

MULTI-JURISDICTIONAL LITIGATION: WHO CAUSED THIS
PROBLEM, AND CAN IT BE FIXED?

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ABSTRACT

This Article examines the origins of multi-jurisdictional deal litigation—the growing phenomenon of stockholder claims relating to the same proposed transaction being filed not only in the target company's state of incorporation (oftentimes, Delaware), but also in other locations, such as where the company's principal place of business is located (usually, a non-Delaware forum). The Article examines the many costs, risks and problems associated with multi-jurisdictional litigation, as well as the methods being used by defendants to manage a plaintiff-driven problem that has no easy solution. The Article also explores how the Delaware Court of Chancery—regarded by many as the most renowned business court in the world—has approached the multi-jurisdictional litigation issue, and identifies potential solutions for parties, counsel and the courts to consider. The authors ultimately advocate that though there is no perfect solution, the best approach would be one in which the common law acknowledges claims involving the internal affairs of a corporation, including those arising out of a proposed transaction, be raised solely in, and addressed by, courts in the state of incorporation.

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I. INTRODUCTION

The decades-long war between stockholder plaintiffs and boards of directors (and the law firms that represent them) has seen brief respites over the years, but has returned recently, with a vengeance.¹ Over the past two years, merger and acquisition activity has steadily gained steam and, not surprisingly, there has been a corresponding increase in deal litigation.²

¹See CORNERSTONE RESEARCH, RECENT DEVELOPMENTS IN SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS 2 (2012) (finding that "the number of M&A shareholder lawsuits valued at or over \$500 million for deals announced in 2007 [compared] with those announced in 2010 and 2011 . . . [has] increased almost twofold"); Dionne Searcey & Ashby Jones, *Deals & Dealmakers: First, the Merger; Then the Lawsuit*, WALL ST. J., Jan. 10, 2011, at C1.

²*Id.* (noting that "[t]he mergers-and-acquisitions market is heating up again," and that "[t]he number of [deal litigation] lawsuits filed in state and federal courts has risen from 36 in 2008 to 191 in 2009 and 216 in the first 10 months of 2010"); see also Peter E. Kazanoff, *Multi-Jurisdictional Shareholder Challenges to M&A Transactions*, in M&A LITIGATION 2011 39, 42 (Practising Law Institute ed., 2011) ("Shareholder lawsuits challenging M&A transactions are now so commonplace

One of the more interesting recent battles between these warring corporate constituents does not relate to a matter of substance, but rather, a matter of location: Where should these corporate governance disputes be litigated? Ten years ago, this was not a serious concern. If the company at the center of the deal litigation was incorporated under Delaware law, the litigation would be filed and resolved in the Delaware Court of Chancery, a world-renowned business court known for its experience in handling such matters.³ That is no longer the case.⁴ Indeed, due to tactical maneuvering by clever plaintiffs' counsel, it is no longer axiomatic that a stockholder claim for breach of fiduciary duty against a board of directors of a Delaware company—a claim which must be resolved, as a matter of constitutional law, under Delaware law⁵—will be litigated in the Delaware courts.⁶

that regardless of the process run by a corporation and the price offered to shareholders, attorneys invariably file lawsuits challenging the transaction."); Mark Lebovitch, Jerry Silk & Jeremy Friedman, *Making Order Out of Chaos: A Proposal To Improve Organization and Coordination in Multi-Jurisdictional Merger-Related Litigation*, (Dec. 01, 2011), http://www.blbglaw.com/misc_files/MakingOrderoutofChaos (noting that the increased deal volume over the past two years has led to an increase in merger-related class action lawsuits in multiple locations); Kevin LaCroix, *Why M&A-Related Litigation is a Serious Problem*, (Nov. 28, 2011), <http://www.dandodiary.com/2011/11/articles/securities-litigation/why-marelated-litigation-is-a-serious-problem/>; David Marcus, *The dramatic increase in M&A litigation*, DEAL MAG, Nov. 28, 2011, <http://www.thedeal.com/magazine/ID/043019/commentary/the-dramatic-increase-in-m-a-litigation.php>; Jennifer Johnson, *Securities Class Actions in State Court* 54 (Lewis & Clark Law School Legal Studies Research Paper No. 2011-17), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1856695 (noting that while "only a very few traditional securities class actions now proceed in state court . . . [t]he number of M&A class action objection suits has mushroomed over the past few years").

³See Sara Lewis, *Transforming the "Anywhere but Chancery" Problem into the "Nowhere but Chancery" Solution*, 14 STAN. J.L. BUS. & FIN. 199, 200 (2008) (stating that Delaware courts "have developed an extensive and thorough body of corporate law," and that "Delaware's judges typically have considerable expertise in corporate law matters, and Delaware courts provide litigants with an expedited process that results in speedier and more efficient resolutions of disputes").

⁴See *infra* Part I.B.1 for a discussion of reasons why corporations have begun to file lawsuits outside of Delaware. See also Lewis, *supra* note 3, at 200 (noting that plaintiffs' lawyers seek to file anywhere but the Delaware Court of Chancery in hopes of settling meritless strike suits due to the unpredictability and perceived inefficiency of non-Delaware courts).

⁵See *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 91 (1987) (noting that it is "an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares"); see also *Edgar v. Mite Corp.*, 457 U.S. 624, 645 (1982) ("The internal affairs doctrine is a . . . principle which recognizes that only 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 . . ."); *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas*, 2011 WL 6793775, at *4 (Del. Dec. 28, 2011) ("In American corporation law, the internal affairs doctrine is a dominant and overarching choice of law principle."); *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005) ("The internal affairs doctrine applies to those matters that pertain to the relationships among or between the corporation and its officers, directors, and shareholders."); *Draper v. Paul N. Gardner Defined Plan Trust*, 625 A.2d 859, 865 (Del. 1993) (noting that the internal affairs doctrine is one of "serious constitutional

What was once considered a contrarian, leverage-creating tactic by a few discrete plaintiff law firms has now become a routine facet of deal litigation.⁷ Stockholder plaintiffs will file deal litigation (raising issues of Delaware law) not only in Delaware, but also in non-Delaware forums (usually where the company's principal place of business is located).⁸ As a result, multiple sets of plaintiffs will file multiple lawsuits in multiple locations related to the same deal.⁹ This tactical phenomenon has become known as "multi-jurisdictional litigation," and it now exists in nearly every deal litigation matter. As former Chancellor Chandler remarked in a settlement-related decision involving multi-jurisdictional litigation in *In re Allion Healthcare Inc. Shareholders Litigation*,¹⁰ "[j]udges, defense counsel, and the plaintiffs' bar are now routinely confronted with these sorts of disputes and have yet to come up with a workable solution. The potential problems, as one can imagine, are numerous."¹¹ Indeed, there is no unified mechanism for handling this issue on a national scale.¹²

proportions—under due process, the commerce clause and the full faith and credit clause").

⁶See Lewis, *supra* note 3, at 200.

⁷See, e.g., *In re Allion Healthcare Inc. S'holders Litig.*, 2011 WL 1135016, at *4 (Del. Ch. Mar. 29, 2011) (noting that the "fallout" of multi-form deal litigation "has become increasingly problematic in recent years as more and more of these cases are filed in multiple jurisdictions"); Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 19, *In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL (Del. Ch. Jan. 13, 2011) ("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."); see also *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 957 (Del. Ch. 2007) ("The reality is that every merger involving Delaware public companies draws shareholder litigation within days of its announcement. An unseemly filing Olympiad typically ensues, with the view that speedy filing establishes a better seat at the table for the plaintiffs' firms involved.").

⁸Lebovitch et al., *supra* note 2, at 1.

⁹Transcript of Courtroom Status Conference at 18, *Scully v. NightHawk Radiology Holdings, Inc.*, C.A. 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. It's increased dramatically to the point where there's now a suit filed over virtually every case; not only that, but over every deal. Effectively now, you also get multiple suits over every deal.").

¹⁰2011 WL 1135016 (Del. Ch. Mar. 29, 2011).

¹¹*Id.* at *4 (footnote omitted).

¹²This is in contrast to the federal system where a judicial panel is the mechanism for determining whether civil actions pending in different federal districts that involve one or more common questions of fact should be transferred to one federal district. See 28 U.S.C. § 1407 (2006), which provides procedures for handling "Multidistrict litigation," stating that:

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

Id. § 1407(a).

