is diverse from at least one defendant. Two recent reforms have expanded diversity jurisdiction by requiring only minimal diversity,[319] and this proposal follows that approach. For most public companies, this would be sufficient to establish subject matter jurisdiction in shareholder litigation.

One potential problem is that defendants may fail to remove a state case or seek to stay a federal case in order to preserve a second forum as a safety valve, in the event that the plaintiff or judge in the incorporation state becomes too demanding.[320] To avoid that possibility, this proposal allows any person on whose behalf the claim is brought—a shareholder in the case of a derivative suit or a class member in the case of a class action—to intervene in the case for the purpose of instituting removal and seeking the protection of the stay.[321] In this way, the plaintiff *in the incorporation state case* could intervene in federal court to effect the removal and the stay. The incentives of the plaintiff's attorney in the incorporation state to obtain complete control over the case would thus ensure that the case is always removed and stayed.

3. Settlement Bars

The federal stay and removal power are sufficient to ensure that no fiduciary claim proceeds in a way that would undermine the power of the plaintiffs' attorney in the incorporation state. But there remains a subtle risk to incorporation state claims from the pendency of related securities claims.

Under this proposal, a federal complaint that alleges both federal securities claims and state shareholder claims can be stayed in its entirety.[322] This prevents plaintiffs' attorneys from using securities claims as a mere pretext for bringing state fiduciary claims in federal court.[323] Securities claims may sometimes be independently meritorious, however, and to preserve the continued viability of the federal securities laws, this pro-

318. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

319. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4; Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. No. 107–273, § 11020(b)(1)(A), 116 Stat. 1758; *see* 28 U.S.C. § 1332(d)(2)(A) (stating that jurisdiction exists where "any member of a class of plaintiffs is a citizen of a State different from any defendant"); 28 U.S.C. § 1369(c)(1) (giving the district courts jurisdiction where "any party is a citizen of State and any adverse party is a citizen of another State").

320. *See supra* note 303.

321. *See* section (d) in Appendix II.

322. *See* section (b)(1) in Appendix II.

323. *E.g.*, Calleros v. FSI Int'l, Inc., 892 F. Supp. 2d 1163, 1166 (D. Minn. 2012) ("Calleros raced to the wrong courthouse, apparently on the mistaken belief that FSI is a Delaware corporation—he commenced his action in the Delaware Chancery Court. After being informed of his error, he voluntarily dismissed that case. He then filed the instant action . . . alleging breaches of fiduciary duties similar to the aforementioned state-court cases. Yet, he also added claims under the Exchange Act based on purported omissions from a document FSI had filed with the Securities and Exchange Commission known as a Schedule 14D–9 . . . .").

posal would not stay a federal case alleging only securities claims. The risk of the reverse auction would persist because the federal plaintiffs' attorneys might offer defendants a release broad enough to cover also the state fiduciary claims in settlement negotiations. This is the same pressure that gives rise to the existing pathologies of multi-forum litigation.

To address that issue, my proposal forbids courts outside of the incorporation state from approving any settlement that purports to release any defendants from shareholder claims asserted in a contemporaneously-filed action in the incorporation state.[324] A plaintiff's attorney in a federal action thus could offer to settle the securities claims asserted in the federal action, but the release in settlement could not include any of the fiduciary claims asserted in the incorporation state action. This allows the federal claims to proceed unfettered and poses no risk of undermining the negotiating power of the plaintiff's attorney in the state claims.

Federal actions may be too vulnerable in this position, though. The settlement threat is asymmetric; the federal action may not release the shareholder claims pending in state court, but the federal claims can be released in the state settlement.[325] Allowing defendants to obtain releases for securities claims while paying the full value only of the shareholder claims would deprive the federal securities laws of their deterrent effect. Thus, the proposal forbids the settlement of federal securities claims by plaintiffs' attorneys in a contemporaneously-filed incorporation state case.[326] This would prevent plaintiffs' attorneys in either forum from bidding against the other.[327]

4. Opting Out

The proposed system may work very well for many public companies. It essentially supplies all public firms with something like a forum selection clause designating their incorporation state as the preferred forum, on the assumption that no firm prefers anarchy in its multi-forum shareholder litigation. For some companies, however, this might be suboptimal. A corporation headquartered in Maine but incorporated in Delaware may for whatever reason wish to channel its litigation to Maine.

There is no case for forcing firms to abide by any aspect of this proposal, and thus the proposal preserves the flexible character of existing corporate law rules. Here forum selection clauses become useful. The

324. *See* section (e)(1) in Appendix II.

325. *E.g.*, *In re* Phila. Stock Exch., 945 A.2d 1123, 1146 (Del. 2008) ("In Delaware, the limiting principle is that a settlement can release claims that were not specifically asserted in the settled action, but only if those claims are based on the same identical factual predicate or the same set of operative facts as the underlying action.") (quotation marks omitted).

326. Section (e)(2) in Appendix II.

327. The obvious hold-out risk is explored below.

current default approach to multi-forum litigation is chaos, and any firm that wishes to channel its shareholder litigation to the state of incorporation (or anywhere else) must adopt a charter amendment and then hope it is enforceable. This proposal switches the default to litigation in the incorporation state. But shareholders may by majority vote change the priority rule by adopting a forum selection clause designating some other jurisdiction for shareholder litigation.[328] Shareholders also may by majority vote opt out of the proposal entirely, reverting to the current arrangement where shareholder litigation can proceed in any court of competent jurisdiction.[329]

B. Evaluating the Benefits and Costs of this Proposal

This proposal has two conceptual pieces: first, it creates a mechanism to coordinate shareholder litigation in different fora and, second, it prioritizes cases in the incorporation state within that mechanism. Creating the coordination mechanism promotes the deterrent effect of shareholder litigation because it allows plaintiffs' attorneys to press for the strongest possible settlement without fear of being underbid (good in strong cases) and allows courts to eliminate meritless cases quickly (good in weak cases); these effects tighten the relationship between the merits of shareholder claims and the values at which they settle. Prioritizing litigation in the state of incorporation provides systemic benefits for American corporate law by allowing states to develop their corporate law. The proposal suffers from some weaknesses, of course, but none sufficient to call into question the overall wisdom of the reform.