This Article proceeds in Part II by examining the phenomenon of multi-jurisdictional litigation, how it originated, and why it has increased in popularity within the plaintiffs' bar. Part III of this Article examines the numerous risks and problems that multi-jurisdictional litigation poses to defendant companies and boards of directors, and ways that the defense bar has attempted to handle this tactic. Part IV of this Article further examines the conflicts inherent in multi-jurisdictional litigation, and the approach that the Delaware Court of Chancery has taken to address these perceived concerns.¹³ Finally, Part V of this Article identifies potential solutions for parties, practitioners, and courts to consider for addressing multi-jurisdictional litigation.

II. MULTI-JURISDICTIONAL LITIGATION: HOW AND WHY THE TACTIC EMERGED

A. *What is Multi-Jurisdictional Litigation?*

The concept of multi-jurisdictional litigation is easily described: In the wake of an announced transaction, different sets of plaintiffs' counsel will "rush to a courthouse" with class action lawsuits challenging a proposed transaction in both the state in which the company is incorporated (usually Delaware) and the state where the corporation has its principal place of business (which may be anywhere in the United States, other than Delaware).¹⁴ These lawsuits will typically raise virtually identical claims on behalf of the same putative stockholder class. Multi-jurisdictional litigation may also involve virtually identical state law claims that are filed in federal court, coupled with federal securities law disclosure claims filed under

¹³Despite the advent of multi-jurisdictional litigation, the Delaware Court of Chancery clearly remains the most important business law court in the country, if not the world, because of Delaware's status as the preferred location for companies to incorporate. The Court of Chancery has, over decades, developed an expertise in handling expedited deal litigation and, along with the Delaware Supreme Court, has produced a body of corporation law that other states routinely rely on when required to address a matter of corporation law, whether under Delaware law or their own state's law. *See, e.g.,* Davenport v. Benhamou, 2007 WL 4711512, at *2 (Mass. Super. Ct. Dec. 20, 2007) ("While it is true that this court is capable of interpreting and applying Delaware law, it is not unreasonable to defer to the Delaware court's greater expertise in dealing with its own laws." (citation omitted)); *In re Dial Corp.*, CV 2003-023973, at 2 (Ariz. Super. Ct. Mar. 1, 2004) (granting a motion to stay because the Delaware Court of Chancery was better able to address "substantial, sophisticated and significant issues of Delaware law," and to "do so on an expedited basis if requested").

¹⁴Lebovitch et al., *supra* note 2, at 1.

Section 14(a) of the Securities Exchange Act of 1934.¹⁵ As a result, "[d]efense counsel is forced to litigate the same case—often identical claims—in multiple courts."¹⁶ Perhaps even worse, "if a case does not settle or consolidate in one forum, there is the possibility that two judges would apply the law differently or otherwise reach different outcomes, which would then leave the law in a confused state and pose full faith and credit problems for all involved."¹⁷

B. *The Origins of Multi-Jurisdictional Litigation*

1. Possible Origins of the Phenomenon

Why does multi-jurisdictional litigation happen in the wake of a deal announcement? There are a number of reasons, some more obvious than others. Many believe, for example, that the advent of multi-jurisdictional litigation was a reaction by the plaintiffs' bar to certain unfavorable rulings in Delaware from a stockholder point of view.¹⁸ Plaintiffs' counsel began to file routine corporation law disputes elsewhere so that they would not be heard by the experienced business law judges of the Delaware Court of Chancery.¹⁹ A claim for breach of fiduciary duty that might otherwise be dismissed by the Delaware courts may gain traction in a non-Delaware forum.²⁰ In other

¹⁵See, e.g., *Krieger v. Atheros Commc'ns, Inc.*, 776 F. Supp. 2d 1053, 1058 (N.D. Cal. 2011).

¹⁶*Allion*, 2011 WL 1135016, at *4; see also Lebovitch et al., *supra* note 2, at 1 (noting that multi-jurisdictional litigation results in "parallel litigation that wastes judicial resources, unduly burdens defendants, and, most importantly, threatens shareholders").

¹⁷*Allion*, 2011 WL 1135016, at *4.

¹⁸John Armour, Bernard Black & Brian Cheffins, *Delaware's Balancing Act*, 87 IND. L.J. (forthcoming 2012) (manuscript at 23), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677400 ("Plaintiffs' attorneys might avoid Delaware because they believe its judges tend to favor corporate defendants.").

¹⁹See Searcey & Jones, *supra* note 1, at C1 ("Lawyers in turn have been filing the suits in state courts where they think they may be able to find an unsuspecting judge who won't see the harm in holding up a deal while the matter works its way through court."); Theodore Mirvis, *Anywhere But Chancery: Ted Mirvis sounds an alarm and suggests some solutions*, 7 M&A J. 17, 17 (May 2007) ("[Y]ou take that maybe to a state court judge someplace who's never had a corporate case and . . . it can be a little unnerving."); Kazanoff, *supra* note 2, at 42-43 (noting that plaintiffs will file outside of Delaware in the hope that a court will take extra-corporate interests, such as employment concerns, into account when making a decision, or will ignore dispositive motion practice in favor of liberal discovery); Lebovitch et al., *supra* note 2, at 2 ("Shareholders are also hurt [by multi-jurisdictional litigation] when a plaintiffs' firm in one of the competing jurisdictions seeks to accelerate the procedural posture of its case by pursuing a temporary restraining order or some other form of extra-expedited relief that is not really appropriate for the facts of the case.").

²⁰*Compare* Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 243 (Del. 2009) (noting that "[i]n the transactional context, an extreme set of facts [is] required to sustain a disloyalty claim premised

words, plaintiffs who file in a non-Delaware forum may hope to obtain a different interpretation of Delaware law than would be provided by a Delaware court.²¹ In addition, unlike most other courts, litigation in the Court of Chancery, a court of equity, does not pose the risk of a jury trial²² or punitive damages if the case proceeds past a preliminary injunction phase.²³ This may help a plaintiff stockholder create leverage over corporate defendants in a particular matter by making the case riskier to take all the way through trial, and thus, make defendants more inclined to settle at a higher cost.²⁴ Perhaps even more disconcerting is that when neither court is willing to stay one action in favor of the other, defendants may face litigating the same action in separate courts and encounter inconsistent rulings.²⁵

on the notion that disinterested directors were [acting in bad faith by] intentionally disregarding their duties." (internal quotation marks omitted)), and *Wayne Cnty. Emps.' Ret. Sys. v. Corti*, 2009 WL 2219260, at *9 (Del. Ch. July 24, 2009) (granting the director defendant's motion to dismiss for plaintiff's failure to adequately plead facts that state a claim for damages that was not barred by the corporation's exculpatory clause, pursuant to Delaware General Corporation Law Section 102(b)(7), unless the plaintiffs could sufficiently plead facts that constituted a failure to act loyally or in good faith), *aff'd*, 996 A.2d 795 (Del. 2010) (Table), with *Brown v. Brewer*, 2010 WL 2472182, at *5-*10, *16 (C.D. Cal. June 17, 2010) (distinguishing *Lyondell* and *Corti*, and denying defendants' motion for summary judgment "on the fiduciary duty claim with respect to Plaintiff's bad faith theory in the *Revlon* auction context").

²¹See Transcript of Office Conference at 13, *In re Medco Health Solutions, Inc. S'holders Litig.*, C.A. No. 6720-CS (Del. Ch. Aug. 11, 2011). Chancellor Strine stated:

It is not in my view a legitimate reason to not have a case in a forum [because] I don't like how the highest court of that state will apply its own law. . . . If the reason you don't wish to be in a forum is that you don't like the decision that will be rendered by the highest court of that state on a decision, what you're saying is, I want to have a law applied different than the law of that state.

Id.

²²See *Getty Ref. & Mktg. Co. v. Park Oil, Inc.*, 385 A.2d 147, 151 (Del. Ch. 1978) ("The old procedure of framing of issues by the Court of Chancery for jury trial is now probably outmoded and this Court is certainly not equipped to hold jury trials itself even if permissible." (citation omitted)).

²³See *Envo, Inc. v. Walters*, 2009 WL 5173807, at *8 (Del. Ch. Dec. 30, 2009) ("The Court of Chancery does not award punitive damages."); *Beals v. Washington Int'l, Inc.*, 386 A.2d 1156, 1158-60 (Del. Ch. 1978) (explaining that the Court of Chancery does not have jurisdiction to award punitive damages). *Cf. Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 784 (Tex. App. 1987) (describing a jury verdict arising from deal litigation, in a court of law rather than court of equity, where the jury found that Texaco had knowingly induced a breach of a contract when Pennzoil's attempt to acquire Getty Oil stock was thwarted by a higher bid by Texaco, and awarded Pennzoil \$3 billion in punitive damages, which was later reduced to \$1 billion on appeal).

²⁴*Mirvis*, *supra* note 17, at 17 ("I think it's the plaintiffs' bar kind of paying a back-handed compliment to the Delaware courts. They 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.")

²⁵*Compare In re Topps Co. S'holders Litig.*, 924 A.2d 951, 958 (Del. Ch. 2007) (holding that the Delaware Court of Chancery held a greater interest, pursuant to the internal affairs doctrine, than a New York court in resolving deal litigation involving a Delaware company), with *In re Topps Co., S'holders Litig.*, 2007 WL 5018882, at *7 (N.Y. Sup. Ct. June 8, 2007) (declining to stay the

In addition, many believe that the decision by the plaintiffs' bar to start filing Delaware deal litigation in non-Delaware forums was more about their personal bottom line.²⁶ It became well known in the early part of last decade that the Court of Chancery would not lavishly reward plaintiffs' counsel with fees arising from settled or mooted disclosure claims.²⁷ In fact, some track

New York cause of action in deference to the pending Delaware litigation because, among other reasons, the New York lawsuit was "first-filed" by one day). *See also In re Allion Healthcare Inc. S'holders Litig.*, 2011 WL 1135016, at *4 (Del. Ch. Mar. 29, 2011) (identifying the problems when two courts reach inconsistent results on the same claims).

²⁶*See* Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 20, *In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL (Del. Ch. Jan. 13, 2011) (explaining to plaintiffs' counsel that "the whole problem is the diversion of interests between entrepreneurial plaintiffs' counsel and the class," and noting that plaintiffs' counsel "maximize by getting the most fee for the least work" and "[t]he class maximizes by getting a recovery. . . . So [plaintiffs' counsel] have an incentive to do less").

²⁷A disclosure-based settlement is one in which a deal litigation is resolved through the issuance of corrective or supplemental disclosures. In return for providing these additional disclosures, plaintiffs will release claims against defendants relating to price and process, and will also seek a fee for obtaining the disclosure benefit for the class. These fees generally range from \$400,000 to \$500,000. *See* Transcript of Status Conference at 9, *In re Burger King Holdings, Inc., S'holders Litig.*, C.A. No. 5808-VCL (Del. Ch. Jan. 19, 2011); *see also* Transcript of Oral Argument at 103, *Continuum Capital v. Nolan*, C.A. No. 5687-VCL (Del. Ch. Feb. 3, 2011) (awarding \$525,000 for disclosures); Transcript of Rulings of the Court from Settlement Hearings at 6, *In re Valeant Pharm. Int'l S'holders Litig.*, C.A. No. 5644-VCS (Del. Ch. Jan. 24, 2011) (awarding \$450,000 for disclosures); Transcript of Settlement Hearing and Rulings of the Court at 67, *In re Burlington N. Santa Fe S'holder Litig.*, C.A. No. 5043-VCL (Del. Ch. Oct. 28, 2010) (awarding \$450,000 for disclosures); *Laborers Local 235 Benefit Funds v. Starent Networks, Corp.*, C.A. No. 5002-CC, at 6 (Del. Ch. June 30, 2010) (approving therapeutic settlement of disclosure claims with \$385,000 in attorneys' fee); *In re Nat'l City Corp. S'holders Litig.*, 2009 WL 2425389, at *6 (Del. Ch. July 31, 2009) (awarding \$400,000 for supplemental disclosures and noting that counsel's efforts did not justify a larger award where "the benefit obtained for the shareholder class was miniscule"), *aff'd*, 998 A.2d 851 (Del. 2010) (Table); *In re James River Grp., Inc. S'holders Litig.*, 2008 WL 160926, at *2 (Del. Ch. Jan. 8, 2008) (awarding a fee of \$400,000 for supplemental disclosures and the number of hours spent by counsel on the case); *In re Golden State Bancorp Inc. S'holders Litig.*, 2000 WL 62964, at *3 (Del. Ch. Jan 7, 2000) (awarding \$500,000 for a disclosure-based settlement). Plaintiffs may also seek fees when their disclosure claims are mooted, unilaterally, by corrective or supplemental disclosure apart from any settlement. *See, e.g., In re Sauer-Danfoss Inc. S'holders Litig.*, C.A. No. 5162-VCL, at 1 (Del. Ch. May 3, 2011) (awarding only \$75,000 out of the requested \$750,000 for plaintiff attorneys' fees when Vice Chancellor Laster found that only ten out of eleven identified disclosure claims that were purportedly mooted by additional disclosures did not identify material information); *Greenfield v. Frank B. Hall & Co.*, 1992 WL 301348, at *3 (Del. Ch. Oct. 19, 1992), *reprinted in* 18 DEL. J. CORP. L. 1003, 1010 (1993) ("When a suit is settled or mooted, counsel fees may be granted if: (1) the suit was meritorious when filed; (2) action producing a benefit to the corporation was taken; and, (3) the benefit to the corporation was causally related to the suit." (emphasis added) (citing *Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 878 (Del. 1980))). Under such circumstances, defendants will not obtain a release of other claims. The Delaware courts have recently split on whether these types of motions for mootness fees should be allowed on an "interim" basis. *Compare In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *16 (Del. Ch. June 27, 2011) (granting interim award of \$2.75 million in mootness fees), *with In re Novell, Inc. S'holder Litig.*, C.A. No. 6032-VCN, at 16 (Del. Ch. Aug. 30, 2011), *and Frank v. Elgamal*, C.A. No. 6120-VCN, at 11 (Del.

the origin of the multi-jurisdictional litigation boom to (then) Vice Chancellor (now Chancellor) Strine's decision in *In re Cox Communications, Inc. Shareholders Litigation*,²⁸ where he appeared to crack down on what he perceived to be a cozy settlement practice in the deal litigation context that was netting the plaintiffs' bar sizeable fees for what some perceived to be modest benefits.²⁹ The court's opinion was issued in the context of deciding whether to approve a settlement arising from litigation involving a "going-private" merger with a controlling stockholder,³⁰ which implicated the entire fairness standard of review under *Kahn v. Lynch Communication Systems, Inc.*³¹ As the court explained:

[T]he very nature of *Lynch* makes it impossible for the court to determine what, if any value, the plaintiffs' lawyers are creating—especially when the plaintiffs sue on the mere announcement of a negotiable proposal. *Lynch* deals started with a publicly announced proposal to a special committee tend to always result in an improvement in price and they tend to always result in a settlement at the same level approved by the special committee. Defendants have no rational incentive to hold out and refuse to settle, as they know they will face a non-dismissible complaint and substantial discovery costs, at a minimum, or, said another way, they have a positive incentive to buy peace in the form of a general release. For their part, plaintiffs' lawyers have a substantial incentive to go along with the final price level a special committee accepts because that will generate a substantial fee at no risk, in strong contrast to the substantial risk that counsel would incur if it spurned settlement, suffered the costs of pressing a case to trial, and hazarded a judicial decision that might find that the special committee obtained a fair price after fair bargaining. The incentives on both sides maximize the likelihood of settlements that result not from any case-specific efforts by the plaintiffs' lawyers, but from the mutually livable outcomes generated

Ch. July 28, 2011) (denying interim mootness fee application as premature).

²⁸879 A.2d 604 (Del. Ch. 2005).

²⁹*Id.* at 642 (holding that the court would not credit the full amount of hours submitted by the plaintiffs' attorneys as being reasonable "given that the hours worked on the matter [were] excessive in relation to what was usefully done, involved an inefficient allocation between partners and associates, and involved work done on poorly crafted complaints and organizational infighting").

³⁰*Id.* at 605.

³¹638 A.2d 1110 (Del. 1994).

when settlements are tied to the financial results achieved by special committees. Everyone gets happy and those few who are not can seek appraisal if they believe strongly enough in their position to run that risk.³²

The court concluded by drastically cutting the fee sought by the plaintiffs in that case, and "by recognizing that complaints attacking negotiable proposals are not meritorious and do not give rise to a presumptive claim to a fee."³³ Later decisions by the Court of Chancery have picked up on these themes, characterizing the settlement negotiations that occur in similar deal litigation contexts as a "Kabuki dance."³⁴ Other decisions have also cast doubt on deal litigation matters that settle quickly based on disclosures alone.³⁵

³²*Cox Commc'ns*, 879 A.2d at 633.