1. Promoting Deterrence in Shareholder Litigation

This proposal would resolve multi-forum shareholder litigation. Consider, as an example, a company incorporated in Delaware that has its headquarters in Manhattan and that has just announced that it will be acquired by a private equity firm. Plaintiffs' attorneys might file fiduciary challenges in three jurisdictions: the Delaware, New York, and federal courts. Currently, each of these cases could end up being the active complaint, depending on the timing of the filings, the intrepidity of the judges, and the cunning of the plaintiffs' attorneys. Under my proposal, the resolution is straightforward. The New York complaint could be removed to federal court, consolidated with the complaint filed there, and then stayed during the pendency of the Delaware case. This tidy result would cut down on disputes between fora, which are really nothing more than disputes between competing teams of plaintiffs' attorneys. To be sure, there is value in plaintiffs' firms competing to have control of the case, but lead counsel selection allows for that to happen. Indeed, the

328. *See* sections (a)(5) & (b)(1)(B) in Appendix II.
329. *See* section (f) in Appendix II.

process for selecting lead counsel in many jurisdictions is a far superior way to choose the advocate who can do the most for shareholders.

In practice, this proposal would not resolve multi-forum shareholder litigation so much as end it. Under normal circumstances, no shareholder would file outside of the incorporation state if he expected anyone else to file in the incorporation state. Thus, the mere existence of a mechanism for centralizing shareholder litigation in one forum would likely cause the volume of multi-forum litigation to fall precipitously.

The benefits of creating the mechanism to coordinate shareholder litigation are numerous. It would of course conserve judicial resources and avoid duplicative litigation.[330] More importantly, it would eliminate the pathologies of multi-forum litigation. In only one forum, the presiding judge would have the power to deal quickly and effectively with meritless cases. A plaintiff's attorney could investigate claims before filing to draft a better and more focused complaint, confident that the delay in filing would not compromise his chances of winning a lead counsel appointment. A plaintiff's attorney similarly would have the optimal incentive to invest resources in discovery and depositions to develop the claims. And, most importantly, he could insist on receiving the strongest possible settlement without fear of being underbid. Strong cases would be pressed more vigorously and weak cases screened out faster, relative to the existing multi-forum baseline. This would push settlement values into greater alignment with a claim's underlying merit and thus improve the deterrent value of shareholder litigation.

One virtue of this proposal is that it goes no further than necessary to address the problem of multi-forum litigation. It would affect only multi-forum disputes, not the entire universe of shareholder litigation. Some kinds of shareholder suits might *not* generate multi-forum litigation because they might not generate a fee large enough to attract multiple plaintiffs' attorneys. One such category might consist of garden-variety shareholder suits. Even if such a case turned out to be strong, say after uncovering some blockbuster documents in discovery, the plaintiff's attorney would be protected in his investment in the case. The case would be far enough along that the 30-day window would pose no threat, and other courts would likely stay subsequent proceedings under existing doctrine.[331] Another category of shareholder litigation that might persist outside of this proposal is the so-called tagalong derivative suit,[332] where

330. *See, e.g.*, Crosley Corp. v. Hazeltine Corp., 122 F.2d 925, 930 (3d Cir. 1941) ("The economic waste involved in duplicating litigation is obvious. Equally important is its adverse effect upon the prompt and efficient administration of justice.").

331. Strine et al., *Stockholders First*, *supra* note 5, at 99 (stating that even under their modified forum non conveniens, when "the court in a jurisdiction other than the state of incorporation have actively and responsibly advanced the proceedings, a belatedly filed complaint in the state of incorporation should not compel the court there to go forward with the case simply because the law of its state is at issue").

332. BAKER & GRIFFITH, ENSURING MISCONDUCT, *supra* note 13, at 23 (noting the continued relevance of the "'tagalong derivative suit' that is likely to be filed in the wake of the 10b-5 claim"); *see also* Erickson, *supra* note 41, at 1778–79 (describing tag-along derivative suits).

the object is to obtain discovery that can be used in a separate securities law case.[333] In contrast to exclusive forum provisions or changes to the Delaware carve-out, this proposal does nothing beyond what must be done to address the problem of multi-forum litigation.

An unavoidable limitation of the proposal is its inability to eliminate duplicative proceedings, even if it can eliminate duplicative claims. The symmetric bar on settlement forecloses the risk of a reverse auction in such a scenario, but it comes with other costs.[334] The proceedings might duplicate each other, consuming scarce judicial resources and burdening shareholders who must finance the defense of claims in two courts. The settlement bar also creates the possibility of hold-out problems in shareholder litigation: defendants could be in a position where each plaintiff's attorney attempts to hold out for a settlement higher than the discounted trial value of the claims. The aspiration, of course, is to ensure that each claim is priced in settlement at an amount that approximates its merit. But plaintiffs' attorneys may rush to file tagalong federal claims—regardless of their merits—knowing that defendants will be forced to settle them for more than they are worth in order to achieve closure. The best hope for mitigating such a scenario is that improved judicial oversight will screen out weak claims early enough and effectively enough to minimize the resulting settlement burden on defendants.