³³*Id.* at 647-48.

³⁴See *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 945 (Del. Ch. 2010). Vice Chancellor Laster noted that:

Knowledgeable readers will by this time have recognized the opening steps in the *Cox Communications* Kabuki dance. 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.

Id. at 945-46.

³⁵This message has been sent at times to both plaintiffs and defendants. See, e.g., Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 7, *In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL (Del. Ch. Jan. 13, 2011) (noting that the court will take into account the law firm's history of settling based on disclosures when appointing lead counsel, and stating that refusal to settle based on disclosures "shows you're in there fighting and you're not simply taking the easy disclosure settlement and walking away with your four to [five hundred thousand dollars]"); Transcript of Courtroom Status Conference at 19, *Scully v. NightHawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL (Del. Ch. Dec. 17, 2010) (questioning the motivation of the defense counsel for entering into a disclosure-based settlement in Arizona, which would then be used to dismiss the Delaware action on *res judicata* grounds, and noting that "historically, plaintiffs' lawyers have been subjected to criticism for the practice of suing on the announcement of every deal, then agreeing to global disclosure settlements"); *Revlon*, 990 A.2d at 947 (replacing lead plaintiff counsel and commenting on the proposed settlement based on therapeutic changes to the merger agreement by noting that "[f]requent filers like the firms in this case have perfected this technique as a basis for settling cases challenging third-party deals"); Transcript of Settlement Hearing at 14, *In re Monogram Biosciences, Inc. S'holders Litig.*, C.A. No. 4703-CC (Jan. 26, 2010) ("[T]here is a sort of continuing pattern of people just challenging deals, basically raising sort of increasingly marginal disclosure claims Honestly, it's not the kind of litigation that is particularly edifying. It doesn't seem to be inspired . . . by the economic motivations of stockholders or the class."); *In re Nat'l City Corp. S'holders Litig.*, 2009 WL 2425389, at *4, *6 (Del. Ch. July 31, 2009) (reducing plaintiffs' fee request from the "princely sum" of \$1.2 million to \$400,000 where the benefit was solely therapeutic disclosures). The message has prompted some plaintiffs' lawyers to forgo disclosure-based settlements in favor of abandoning preliminary injunction applications based on disclosure claims when supplemental disclosures are made, and

Perhaps dissatisfied with the courts' views on disclosure-based settlements or plaintiff counsel fees in such contexts, certain plaintiffs' counsel began to look elsewhere for a more receptive forum of a million-dollar-plus fee payday for disclosure-based settlements or mooted disclosure claims.³⁶ Moreover, it comes as no surprise that plaintiffs' counsel are financially motivated to be appointed "Lead Plaintiff" in a deal litigation, presumably because it will allow them the greatest leverage among all the plaintiff law firms that file lawsuits in connection with a particular transaction when it comes time to split up any fee award.³⁷ Opening

then seeking "mootness" fees on an interim basis—a practice that courts have historically described as disfavored. *See, e.g.*, *Emerald Partners v. Berlin*, 1994 WL 48993, at *1 (Del. Ch. Feb. 4, 1994), *reprinted in* 19 DEL. J. CORP. L. 1195, 1197 (1994) (denying the motion for an award of interim attorneys' fees after noting that "[i]nterim attorneys' fees are not favored").

³⁶*See* Mirvis, *supra* note 17, at 17 ("We've talked to the plaintiffs' lawyers in settlements and they will tell you that they have clubbed together, they have made deals with each other, that they have different fee schedules for the 49 states versus the first state."); Alison Frankel, *Strive to M&A bar: Don't stop believing . . . in Delaware*, (Nov. 14, 2011), <http://newsandinsight.thomsonreuters.com/Legal/News/ViewNews.aspx?id=32272&terms=@ReutersTopicCodes+CONTAINS+ANV> (quoting plaintiffs' counsel at a conference about the role of the Court of Chancery in handling deal litigation, stating that "if plaintiffs' lawyers believe it's too hard to win a case in Delaware and that they're unlikely to be awarded generous fees, they'll file their cases elsewhere"); *see also* Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 19, *In re Compellent*, C.A. No. 6084-VCL (identifying certain plaintiffs' firms that began to consciously file Delaware deal litigation cases in non-Delaware forums). Despite the recent scrutiny of disclosure-based settlements, one point often overlooked is that deals are continuing to be enjoined on disclosures alone. *See, e.g.*, *In re Atheros Commc'ns., Inc. S'holder Litig.*, 2011 WL 864928, at *14 (Del. Ch. Mar. 4, 2011) (enjoining a transaction based on a disclosure claim relating to banker compensation); Transcript of Plaintiffs' Motion for a Preliminary Injunction at 98, *Steinhardt v. Howard-Anderson*, C.A. No. 5878-VCL (Del. Ch. Jan. 24, 2011) (enjoining a transaction based on a disclosure claim relating to a banker's valuation analysis); *Maric Capital Master Fund, Ltd. v. PLATO Learning, Inc.*, 11 A.3d 1175, 1176 (Del. Ch. 2010) (enjoining a deal that was based on a disclosure claim relating to a banker's discounted cash flow analysis and free cash flow projections, along with other disclosure issues). Given this fact, it must be the case that if a deal can be enjoined based on disclosures, then disclosures should be a valid basis for a settlement, under the appropriate circumstances.

³⁷Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 20, *Compellent*, C.A. No. 6084-VCL (noting that if plaintiffs' counsel files a suit in another forum, "you do have control of that case and . . . [y]ou 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* Lebovitch et al., *supra* note 2, at 3. In his article, Mark Lebovitch identified that increased costs and leverage in the settlement context may occur, stating that:

[P]laintiffs in the alternate and stayed [non-Delaware] forum [may] refuse to join the settlement [in Delaware] unless they are paid a significant "tax," disproportionate to any efforts or actual contributions toward the outcome of the case Whether the end result is a negotiated fee or a contested fee application, Delaware shareholders' counsel must request a larger fee to pay the necessary "taxes" to plaintiffs in the alternate forum. Thus, defendants often end up paying higher attorneys' fees than if the case was litigated in a single forum.

Id. In one situation, the same plaintiff represented by the same law firm filed virtually identical lawsuits on behalf of the same purported class of stockholders in both Delaware and a non-Delaware

litigation on multiple fronts provides plaintiffs' counsel multiple opportunities to be the lead plaintiff, and therefore claim a bigger piece of the pie.³⁸ In addition, other jurisdictions may allow tempting settlement practices that Delaware does not, like allowing parties to negotiate settlement terms contemporaneous with fees.³⁹

The net result of the "multi-jurisdictional litigation" tactic is to increase the costs of litigation and elevate the risk of an adverse decision for corporate defendants.⁴⁰ This tactical leverage forces defendants to consider settling deal litigation that, but for the risks posed by multi-jurisdictional litigation, defendants might otherwise have moved to dismiss.⁴¹

2. Judicial Observations About the Origins

Recently, the Court of Chancery began to expressly acknowledge the origin of multi-jurisdictional litigation and its underpinnings. For example, in *In re Compellent Technologies Inc. Shareholder Litigation*, Vice Chancellor Laster observed during a hearing on a motion to consolidate and to organize counsel that defendants did not create the multi-jurisdictional litigation problem.⁴² He first noted that plaintiffs' counsel will file in a

forum in an apparent attempt to win lead plaintiff in both locations, with the goal of allowing the non-Delaware forum to take the lead. *See* Transcript of Teleconference at 8-9, *In re BJ Servs. Co. S'holders Litig.*, C.A. No. 4851-VCN (Del. Ch. Sept. 25, 2009). This was not successful. *See* Transcript of Hearing on Motions for Designation of Lead and Liaison Counsel at 28, *In re BJ Servs. Co. S'holders Litig.*, C.A. No. 4851-VCN (Del. Ch. Oct. 5, 2009) (appointing the plaintiffs and their counsel that filed exclusively in Delaware as lead plaintiff, rather than the parties that filed in both jurisdictions). The "deal world is [now] watching" such scraps amongst plaintiffs' counsel for lead counsel status. Alison Frankel, *Shareholder lawyers battling to control Dela. El Paso case*, (Nov. 15, 2011), http://newsandinsight.thomsonreuters.com/Legal/News/2011/11_November/Shareholder_lawyers_battling_to_control_Dela__El_Paso_case/.