2. Prioritizing Incorporation State Litigation

The proposal channels shareholder litigation first to the incorporation state, then to federal court, and finally, to a non-incorporation state. Given this mechanism and priority, the *ex ante* incentive for a plaintiff's attorney is to file in the incorporation state.[335] This rule of priority is not a necessary aspect of the proposal. Indeed, the mechanism could improve the deterrent effect of shareholder litigation with *any* simple rule of priority among fora:[336] one based on filing date, the height of the named plaintiffs, or the alphabetical order of the fora in question.[337]

333. ABC, *Balancing Act*, *supra* note 1, at 40 ("The primary intent [in tagalong derivative suits] was to obtain discovery under corporate law that was barred under the securities law, and use that to support the security claim."). On their own, these cases do not have enough merit to attract filings by any attorney who is not part of the securities litigation team. *See* Jessica M. Erickson, *Overlitigating Corporate Fraud: An Empirical Examination*, 97 IOWA L. REV. 49, 80 (2011) (suggesting that "so many shareholder derivative suits end with worse outcomes than other types of corporate fraud lawsuits" because they "may simply serve as tagalong suits to other types of corporate litigation").

334. *See supra* Part VII.3; section (e) in Appendix II.

335. The risk of collusion among plaintiff's attorneys—agree somehow that no attorney would file in the incorporation state—seems highly unlikely. Entry into the ranks of plaintiffs' attorneys is easy, and the cartel could thus be easily broken by any attorney wishing to wrest control of the case away from the attorneys attempting to collude.

336. ABCNY, *Coordinating*, *supra* note 4, at 7 (emphasizing the need for "clear and unambiguous provisions concerning where deal litigation may properly be brought and/or a mechanism for coordinating litigation when competing cases are filed in multiple jurisdictions").

337. Others make a similar observation. *See* Strine et al., *Stockholders First*, *supra* note 5, at 69. ("Those costs, however, could conceivably be eliminated by any clear rule, however arbitrary, that

One possible approach to selecting among the implicated fora might be to follow the federal Panel on Multidistrict Litigation, which considers a number of factors—the courts' locations, the judges' levels of experience, the concentration of witnesses, the location of related state proceedings—to determine where to transfer litigation.[338] This would be an improvement on what currently happens, and it suffers only by comparison to the incorporation state rule included in the proposal. A procedure based on the MDL would be slower, more expensive, and less beneficial for the development of corporate law compared to the mechanical rule I propose.[339]

Another potential rule of priority would favor the forum where the first complaint was filed. This would eliminate the problems associated with multi-forum litigation and would be simple to apply. Awarding control of the litigation to the first filer may also serve as a rough way to reward an attorney's diligence in pursuing the claims, although filing speed is likely a poor proxy for that trait.[340] Of course, it could just as easily be seen as rewarding those plaintiffs who rush to sue without conducting any presuit investigation to determine whether the claims are meritorious. A first-filed rule generally would encourage the filing of complaints in those fora which offer the most attractive rules for plaintiffs' attorneys, not necessarily for shareholders.[341] But the fatal problem with prioritizing the first filing is that it could undermine the development of corporate law by allowing cases to regularly proceed outside of the incorporation state.

The principal reason to prioritize cases to the incorporation state is that doing so would promote the distinctive U.S. system of producing corporate law.[342] The common law development of corporate law in the U.S. depends on a steady stream of cases in the incorporation state. Prioritizing proceedings in the incorporation state thus offers systemic benefits by sustaining the generative force of U.S. corporate law.

A related concern with this rule of priority is that it might deprive non-incorporation states of opportunities to articulate their own interests in corporate disputes involving foreign firms.[343] The premise of that ob-

resolved competing jurisdictional claims. A rule giving priority according to alphabetical order of plaintiffs' names, for example, would quickly and efficiently resolve competing forum claims . . . .").

338. *See* John G. Heyburn II, *A View From the Panel: Part of the Solution*, 82 Tul. L. Rev. 2225, 2239–40 (2008).

339. In a sense, the incorporation state priority reflects a strong default rule that the incorporation state's interest should always predominate any kind of MDL analysis.

340. *In re* Topps Co. S'holders Litig., 859 N.Y.S.2d 907, at *3 (N.Y. Sup. Ct. 2007) (noting that the rapidity with which plaintiffs filed "shows the tenacity and ability of this plaintiff and his counsel to act quickly and forcefully to challenge what they believe to be improper actions by [the defendants]").

341. *See supra* Part V.A.

342. *See supra* Part V.B.2.

343. Griffith & Lahav, *Market for Preclusion*, *supra* note 5, at 1106 ("States are understandably reluctant to cede all authority over what they consider to be instate businesses merely because the organizational documents are filed elsewhere."); *id.* at 1138 (noting that multi-forum litigation preserves "the real interests of the states in deciding existential questions for locally headquartered corporations, even if those corporations are incorporated elsewhere"); Thomas & Thompson, *Theory*, *supra* note 5,

jection stands in direct tension with the internal affairs doctrine. As the U.S. Supreme Court has recognized, a state "has no interest in regulating the internal affairs of foreign corporations."[344] Shareholder litigation is very different from other types of aggregate litigation; in a products liability class action, for example, the applicable substantive law depends on the forum.[345] Conflict of laws principles reflect this: there is no public policy exception to the internal affairs doctrine.[346] Prioritizing incorporation state litigation would not work any legitimate harm upon other states.

The priority rule in favor of incorporation states means, in practice, that a great deal of shareholder litigation for public companies would proceed in Delaware, an unwelcome development for those who mistrust that state.[347] The proposal allows shareholders to opt out of this proposal by simple majority vote.[348] Thus any firm whose shareholders wish to avoid Delaware (or anywhere else) is free to do so.

Another potential problem with this priority rule is that it might overburden the courts of Delaware and other incorporation states. First, by forcing claims into incorporation states, it threatens to flood Delaware with "junk" cases.[349] This could diminish the amount of attention Delaware courts can devote to important cases.[350] At the same time, many of these nuisance claims might settle for amounts beyond their discounted trial value because defendants will no longer be able to use the reverse

at 1800 ("Multijurisdictional litigation gives other states' courts a channel to articulate their states' interests in these cases.").