³⁸*See* Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 20, *Compellent*, C.A. No. 6084-VCL.

³⁹*See* Transcript of Settlement Conference and Plaintiffs' Application for Attorneys' Fees at 49, *In re Clariant, Inc. S'holders Litig.*, C.A. No. 5932-VCS (Del. Ch. June 15, 2011) (discussing the practice in California where, "like many other jurisdictions outside of Delaware, discussions regarding [attorney's] fees contemporaneous with the discussion of the agreement in principle for the settlement are permissible"). Delaware courts have frowned upon this practice. *See, e.g., id.* at 46-47 (noting that the best way to avoid these unsavory settlement practices "is to make sure that the [Memorandum of Understanding] doesn't have anything about fees").

⁴⁰*See* Angela C. Zambrano & Paige H. Montgomery, *Fighting on All Fronts: Successfully Managing Multi-Jurisdictional Employment Litigation*, 33 EMP. RELATIONS L.J. 1, 1 (Winter 2007).

⁴¹*See* Brief of Defendants in Response to the Court's December 22, 2010 Order at 1-2, *Scully v. NightHawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL (Del. Ch. Feb. 11, 2011) (noting the Court of Chancery's recognition of the systemic problem of the automatic filing of multiple lawsuits in multiple jurisdictions pursuant to a merger announcement, and noting that the response by boards of directors is to seek to obtain global settlements, regardless of the merits of the allegations).

⁴²*See* Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at

different jurisdiction after actions have already been filed in Delaware to try to get control of cases because "when 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."⁴³ Vice Chancellor Laster has also recognized that plaintiffs' counsel may have been looking for a more receptive forum for a fee application arising from a disclosure-based settlement, stating in one case that "I do think that the . . . plaintiffs initially were probably trying to set up an easy disclosure settlement."⁴⁴

Similarly, in *Scully v. NightHawk Radiology Holdings, Inc.*, Vice Chancellor Laster remarked that "[w]e all know that the phenomenon of plaintiffs filing deal litigation in multiple forums is a continuing problem. It's increased dramatically to the point where there's now a suit filed over virtually every case; not only that, but over every deal."⁴⁵ The court continued by explaining that "[i]t's also well-known that Delaware courts have responded to the filing of poorer-quality suits by cutting fees and criticizing the . . . rapid filing, of these poor-quality, nonmeritorious suits. It's not surprising that plaintiffs' lawyers . . . rationally responded to that by increasing the frequency with which they file elsewhere."⁴⁶

In *In re Allion Healthcare Inc. Shareholders Litigation*,⁴⁷ the court described the multi-jurisdictional litigation phenomenon of filing lawsuits in "Delaware and elsewhere" as "typical."⁴⁸ Vice Chancellor Laster also appeared to acknowledge, in *In re Compellent*, the implications for defendants in these situations, stating that "I regret the fact that the defendants now face proceedings in two forums," which appears to be "something that is driven by the dynamics of the entrepreneurial plaintiffs[] bar in class action situations, rather than by what is collectively rational for the system."⁴⁹ Similar remarks were made by former Chancellor Chandler at

34, *Compellent*, C.A. No. 6084-VCL (noting that multi-jurisdictional litigation "is driven by the dynamics of the entrepreneurial plaintiffs[] bar in class action situations, rather than by what is collectively rational for the system").

⁴³*Id.* at 20.

⁴⁴Transcript of Courtroom Status Conference at 23, *Scully v. NightHawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL (Del. Ch. Dec. 17, 2010).

⁴⁵*Id.* at 18.

⁴⁶*Id.* at 18-19.

⁴⁷2011 WL 1135016 (Del Ch. Mar. 29, 2011).

⁴⁸*Id.* at *1.

⁴⁹Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 34, *Compellent*, C.A. No. 6084-VCL; *see also* Transcript of Oral Argument at 87, *Continuum Capital v. Nolan*, C.A. No. 5687-VCL (Del. Ch. Feb. 3, 2011) (acknowledging the awkward position that defendants are placed in when advocating one forum over another, commenting that "as all litigators know, and as I've mentioned before, it is never an easy task to say to a judge, 'We don't want to be in your courtroom'" because "[t]here is always concern about collateral consequences from that");

an early hearing in the *In re Allion* matter, where the Chancellor noted that "my empathies and sympathies are with the defense bar because they're the ones who are caught in the midst of these multi-forum litigations. They aren't there by choice. They simply have to deal with it."⁵⁰

III. THE DEFENDANT RESPONSE TO MULTI-JURISDICTIONAL LITIGATION

Defendants faced with multi-jurisdictional litigation have attempted to respond and control the increased costs and risks posed in a number of different ways.⁵¹ Though defendants have employed many different methods for dealing with this problem, it is readily apparent that there is no perfect solution.

A. Motion Practice

1. Motions to Dismiss or Stay

In response to multi-jurisdictional litigation, some defendants have moved to dismiss or stay a lawsuit in a non-Delaware forum in deference to a lawsuit in Delaware (assuming one has been filed there).⁵² The grounds for this type of motion can vary, but may include, under appropriate circumstances: (1) the fact that the Delaware action was first-filed⁵³ (or a

Transcript of Telephonic Oral Argument on Plaintiffs' Motion for Expedited Discovery at 20-21, *In re Wyeth S'holders Litig.*, C.A. No. 4329-VCN (Del. Ch. Apr. 7, 2009) (acknowledging that "there may be some unnecessary duplication" where multi-jurisdictional deal litigation is involved, but the result of duplication is "just the nature of the beast of having litigation going on in multiple venues at the same time"); *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 953 (Del. Ch. 2007) ("Presented with the inefficient prospect of litigating identical issues in two courts simultaneously, the defendants now seek to have this court refrain from hearing the injunction motion in order to avoid an unseemly and wasteful duplication of effort.").

⁵⁰Transcript of Settlement Hearing and Rulings at 84, *In re Allion Healthcare Inc. S'holders Litig.*, C.A. No. 5022-CC (Del. Ch. Jan. 19, 2011).

⁵¹*See infra* Part III.A-C.

⁵²*See, e.g.*, Transcript of Hearing on Motions at 48, *Sinioukov v. SRA Int'l, Inc.*, C.N. 1:11-cv-447 (E.D. Va. July 14, 2011) (denying a motion to lift a stay, in part, because "the Delaware action has proceeded," "[l]ead counsel [in Delaware] have done their investigation," and "[t]here has been further negotiation between the initial proxy and the proxy which presently has provided far greater information").

⁵³*See, e.g.*, *Silver v. Engelhard Corp.*, Docket No. MER-C-01-06, at 9 (N.J. Super. Ct. Ch. Div. Mar. 7, 2006) (holding that one factor to consider when granting a motion to stay is whether the action was first-filed in another state, but also noting that "[i]n the class action context, courts should give 'much less weight to first-filed status than is required in the non-representation action context'" (quoting *Biondi v. Scrushy*, 820 A.2d 1148, 1159 (Del. Ch. 2003))); *Braun v. Playboy Enters., Inc.*, No. 2010-CH-30121, at 7 (Ill. Cir. Ct. Oct. 6, 2010); *Ripley v. AMC Entm't, Inc.*, Case No. 04CV220931 (Mo. Cir. Ct. Dec. 15, 2004); *Devine v. Edison Sch., Inc.*, Index No. 602295/03, at 6-7 (N.Y. Sup. Ct. Feb. 13, 2004). Courts are critical of this doctrine because it appears to condone a

McWane argument⁵⁴); (2) a *forum non conveniens* argument,⁵⁵ or (3) the common sense notion that a Delaware court is a more appropriate forum to address an important matter of Delaware corporation law than a non-Delaware court.⁵⁶ Other arguments may be made under the *Colorado River*

different plaintiff's lawyer tactic—the race to the courthouse with a conclusory, perhaps baseless, complaint. See *King v. Verifone Holdings, Inc.*, 994 A.2d 354, 364 & n.34 (Del. Ch. 2010) (stating that "[p]erhaps it is time for the reversal of the traditional presumption in favor of first filers in the derivative suit context," and noting that one way to deal with prematurely filed complaints is to dismiss the complaint with prejudice as to the lead plaintiff), *rev'd*, 12 A.3d 1140 (Del. 2011); *Topps*, 924 A.2d at 957 ("[T]he fact that a particular plaintiff filed the first complaint in a wave of hastily-crafted class action complaints attacking a just-announced transaction has no rational force in determining where a motion to enjoin that transaction should be heard."); *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 608 (Del. Ch. 2005) ("It is exemplary of hastily-filed, first-day complaints that serve no purpose other than for a particular law firm and its client to get into the medal round of the filing speed (also formerly known as the lead counsel selection) Olympics.").