344. Edgar v. MITE Corp., 457 U.S. 624, 645–46 (1982).

345. Debra Lynn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 349 (2006) ("A choice of forums invoking different substantive laws is perhaps the classic forum shopping paradigm, and the one most likely to stir incendiary debate."); Robert A. Sedler & Aaron D. Twerski, *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*, 73 MARQ. L. REV. 76, 86 (1989).

346. ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET 114 (2009) ("[U]nder general choice-of-law rules, courts make exceptions to the enforcement of choice-of-law clauses for certain fundamental policies strongly favored by pro-regulatory interest groups. Yet the courts do not recognize such an exception for the [internal affairs doctrine].").

347. *See*, *e.g.*, Griffith & Lahav, *Market for Preclusion*, *supra* note 5, at 1112 ("[S]hareholders with meritorious claims may be stymied in Delaware because of (real or perceived) pro-management bias. Centralization would eliminate the safety valve aspect of multijurisdictional litigation. Indeed, the out-of-Delaware trend encourages Delaware courts to remain receptive to plaintiffs' interests. A Delaware monopoly over merger litigation thus threatens to increase the state's promanagement bias, leading to worse outcomes for plaintiffs and a greater risk of federal intervention in state corporate law."); Stevelman, *supra* note 100, at 132 ("[A]ccess to forums beyond Delaware's equity courts, as this article contends, exerts a salutary, countervailing force against corporate managers' preferences in Delaware corporate law.").

348. Managers constitute little obstacle to opting-out, given the possibility that they wish to preserve the benefits of multi-forum litigation and the reverse auction. *See supra* note 303.

349. Griffith & Lahav, *Market for Preclusion*, *supra* note 5, at 1112 ("Delaware would be unable to avoid deciding certain classes of cases that . . . it might like to avoid. Its dockets would be clogged with 'junk' cases . . . ."); ABC, *Losing Cases*, *supra* note 1, at 652 (reporting that in conversations with practitioners "a common view was that the Delaware judges view many of the cases [filed outside the state] as of low-quality and are happy to see them go elsewhere."). In reality, this proposal would not herald an increase in *cases* filed in incorporation states as much as an increase in *cases that are active* there.

350. Griffith & Lahav, *Market for Preclusion*, *supra* note 5, at 1098 (Multi-forum litigation "creates an opportunity to engage in . . . *strategic outsourcing*—that is, an opportunity to keep good cases while letting bad ones go.").

auction to settle claims cheaply.[351] This concern is potentially serious but not ultimately persuasive. This proposal likely would change how judges in incorporation states deal with cases. Without having to worry about driving cases to other jurisdictions, judges could screen shareholder claims more aggressively.[352] In Delaware, for example, all signs indicate that courts shower rich rewards on the plaintiffs' attorneys who pursue strong claims,[353] and at the same time deal quite harshly with those who bring weak claims.[354] Under this proposal, Delaware judges might feel free to knock down fee awards in disclosure-only settlements. Such changes in judicial behavior would lead to a predictable change in the behavior of plaintiffs' attorneys: they would file fewer weak cases. A lower expected return on weak cases would sharply diminish the incentive to file them in the incorporation state. In this way, channeling cases into the incorporation state may reduce the volume and settlement value of weak cases.

Even if the volume of cases were too much for an incorporation state, the proposal includes a safety valve: the incorporation state court can stay the case, which would supply grounds for lifting the stay in federal court or other states.[355] In response to caseloads that are too high, incorporation states—Delaware, in particular—might develop a custom of staying certain types of shareholder claims. Consider backdating, for example. After having addressed the novel issues of Delaware law and applying it in a few exemplary cases that established adequate settlement values and levels of attorneys' fees,[356] Delaware courts might have been comfortable deferring to other courts. If Delaware courts signaled their inclination to stay future backdating cases, a plaintiff's attorney could file a backdating claim in federal court with confidence. Unlike an exclusive forum clause, this proposal would allow a plaintiff to seek relief in an al-

351. *Id*. at 1112 ("[C]entralization will likely make it more difficult to settle low-value cases expeditiously. Centralization means litigants cannot use the reverse auction to make quick work of low-value claims.").

352. The worries of Griffith & Lahav are founded on an assumption that judicial behavior would remain unchanged. *Id*. at 1112–13 ("Centralization in Delaware is also unlikely to kill off low-value merger litigation, should that be the reformers' aim, considering the chancery's willingness to approve non-pecuniary relief and attorneys' fees.").

353. Cain & Davidoff, *supra* note 32, at 6 ("Overall, Delaware's strategy implies that it is favoring good cases by preferring to award higher attorneys' fee awards rather than dilute its law and dismiss fewer cases to attract litigation."); Strine et al., *Stockholders First*, *supra* note 5, at 6 (noting aspiration to allow courts to "select the plaintiffs best able to represent stockholders with fidelity, weed out non-meritorious cases, and focus more attention on meritorious cases by setting incentives for class counsel that reward achievements for stockholders and do not encourage settlements without benefits for them").

354. *E.g.*, Hearing on Plaintiffs' Counsel's Application for Attorneys' Fees and Expenses and Rulings of the Court at 63, *In re* Zenith Nat'l Ins. Co. S'holders Litig., No. 5296-VCL (Del. Ch. July 26, 2010) ("[P]art of this, in my mind, desire to be a little bit more rigorous in fee awards is also to give people incentives from the plaintiffs' side to really price what cases are worthwhile to bring. You know, the reality is that not every deal merits a lawsuit.").

355. *See* section (b)(2)(B) in Appendix II.

356. This could work basically like bellwether trials work in mass-tort class actions. *See* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576 (2008).

ternative forum if the incorporation state court had no interest in the case.[357]

Another potential concern is that incorporation states might, under this proposal, be forced to confront hard cases they could otherwise discreetly avoid. The classic example involves Bear Stearns.[358] In 2008, Bear Stearns shareholders filed class action complaints in Delaware and in New York that challenged JP Morgan's acquisition of Bear Stearns.[359] The plaintiffs' claim was very strong and raised important questions of Delaware law.[360] Nevertheless, the Delaware court deferred to the New York court.[361] This "strategic use of comity" allowed the court to avoid being placed in the position of halting a transaction that the entire federal apparatus determined was necessary to avoid financial calamity.[362] Eliminating multi-forum litigation would deprive incorporation states of "an important pressure-relief valve for avoiding such situations."[363] This is a serious potential problem for incorporation states, especially Delaware, even conceding that such scenarios are rare and not always as freighted as they first appear.[364] But the proposal here preserves the ability of an incorporation state to defer to another court—chiefly the federal courts. As noted earlier, an incorporation state court retains the option of staying a case before it, which under the proposal, allows a plaintiff in federal court to press the claims. Doing so might be awkward, but awkwardness presumably is only a small problem in cases like *Bear Stearns* that purport to present existential challenges to an incorporation state's corporate law. To the extent that incorporation states need a way to avoid certain cases, they can do so under this proposal.

A final potential objection is that this proposal would require an act of Congress and perhaps thus constitute a step along the increasing fed-

357. The federal multi-district litigation panel takes a similar approach. In considering where to transfer cases, the panel pays particular attention to the "willingness and motivation of a particular judge to handle an MDL docket," and the panel "has neither the power nor the desire to force an MDL docket upon a district judge." Heyburn II, *supra* note 338, at 2240, 2242. Judge Heyburn is chief judge of the Western District of Kentucky and has been chair of the MDL panel since 2007.

358. *See* Marcel Kahan & Edward Rock, *How to Prevent Hard Cases From Making Bad Law: Bear Stearns, Delaware, and the Strategic Use of Comity*, 58 EMORY L.J. 713 (2009).

359. *See In re* Bear Stearns Cos., Inc. S'holder Litig., No. 3643-VCP, 2008 WL 959992, at *1 (Del. Ch. Apr. 9, 2008).

360. Rock & Kahan, *supra* note 358, at 721 (arguing that "under *existing* statutory and case law, the SEA was invalid and should have been enjoined").

361. *In re Bear Stearns*, 2008 WL 959992, at *7–9.

362. Kahan & Rock, *supra* note 358, at 756.

363. Griffith & Lahav, *Market for Preclusion*, *supra* note 5, at 1105.

364. The "anticlimactic" end of the Bear Stearns story is that shareholder opposition disappeared and the plaintiffs ultimately withdrew their motion to enjoin the merger. Kahan & Rock, *supra* note 358, at 721. That result could have happened in Delaware too. Moreover, strategic dawdling might have been at least as effective a strategy as the strategic use of comity. Kahan & Rock suggest that delay would have compromised the Delaware court's reputation for speed, *id.* at 757, which is of course true. But perhaps deferring to New York had its own different and perhaps more injurious effect on the reputation of the Delaware courts: suggesting that Delaware was unwilling to confront difficult questions or unable to craft exceptions in scenarios that called for them.

eralization of corporate law.[365] To be sure, this proposal would make it easier in some circumstances to remove shareholder litigation from nonincorporation states to federal court by expanding diversity jurisdiction.[366] This expanded definition applies, however, in limited circumstances: only to removal from a nonincorporation state, and only once a similar claim has been filed in federal court or in any other state court. Furthermore, a case so removed can always be trumped by an incorporation state filing. There is thus very little threatened federalization in this proposal. Indeed, far from undermining our state-based system of corporate law, this proposal comes to its aid. It holds out the promise of improving U.S. corporate law by offering incorporation states more opportunities to shape and develop their law and also by making it easier for them to tie settlement values in shareholder litigation to the merit of the underlying claims.

VIII. CONCLUSION

Important shareholder disputes now involve filings in multiple fora, and this phenomenon accounts for much of the out-of-Delaware trend that others have identified. Multi-forum litigation threatens to impair the usefulness of the shareholder suit and deprive incorporation states of important cases. The proposal here offers a simple solution to the problem. By creating a mechanism to coordinate filings in different fora and prioritizing the incorporation state, this proposal would restore some deterrent value to shareholder litigation and ensure the continued success of our state-based system of corporate law.

365. Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1789–96 (2011) (describing and later criticizing a "process of gradual federalization" of corporate law).

366. *See* Appendix II, sec. (c)(3).

APPENDIX I

Data Appendix

Backdating cases

To identify the backdating cases, I began by identifying firms that had been implicated in the backdating scandal. I aggregated lists prepared by three sources: The Wall Street Journal,[367] NERA Economic Consulting,[368] and the D&O Diary blog.[369] For each implicated company, I searched public disclosures filed with the SEC to identify relevant derivative lawsuits. This aggregate list included 151 U.S. companies that faced stock option backdating derivative litigation in the mid-2000s. I dropped two Bermuda corporations (Marvell Technology Group and Nabors Industries). For each lawsuit in an SEC filing, I examined the dockets of the relevant court to confirm the existence of the case and its attributes. Various descriptive statistics follow.

- 151 firms sued for backdating between 2005 and 2008
- 629 derivative lawsuit filings
- 4.2 suits per firm

367. *Perfect Payday: Options Scorecard*, WALL STREET J. (Sept. 4, 2007), http://online.wsj.com/public/resources/documents/info-optionsscore06-full.html.

368. Renzo Comolli et al., *Options Backdating: The Statistics of Luck*, NERA ECON. CONSULTING 9–12 (Mar. 8, 2007), http://www.nera.com/nera-files/PUB_Backdating_PartIII_0411.pdf.

369. Kevin M. LaCroix, *Counting the Options Backdating Lawsuits*, THE D & O DIARY (July 20, 2006), http://dandodiary.blogspot.com/2006/07/counting-options-backdating-lawsuits.html.