⁵⁴See *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281 (Del. 1970). In *McWane*, the Delaware Supreme Court noted that:

[A] Delaware action will not be stayed as a matter of right by reason of a prior action pending in another jurisdiction involving the same parties and the same issues; that such stay may be warranted, however, by facts and circumstances sufficient to move the discretion of the Court; that such discretion should be exercised freely in favor of the stay when there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and the same issues

Id. at 283; see also *Chadwick v. Metro. Corp.*, 2004 WL 1874652, at *2 (Del. Aug. 12, 2004) ("Under *McWane* and its progeny, a judge, in the exercise of his or her discretion, may stay or dismiss a later-filed suit where a first-filed suit is pending in a court capable of administering prompt and complete justice, and involves substantially similar parties and issues.").

⁵⁵See *Rosen v. Wind River Sys., Inc.*, 2009 WL 1856460, at *3 (Del. Ch. June 26, 2009), *reprinted in* 35 DEL. J. CORP. L. 1147, 1153-54 (2010); see also *Hart v. Gen. Motors Corp.*, 517 N.Y.S.2d 490, 494 (N.Y. App. Div. 1987). The New York Appellate Division court held that:

Given Delaware's paramount interest in determining whether a Delaware corporation properly purchased securities from a group of its shareholders, including one of its directors, the pendency of virtually identical actions in that jurisdiction and the need for uniformity in the application of the pertinent law to this controversy, the court erred in denying the motion to dismiss on the ground of *forum non conveniens*.

Id.

⁵⁶See *supra* note 13; see also *Carroll v. Weill*, 767 N.Y.S.2d 627, 627 (N.Y. App. Div. 2003) ("Delaware, the state of incorporation, where shareholder derivative actions challenging these same transactions were already being litigated, has a paramount interest in claims involving the corporation's internal affairs." (citations omitted)); *Bass v. DeVink*, 765 A.2d 247, 251 (staying a New Jersey litigation and holding that "[t]he Delaware Chancery Court is a particularly appropriate forum because it has a highly developed body of corporate law, and has been recognized as the 'pacesetter' in the field" (citations omitted)); *McCreary v. Celera Corp.*, 2011 U.S. Dist. LEXIS 41639, at *11 (N.D. Cal. Apr. 13, 2011) (staying action in favor of a Delaware action given the "unique expertise of the Delaware court in applying Delaware corporate law"); *Teamsters Local Nos. 175 & 505 Pension Trust Fund v. IBP, Inc.*, 123 F. Supp. 2d 514, 517 ("Because the issues raised in this lawsuit concern the internal affairs of [the company], a Delaware corporation, those issues must be settled under Delaware law.").

abstention doctrine in connection with claims brought in federal court,⁵⁷ including Securities Exchange Act of 1934 Section 14(a) claims, although federal courts have come to different conclusions on whether they have discretion to stay federal securities law claims.⁵⁸ By and large, such motion

⁵⁷See, e.g., *In re Countrywide Fin. Corp. Deriv. Litig.*, 542 F. Supp. 2d 1160, 1172-73 (C.D. Cal. 2008) (applying the *Colorado River* doctrine and staying breach of fiduciary duty claims governed by Delaware law arising from proposed merger in favor of identical claims pending in Delaware Court of Chancery, which "has a well-recognized expertise in the field of state corporation law" (citation omitted)); see also *Telesco v. Telesco Fuel & Masons' Materials, Inc.*, 765 F.2d 356, 359 (2d Cir. 1985) (upholding abstention from shareholder derivative suit when prior shareholder derivative suit had progressed in state court); *Dimaria v. Goor*, 2010 WL 3923227, at *10-*12 (E.D.N.Y. Sept. 30, 2010) (abstaining and dismissing derivative claims in favor of similar claims pending in state court); *Ash v. Alexander*, 2000 WL 20704, at *4 (S.D.N.Y. Jan. 12, 2000) (dismissing a shareholder derivative suit filed in the Southern District of New York in favor of a prior-filed shareholder derivative suit pending in state court). The *Colorado River* doctrine allows federal courts to abstain from exercising jurisdiction in favor of parallel state litigation where doing so would serve the interests of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (citation omitted). The scope of the *Colorado River* doctrine is beyond the purview of this Article. Further discussion of the *Colorado River* doctrine can be found in a number of academic writings. See, e.g., Leonard Birdsong, *Comity and Our Federalism in the Twenty-First Century: The Abstention Doctrines Will Always Be With Us—Get Over It!!*, 36 CREIGHTON L. REV. 375 (2003).

In addition, under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), abstention is appropriate "if there is timely and adequate state court review available," and the federal court determines that one of the following factors applies:

- (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or
- (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

Gen. Reinsurance Corp. v. MS Cas. Ins. Corp., 2005 WL 2039156, at *1-*2 (E.D. Pa. Aug. 23, 2005) (quoting *Feige v. Sechrest*, 90 F.3d 846, 847 (3d Cir. 1996)).

There is also relatively recent federal legislation—the Class Action Fairness Act of 2005 ("CAFA")—that appears to support such abstention. Although CAFA's amendment of 28 U.S.C. § 1332 was intended to expand substantially federal court jurisdiction over class actions, it expressly excepted "those class actions that solely involve claims that relate to matters of corporate governance arising out of state law." S. REP. NO. 109-14, at 45 (2005) (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982)). As Senate Report 109-14 explains: "True to the concept of federalism, [CAFA] appropriately leaves certain 'intrastate' class actions in state court: cases involving . . . corporate governance cases. As such, [CAFA] promotes the concept of federalism and protects the ability of states to determine their own laws and policies for their citizens." S. REP. NO. 109-14, at 61. Similarly, traditional application of diversity jurisdiction is informed by the notion that state law questions should be decided by the state courts. See, e.g., *Snyder v. Harris*, 394 U.S. 332, 333, 339-41 (1969) (explaining congressional purpose "to check, to some degree, the rising caseload of the federal courts, especially with regard to the federal courts' diversity of citizenship jurisdiction"); *Harrison v. XTO Energy, Inc.*, 705 F. Supp. 2d 572, 579 (N.D. Tex. 2010).

⁵⁸See *Krieger v. Atheros Commc'ns, Inc.*, 776 F. Supp. 2d 1053, 1058-60 (N.D. Cal. 2011) (staying state law claims, but finding under Ninth Circuit authority that it did not have discretion to stay federal securities law claims). *But see Int'l Jensen Inc. v. Emerson Radio Corp.*, 1996 WL

practice has been successful,⁵⁹ though on occasion a non-Delaware court will decide to "keep" a Delaware deal litigation.⁶⁰ Likewise, on occasion, the Court of Chancery will stay a Delaware action in favor of an action filed in a non-Delaware court.⁶¹

2. The "One-Forum" Motion

Another option used by defendants facing multi-jurisdictional litigation is the so-called "one-forum" motion, or what has recently been dubbed the "Savitt motion."⁶² In essence, defendants that employ this motion

494273, at *7 (N.D. Ill. Aug. 27, 1996) (finding that under the *Colorado River* doctrine, the court was not without discretion to hear or abstain from hearing federal securities law claims where they were essentially the same claims brought in parallel state proceedings).

⁵⁹*Braun v. Playboy Enters.*, Civ. A. No. 10-CH-30121, at 6 (Ill. Cir. Ct. Ch. Div. Oct. 6, 2010) ("The decision most in keeping with the principle of comity is that which grants appropriate deference to the Delaware Court of Chancery as to issues that arise under Delaware law."); *Carroll*, 767 N.Y.S.2d at 627. *But see* *Devine v. Edison Sch. Inc.*, No. 602295/03, at 8 n.1 (N.Y. Sup. Ct. Feb. 5, 2004) ("[T]here is no support for defendants' claim that the affairs of a foreign corporation *must* be adjudicated in the state of incorporation However, . . . the matter should be adjudicated under the law of the state of incorporation, and will be a matter of concern to that state.").