APPENDIX TABLE 1: BACKDATING FIRM STATE OF INCORPORATION, BY HEADQUARTERS STATE
(shaded cells indicate non-Delaware out-of-state firms)

		Headquarters state																						
		Total	Alabama	Arizona	California	Colorado	Connecticut	Florida	Georgia	Illinois	Indiana	Massachusetts	Minnesota	Missouri	North Carolina	New Jersey	New Mexico	New York	Ohio	Oregon	Pennsylvania	South Carolina	Texas	Virginia	Washington
Incorporation state	**Total**	**151**	**1**	**2**	**71**	**2**	**1**	**5**	**2**	**1**	**1**	**15**	**2**	**1**	**1**	**6**	**1**	**12**	**2**	**2**	**2**	**1**	**12**	**5**	**3**
	Arizona	**1**		1																					
	California	**14**			14																				
	Colorado	**1**				1																			
	Delaware	**112**	1	1	55	1	1	3	2	1		12	1	1	1	3		10		1	1		12	4	1
	Florida	**2**						2																	
	Indiana	**1**									1														
	Massachusetts	**4**										3									1				
	Maryland	**1**			1																				
	Minnesota	**1**											1												
	New Jersey	**3**														2	1								
	Nevada	**1**																						1	
	New York	**3**														1		2							
	Ohio	**2**																	2						
	Oregon	**1**																		1					
	South Carolina	**1**																				1			
	Washington	**3**			1																				2

APPENDIX TABLE 2: BACKDATING FIRMS SUED AND SUITS, BY YEAR

	Year			
	2005	*2006*	*2007*	*2008*
Firms sued in year	2	126	22	1
Complaints in that year	10	566	50	3
Mean complaints per year	*5*	*4.5*	*2.3*	*3*

APPENDIX TABLE 3: BACKDATING SUITS PER FIRM

Total suits	*Number of firms*	*% of firms*
1	23	15.2
2	23	15.2
3	31	20.6
4	17	11.2
5	16	10.6
6	18	12.0
7	10	6.6
8	4	2.7
9	3	2.0
10	1	0.7
11	1	0.7
13	1	1.3
14	2	1.3
20	1	0.7
Total	**151**	**100.00**

APPENDIX TABLE 4: BACKDATING LITIGATION IN DIFFERENT FORA, BY FIRM INCORPORATION STATE

	Overall litigation		*Incorporation state litigation*		*Headquarters litigation*		*Federal court litigation*	
	# sued	mean suits	# sued *% sued*	mean suits	# sued *% sued*	mean suits	# sued *% sued*	mean suits
Delaware (n=112)	112	4.1	17 *15%*	1.1	77 *69%*	2.3	97 87%	2.7
Out-of-state (n=6)	6	4.3	3 *50%*	1.7	2 *33%*	2.5	5 83%	2.2
In-state (n=33)	33	4	22 *66%*	2.2	0 *0%*	0	24 73%	3.0

APPENDIX TABLE 5: BACKDATING DERIVATIVE SUIT FILING FORUM, BY FIRM INCORPORATION STATE

State of incorporation	*Total filings*	*Filing forum*		
		Incorp. state	*Other states*	*Fed.*
Delaware	463	18	186	259
Other (HQ ≠ inc. state)	24	5	8	11
Other (HQ = inc. state)	142	48	0	94
Total	**629**	**71**	**194**	**364**

APPENDIX TABLE 6: BACKDATING FORA IMPLICATED PER FIRM

Total fora	*Number of firms*		*% of firms*
1	55		36.4
2	82		54.3
3 or more	14		9.3
Total	**151**		**100.00**

APPENDIX TABLE 7: BACKDATING FORA IMPLICATED PER FIRM, BY FIRM INCORPORATION STATE

State of incorporation	*Number of firms*	*Courts where the firm was sued*			
		Inc. only	*Inc. & others*	*Multiple others*	*One other*
Delaware	112	1	16	56	39
Other (HQ not in inc. state)	6	1	2	2	1
Other (HQ in inc. state)	33	2	20	0	11
Total	**151**	**4**	**38**	**58**	**51**

M&A cases

To identify the merger cases, I ran a search through the ThomsonOne database of mergers to identify transactions. I searched the "All Mergers & Acquisitions" database for transactions announced between January 1, 2009 and December 31, 2011 where the target company was traded on the New York Stock Exchange, NASDAQ, or the AMEX. I excluded self-tender offers, exchange offers, and repurchases and also excluded acquisitions where the target was in bankruptcy. For the largest 250 remaining transactions, I collected information on fiduci-

ary litigation challenging the target board from public filings with the SEC.

250 largest value transactions by enterprise value from 2009 to 2010

1180 class action lawsuits against target firms

4.7 mean suits per target

APPENDIX TABLE 8: M&A TARGET STATE OF INCORPORATION, BY HEADQUARTERS STATE
(shaded cells indicate non-Delaware out-of-state firms)

Incorporation state	Total	Cal.	Delaware	Florida	Georgia	Illinois	Indiana	Iowa	La.	Md.	Mass.	Minn.	Missouri	Nevada	N.J.	N.Y.	N.C.	Ohio	Penn.	R.I.	S.C.	Tenn.	Texas	Virginia	Vermont	Wash.	Wisc.
Total	250	4	181	2	2	1	1	1	2	8	5	1	1	4	4	4	3	4	6	1	2	2	3	2	1	2	3
Cal.	4	4																									
Delaware	181	2	37	2	2	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Florida	2																										
Georgia	2																										
Illinois	1				2	1																					
Indiana	1						1																				
Iowa	1							1																			
La.	2								1																		
Md.	8	1	1							1																	
Mass.	5										4																
Minn.	1											1															
Missouri	1		1										1														
Nevada	4													1													
N.J.	4														4												
N.Y.	4															3											
N.C.	3																3										
Ohio	4																	4									
Penn.	6																		6								
R.I.	1																			1							
S.C.	2																				2						
Tenn.	2																					2					
Texas	3																						3				
Virginia	2																							1			
Vermont	1																								1		
Wash.	2																									2	
Wisc.	3																										3

Headquarters state	Total	Ariz.	Ark.	Cal.	Colo.	Conn.	Del.	Dist. of Colum.	Florida	Georgia	Illinois	Indiana	Iowa	Kansas	Kentucky	Louisiana	Maryland	Massachusetts	Minnesota	Missouri	Nebraska	Nevada	New Hampshire	New Jersey	New York	North Carolina	Ohio	Oklahoma	Pennsylvania	Rhode Island	South Carolina	Tennessee	Texas	Utah	Vermont	Virginia	Wash.	W. Virginia	Wisconsin
Total	250	2	1	42	5	7	2	2	9	6	12	2	2	1	1	1	5	17	7	4	1	2	1	12	18	9	4	2	17	1	2	5	30	1	1	6	4	1	4
Cal.	4			4																																			
Delaware	181	2		37	4	5	2	1	5	4	11	1		1	1		3	13	6	4	1	2		8	14	4		1	10			3	29			6	2	1	
Florida	2								2																														
Georgia	2									2																													
Illinois	1										1																												
Indiana	1											1																											
Iowa	1												1																										
La.	2															1																	1						
Md.	8			1	1			1					1				2								1				1										
Mass.	5																	4																					
Minn.	1																		1																				
Missouri	1			1																																		
Nevada	4																					1			1			1					1						
N.J.	4																						1	3															
N.Y.	4																							3	1	1													
N.C.	3																									3													
Ohio	4																										4												
Penn.	6																												6										
R.I.	1																													1									
S.C.	2																														2								
Tenn.	2																															2							
Texas	3																																3						
Virginia	2					1																													1				
Vermont	1																																			1			
Wash.	2																																				2		
Wisc.	3																																						3

APPENDIX TABLE 9: M&A TRANSACTIONS AND SUITS, BY YEAR

	Year		
	2009	*2010*	*2011*
Transactions	57	102	91
Complaints filed	250	459	471
Mean complaints per transaction	*4.4*	*4.5*	*5.2*

APPENDIX TABLE 10: M&A SUITS PER FIRM

M&A suits per firm		
Total suits	*Number of firms*	*% of firms*
0	17	6.8
1	26	10.4
2	41	16.4
3	33	13.2
4	29	11.6
5	27	10.8
6	19	7.6
7	17	6.8
8	8	3.2
9	4	1.6
10	6	2.4
11	5	2.0
12	3	1.2
13	4	1.6
14	3	1.2
15	2	0.8
16	2	0.8
19	1	0.4
20	1	0.4
21	1	0.4
22	1	0.4
Total	**250**	**100**

APPENDIX TABLE 11: M&A LITIGATION IN DIFFERENT FORA, BY FIRM INCORPORATE STATE

	Overall litigation		Incorporation state litigation		Headquarters litigation		Federal court litigation	
	# sued	mean suits	# sued *% sued*	mean suits	# sued *% sued*	mean suits	# sued *% sued*	mean suits
Delaware (n=179)	172	4.9	123 *71%*	2.9	148 *86%*	2.4	48 28%	1.5
Out-of-state (n=16)	15	5.9	14 *93%*	2.9	13 *86%*	3.2	5 33%	1.0
In-state (n=55)	46	5.3	46 *100%*	4.2	0 *0%*	0	24 52%	2.0

APPENDIX TABLE 12: M&A CASE FILING FORUM 2009-11, BY FIRM INCORPORATION STATE

State of incorporation	*Total filings*	*Filing forum*		
		Inc. state	*Other states*	*Fed.*
Delaware[370]	862	370	415	77
Other (HQ is inc. state)	230	187	0	43
Other (HQ not inc. state)	88	41	42	5
Total	**1180**	**598**	**457**	**125**

APPENDIX TABLE 13: M&A FORA IMPLICATED PER FIRM (FIRMS WITH LITIGATION)

Total fora	*Number of firms*	*% of firms*
0	17	6.8
1	80	32.0
2	114	45.6
3	39	15.6
Total	**250**	**100.00**

370. Two of the Delaware firms included in this row were headquartered in Delaware. They attracted 12 filings, 8 in Delaware and 4 in federal court.

APPENDIX TABLE 14: M&A CLASS ACTION FORA PER FIRM, BY FIRM INCORPORATION STATE

State of incorporation	*Number of firms*	*Courts where the firm was sued*			
		Inc. only	*Inc. & others*	*Multiple others*	*One other*
Delaware[371]	174	15	110	8	41
Other (HQ in inc. state)	44	21	23	0	0
Other (HQ not in inc. state)	15	2	12	0	1
Total	**233**	**38**	**145**	**8**	**42**

APPENDIX TABLE 15: LOGISTIC REGRESSION COEFFICIENTS FOR INDIVIDUAL VARIABLE IN M&A LITIGATION

		In each case, the dependent variable is the occurrence of multi-forum litigation (i.e., suit in two or more court systems).											
		1	2	3	4	5	6	7	8	9	10	11	12
Merger size	entval (billions)	.070** (.030)											
	lnentval		.367** (.145)										
	eqtyval (billions)			.123** (.054)									
	lneqtyval				.394*** (.127)								
Premium	1dayprem (10% eg)					-.0036 (.0053)							
	1weekprem						-.0016 (.0049)						
	4weekprem							-.0042 (.0038)					
Dummies	Out of state								.712** (.335)				
	Del. Inc.									.368 (.311)			
	Business court										-.323 (.277)		
	Delxoutofstate											.390 (.307)	
Litigation overall	Totalsuits												.654*** (.101)
	Constant	.357 (.178)	-2.21 (1.13)	.301 (.192)	-2.26 (.942)	.784 (.242)	.715 (.236)	.832 (.216)	.087 (.295)	.377 (.265)	.805 (.195)	.365 (.260)	-1.86 (.376)
	prob > chi2	.0037	.0083	.0020	.0012	.4973	.7402	.262	.0345	.2389	.2423	.2068	.0000
	observations	233	233	228	228	219	219	219	233	233	233	233	233
	Log-likelihood value	-145.67	-146.39	-141.71	-141.19	-140.51	-140.69	-140.11	-147.64	-149.18	-149.19	-149.08	-108.1091
	Pseudo r-squared	0.028	0.0232	0.0325	0.036	.0016	.0004	.0045	.0149	.0046	.0046	.0053	.278

371. As noted, two firms were headquartered in Delaware in addition to being incorporated there. One faced litigation only in Delaware, and the other faced litigation in Delaware and elsewhere.