⁶⁰*See, e.g., In re Topps Co., S'holders Litig.*, 2007 WL 5018882, at *7 (N.Y. Sup. Ct. June 8, 2007) (declining to stay the New York state court litigation challenging the same Topps merger at issue in an action before the Delaware Court of Chancery because the New York suit was filed a day before the Delaware suit and principles of comity did not call for a stay); *La. Mun. Police Emps.' Ret. Sys. v. Medco Health Solutions, Inc.*, 2011 WL 4386774, at *4 (D.N.J. Sept. 19, 2011) (denying a motion to stay on abstention grounds and retaining jurisdiction); *In re Medco/Express Scripts Merger Litig.*, C.A. 2:11-cv-4211 (D.N.J. Oct. 25, 2011) (certifying an interlocutory appeal to the Third Circuit of the district court's refusal to abstain in deference to Delaware's first-filed stockholder litigation).

⁶¹*See In re HCA Inc. S'holders Litig.*, 2006 WL 3480273, at *1 (Del. Ch. Nov. 20, 2006) (staying a Delaware action involving the going-private transaction of HCA Inc., a Delaware corporation headquartered in Tennessee, in favor of a Tennessee action filed more than two months before the Delaware action); *see also In re Bear Stearns Cos. S'holder Litig.*, 2008 WL 959992, at *1 (Del. Ch. Apr. 9, 2008), *reprinted in* 33 DEL. J. CORP. L. 515, 516 (2008) (granting a motion to stay a Delaware action in favor of an "essentially contemporaneously filed" New York action arising out of the dire economic crisis at Bear Stearns that required the Federal Reserve to intervene "at potentially great expense to U.S. taxpayers," holding that "for reasons of comity and the orderly and efficient administration of justice," the court would not "entertain a second preliminary injunction motion on an expedited basis and thereby risk creating uncertainty in a delicate matter of great national importance"); *TA Instruments-Waters, LLC v. Univ. of Conn.*, 2011 WL 6116451, at *1 (Del. Ch. Nov. 8, 2011) (denying a motion to expedite because "comity dictates that a Connecticut court should have the first opportunity to consider a matter of paramount importance to that state," where the issue was the internal governance of the University of Connecticut).

⁶²Theodore Mirvis, *Delaware Court of Chancery Addresses Multi-Forum Deal Litigation*, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Apr. 12, 2011, 9:08 AM), <http://blogs.law.harvard.edu/corpgov/2011/04/12/delaware-court-of-chancery-addresses-multi-forum-deal-litigation> (noting that the one-forum motion is "an innovation [Wachtell] developed several years ago in response to the multi-forum

take the position that they "do not care" where they end up—whether in the Court of Chancery or the non-Delaware forum—as long as they are not forced to litigate the same claims in both forums.⁶³ In part, this position is taken out of a concern that the judge in the non-Delaware forum will be upset or insulted that the parties would prefer to litigate the deal litigation involving Delaware law in Delaware.⁶⁴ The motion is typically filed in both forums simultaneously, and asks for the same relief—namely, that the courts in each forum confer with each other to determine where the case should proceed.⁶⁵ Though the "one-forum" concept is an obvious goal from the defense side,⁶⁶ the criticism of this approach is that defendants (and their counsel) are, in essence, divesting themselves of tactical decision-making regarding the forum, and instead are letting others—namely, the courts—resolve the problem for them.⁶⁷ For those defendants favoring a Delaware forum, the end result of the one-forum motion may not always be as they hoped.⁶⁸

litigation problem"); *see also* *Nierenberg v. CKx, Inc.*, 2011 WL 2185614, at *1 (Del. Ch. May 27, 2011) (referring to the one-forum motion as the "Savitt motion").

⁶³Transcript of Hearing on Motion to Expedite at 16-17, *In re RAE Sys., Inc. S'holders Litig.*, C.A. No. 5848-VCS (Del. Ch. Nov. 10, 2010).

⁶⁴*See* Transcript of Oral Argument at 87, *Continuum Capital v. Nolan*, C.A. No. 5687-VCL (Del. Ch. Feb. 3, 2011) ("[I]t is never an easy task to say to a judge, 'We don't want to be in your courtroom.' There is always concern about collateral consequences from that.")

⁶⁵*See Nierenberg*, 2011 WL 2185614, at *1 (responding to a one-forum motion filed in the Delaware Court of Chancery and the Supreme Court for the State of New York, former Chancellor Chandler conferred with the New York judge, after which the two judges agreed that the cases should move forward in one forum; counsel then reached an agreement and voluntarily stayed the New York action, and re-filed in the Court of Chancery); *see also In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *9 (Del. Ch. May 20, 2011) (responding to a one-forum motion filed in the Court of Chancery and the Circuit Court of Cook County, Illinois, Vice Chancellor Parsons conferred with the Illinois judge who "ultimately decided to stay the actions before her pending resolution of [the Court of Chancery] action").

⁶⁶*See* Transcript of Oral Argument at 87, *Continuum Capital*, C.A. No. 5687-VCL (noting that defendants faced with multi-jurisdictional litigation are potentially placed in the awkward position of having to litigate in one forum and motion to the court that the litigation should proceed in another forum). Chancellor Chandler noted shortly before he left the bench, that it was his personal preference that defense counsel "file motions in both (or however many) jurisdictions where plaintiffs have filed suit, explicitly asking the judges in each jurisdiction to confer with one another and agree upon where the case should go forward"). *In re Allion Healthcare Inc. S'holders Litig.*, 2011 WL 1135016, at *4 n.12 (Del. Ch. Mar. 29, 2011).

⁶⁷Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 24, *In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL (Del. Ch. Jan. 13, 2011) ("[T]he defendants have rationally taken this all-we-care-about-is-one-forum position which really punts on the question. And that simply pushes off the time at which somebody has to make a decision and really leaves it to the courts to try to act among themselves.")

⁶⁸For example, in *New Jersey Carpenters Annuity Fund v. Smith International, Inc.*, Vice Chancellor Laster was asked through a one-forum motion to contact a Texas judge that had similar deal litigation pending. Transcript of Teleconference at 6, *N.J. Carpenters Annuity Fund v. Smith Int'l, Inc.*, C.A. No. 5292-VCL (Del. Ch. Mar. 19, 2010). The result of the discussion was that the

3. Class Certification

Another option for controlling multi-jurisdictional litigation is for parties in one forum to either stipulate or move for class certification.⁶⁹ The theory behind this approach is that once a class is certified in one forum, any judgment against the class in that forum should be afforded *res judicata* effect against similar class claims pending in any other forum.⁷⁰ This approach has its own set of complications. There are not many instances where defendants have moved for class certification, but it has been done successfully.⁷¹ Moreover, there are unique questions relating to class certification, such as the potential for overlapping classes in multiple forums.⁷² In addition, by proceeding this way, defendants will obviously lose

actions, which involved Delaware corporation law issues, proceeded in Texas instead of Delaware, where the action was stayed. *See* N.J. Carpenters Annuity Fund v. Smith Int'l Inc., C.A., No. 5292-VCL (Del. Ch. Aug. 24, 2011).

⁶⁹*See, e.g.*, Transcript of Oral Argument on Competing Motions for Appointment of Colead Plaintiffs and Colead Counsel and Class Certification and Rulings of the Court at 89-90, *In re* Medco Health Solutions, Inc. S'holders Litig., C.A. No. 6720-CS (Del. Ch. Aug. 23, 2011) (granting class certification in Delaware where deal litigation was pending in Delaware, New Jersey federal court, and New Jersey state court); *In re* Lawson Software Inc., S'holder Litig., 2011 WL 2185613, at *2 (Del. Ch. May 27, 2011) (granting class certification in Delaware where deal litigation was pending in both Delaware and Minnesota);

⁷⁰*See, e.g.*, Transcript of Telephone Conference on Issues of Class Certification and Rulings of the Court at 8-9, *In re* Art Tech. Grp., Inc. S'holders Litig., C.A. No. 5955-VCL (Del. Ch. Jan. 19, 2011) (noting that if there are numerous proceedings in other courts, and the parties have gained class certification and are on notice that a particular court will adjudicate a matter on a class-wide basis, that decision should ultimately have "a strong argument for having *res judicata* effect going forward").