APPENDIX II

Text of Implementing Legislation

(A). Definitions. For purposes of this section—

(1). The term "covered officer" means an officer of the issuer who

(a) is or was the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer, or chief accounting officer of the issuer, or who served the issuer in a substantially equivalent capacity at any time during the course of conduct alleged in the covered shareholder action to be wrongful,

(b) is or was identified in the issuer's public filings with the United States Securities and Exchange Commission because such person is or was one of the most highly compensated executive officers of the corporation at any time during the course of conduct alleged in the covered shareholder action to be wrongful, or

(c) has, by written agreement with the issuer, consented to be identified as an officer for purposes of this section.[372]

(2). The term "covered shareholder action" means any of the following—

(a) any derivative action or proceeding brought on behalf of the issuer, provided the plaintiff is not the issuer, any action asserting a claim of breach of a fiduciary duty owed by any director or covered officer of the issuer to the issuer or the issuer's stockholders,

(b) any action asserting a claim arising pursuant to any provision of the corporate law of the issuer's domicile state (or, in the case of an issuer that is not a corporation, the applicable organizational statute of the domicile state), or

(c) any action asserting a claim governed by the internal affairs doctrine.

(3). The term "director" means—

372. This is modeled loosely on DEL. CODE ANN. tit. 10, § 3114(b) (2013).

(a) For a corporation, a member of the corporation's board of directors;

(b) For a limited liability company, a manager or a member of the limited liability company's board of managers;

(c) For a limited partnership, a general partner or, if the general partner or, a director of the general partner;

(d) For any other entity, a member of the entity's governing body.

(4). The term "domicile state" means

(a) the State in which the issuer is incorporated, in the case of a corporation, or

(b) the State in which the issuer is organized, in the case of any other entity.

(5). The term "forum designation provision" means a provision approved by the shareholders of the issuer that designates the forum where they prefer to have multi-forum litigation proceed;

(6). The term "plaintiff group" means any person on whose behalf a covered shareholder action purports to be brought. For a derivative action, the "plaintiff group" includes all shareholders. For a class action, the "plaintiff group" includes all class members.

(7). One case is "similar" to another case if the first case—

(a) shares any common cause of action or claim for relief with the second case and

(b) shares a common nucleus of operative fact with the second case.

(B) Stay of proceedings.

(1). A Federal court shall stay any covered shareholder action in its entirety on the motion of any party to the federal covered shareholder action if not later than thirty days after the filing of the federal covered shareholder action any similar covered shareholder action is—

(a) filed in the courts of the issuer's domicile state, or

(b) filed in the forum designated by the issuer's forum designation provision, if any.

(2). The stay under this subsection shall not be dissolved until the earlier of—

(a) judgment is entered in all similar cases pending in the domicile state, or

(b) all cases pending in the domicile state are stayed by the courts of the domicile state expressly in favor of the cases subject to stay under this section.

(C) Removal.

(1). Any covered shareholder action brought in any State court shall be removable to the Federal district court for the district in which the action is pending if not later than thirty days after the filing of the State covered shareholder action—

(a) any similar covered shareholder action is filed in any other State (including but not limited to the domicile state), or

(b) any similar covered shareholder action is filed in any Federal court.

(2). The removal provisions of subsection (c)(1) shall not apply to any covered shareholder action filed in—

(a) the domicile state, in the case of an issuer that has not adopted a forum designation provision, or

(b) the forum designated in the issuer's forum designation provision.

(3). The district courts shall have jurisdiction of any covered shareholder action removed pursuant to this subsection (c) in which the matter in controversy exceeds the sum or value of $1, and in which—

(a) any member of a class of plaintiffs is a citizen of a State different from any defendant, in the case of a class action,[373] or

(b) either the shareholder-plaintiff or the issuer is a citizen of a State different from any defendant.

(4). For purposes of this subsection, the issuer shall be deemed a citizen of both the state where it maintains its principal executive offices and its domicile state.

(D) Intervenors.

Any member of the plaintiff group of any issuer may intervene in a covered shareholder action brought in a Federal court and shall be considered a party to the covered shareholder action solely for purposes of making a motion to stay proceedings under subsection (b) or seeking removal under subsection (c).

(E) Settlement bars.

(1). Except for the courts of the issuer's domicile state or the forum designated by the issuer's forum designation provision, if any, no court may approve the release of any claim asserted in covered shareholder action that is—

(a) filed in the courts of the issuer's domicile state not later than thirty days after the filing of the action purporting to release such claim, or

(b) filed in the forum designated by the issuer's forum designation provision, if any, not later than thirty days after the filing of the action purporting to release such claim.

(2). No settlement in a covered shareholder action may release any causes of action arising under the federal securities acts asserted in an action in federal court that arises out of the same set of operative facts and was filed not later than thirty days after the filing of the covered shareholder complaint in the domicile state or forum designated by the issuer's forum designation provision, if any.

373. This is modeled loosely on 28 U.S.C. § 1332(d)(2) (2006).

(F) Opting out.

This subsection shall not apply to any issuer that has adopted by shareholder vote a resolution stating explicitly that it waives applicability of this Act to covered shareholder actions involving the issuer.