⁷¹*See, e.g.*, Transcript of Oral Argument on Defendants' Motions for Class Certification and Summary Judgment at 3-5, *Ryan v. Lyondell Chem. Co.*, C.A. No. 3176-VCN (Del. Ch. Nov. 27, 2007).

⁷²There are strong reasons why overlapping classes should not be an issue. Under the Federal Rules of Civil Procedure Rule 23(b)(3)(B), for example, a court must consider, among other things, whether and to what extent other class members have begun litigation concerning the controversy when considering the issue of "superiority." *See* FED. R. CIV. P. 23(b)(3)(B); *see also* 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1780 (3d ed. 2005) ("If the court finds that several other actions already are pending and that a clear threat of multiplicity and a risk of inconsistent adjudications actually exist, a class action may not be appropriate Rather than allowing the class action to go forward, the court may encourage the class members who have instituted the Rule 23(b)(3) action to intervene in the other proceedings."); 3 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 7:31 (4th ed. 2002) ("[R]arely should the same class be certified on the same cause of action before more than one court, in the absence of special circumstances."). A number of courts have followed this approach. *See, e.g.*, *In re* DigiTek Prods. Liab. Litig., 2010 WL 2102330, at *18-*19 (S.D. W. Va. May 25, 2010) (refusing to certify the class for failing the superiority requirement where there was other litigation proceeding because the "[d]uplication of effort costs money and wastes resources . . . [which] outweigh[s] the benefits that might be gained from certification"); *see also* *Gregory v. Finova Capital Corp.*, 442 F.3d 188, 191 (4th Cir. 2006) (reversing class certification as inappropriate where certification was "needlessly duplicative"); *Becker v. Schenley Indus., Inc.*, 557

the ability to oppose class certification as a means for having the case derailed on a class-wide basis.

B. *Settlement Considerations*

Another option for defendants is to try to settle the lawsuits early, on the best terms available, and ideally on a global basis.⁷³ This is a sensible and reasonable consideration from the defendants' standpoint because the costs of defending litigation on two fronts (both in terms of actual dollars, and lost time away from managing the company) can be substantial.⁷⁴ In the alternative, settlement may potentially be pursued in just one of the forums where deal litigation is pending, on the theory that approval of a class-wide settlement, including a release of all claims, in one forum should be granted *res judicata* effect in all other forums, warranting dismissal of all pending actions.⁷⁵

Unfortunately, this is not always a perfect solution. As former Chancellor Chandler explained, "[i]n the event that defense counsel settles in Delaware over another jurisdiction, leaving one set of plaintiffs' counsel out in the cold, the unfavored forum's plaintiffs' lawyers then often flock to Delaware to oppose the settlement (and vice versa)."⁷⁶ The Chancellor continued by noting that "there are the post-settlement or post-litigation

F.2d 346, 348-49 (2d Cir. 1977) (affirming the trial court's refusal to certify a class for failing the superiority requirement where overlapping classes had been certified in another court); *Mitchell v. Tex. Gulf Sulphur Co.*, 446 F.2d 90, 107 (10th Cir. 1971) (holding that the trial court properly exercised its discretion in denying certification of an overlapping class action based on Rule 23(b)(3)(B)); *Doe v. Mathews*, 420 F. Supp. 865, 873 (D.N.J. 1976) (refusing to certify a class at the early stages of litigation because "an overlapping of classes in two or more courts can only lead to confusion and a duplication of the severely limited amount of judicial time and effort available").

⁷³See Brief of Defendants in Response to the Court's December 22, 2010 Order at 1-2, *Scully v. NightHawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL (Del. Ch. Feb. 11, 2011) (noting the Court of Chancery's recognition of the systemic problem of the automatic filing of multiple lawsuits in multiple jurisdictions pursuant to a merger announcement, and further noting that the response by boards of directors is to seek to obtain global settlements, regardless of the merits of the allegations).

⁷⁴See *id.* at 1 (noting that a board's decision to settle a case is done for "sound and legitimate business reasons: to eliminate even a small risk to the transaction as well as the cost and distraction inherent to any litigation").

⁷⁵Transcript of Settlement Hearing and Rulings at 42, *In re Allion Healthcare Inc. S'holders Litig.*, C.A. No. 5022-CC (Del. Ch. Jan. 19, 2011) (noting to the court that counsel understood that if the Delaware litigation was settled, the settlement would end all litigation pending in other jurisdictions, and that counsel would have to "go to New York and argue full faith and credit and *res judicata*"). 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. See, e.g., *In re Allion Healthcare Inc. S'holders Litig.*, 2011 WL 1135016, at *3-*4 (Del. Ch. Mar. 29, 2011).

⁷⁶*Allion*, 2011 WL 1135016, at *4 (Del. Ch. Mar. 29, 2011).

issues as well: class certification, approval of attorneys' fees, and then dividing those attorneys' fees between the various plaintiffs' counsel."⁷⁷

The settlement option approach has also been criticized as a means of "forum shopping." In *Allion*, the Court of Chancery explained this critique as follows:

[I]f a stay or dismissal is *not* granted in one jurisdiction, defense counsel may attempt to 'forum shop' for the jurisdiction in which the best outcome for its client is likely. *As has been noted recently before this Court, the forum shopping issue, in and of itself, is not necessarily problematic at all, and indeed may be 'unquestionably proper or [] part of the zealous advocacy expected of attorneys.'* But it in turn does highlight the potential, at least, for collusive settlements or 'reverse auctions'—even if what defense counsel is ultimately doing is simply attempting to litigate its case in one jurisdiction only, wherever that may be. Plaintiffs' counsel may similarly engage in forum shopping for the jurisdiction where the judge is most likely to approve their settlement.⁷⁸

⁷⁷*Id.* (citations omitted).

⁷⁸*Id.* (second emphasis added) (citation omitted). The court in *Allion* was ultimately "put in the unpleasant position of refereeing [a] food fight between Delaware and New York plaintiffs" over fees awarded in connection with the settlement, which offered both disclosures and an increase in the merger price as settlement benefits to the shareholder class. *Id.* at *5. The New York plaintiffs were not directly a part of the settlement, but rather claimed in the Delaware proceeding that their action caused the disclosure and price bump benefits, and thus, they were entitled to "mootness" fees. *Id.* at *2-*3. The court rejected the New York plaintiffs' attempt to "intervene" on an emergency basis in the Delaware action, but held that they could appear and object at the settlement hearing and granted them limited settlement-related discovery. *Id.* at *3. The court approved the requested settlement, and awarded the requested \$1 million in fees, and then faced the question of how to split the fees. *Id.* at *4. Noting that "this fee-splitting issue is yet another byproduct of the rise of multi-forum deal litigation," the court ended up awarding \$125,000 to the New York plaintiffs (half of the fee award attributed to disclosures) and \$875,000 to the Delaware plaintiffs (\$125,000 for disclosures, and the full \$750,000 related to the bump in price). *Id.* at *4, *8-*9. In doing so, the court noted that had the New York plaintiff litigated in Delaware, "it likely would have had a seat (whether or not the front seat, it would have had a seat somewhere) at the negotiating table and would have been included in the Delaware settlement. Thus, the position New York plaintiff Steamfitters now finds itself in is entirely of its own making." *Id.* at *6 n.18; *Cf. In re Dynegey Inc. S'holders Litig.*, C.A. No. 5739-VCS, at 2 (Del. Ch. March 16, 2011) ("To be candid, the plaintiffs' objection to dismissal actually proves why dismissal is required. Plaintiffs are not entitled to file placeholder actions, choose not to prosecute them at all, and to keep them on file because they perceive that gives them some leverage in litigation elsewhere.").

In *Scully v. NightHawk Radiology Holdings, Inc.*,⁷⁹ the Court of Chancery called into question the defense counsels' attempt to settle pending deal litigation in a non-Delaware forum.⁸⁰ In this case, seven class action lawsuits challenging a merger transaction were filed by plaintiff stockholders in Arizona and, subsequently, one was filed in Delaware.⁸¹ Early efforts by the defendants to have the plaintiffs in both forums agree to litigate in just one forum were unsuccessful.⁸² The plaintiffs in the Delaware action pursued a motion to expedite, which was "vigorously briefed by the defendants on merits grounds."⁸³ During the hearing on the motion to expedite, the court found that the disclosure claims were not colorable.⁸⁴ However, the court also expressed the view that "there were meaningful, litigable process [f]laws in this deal."⁸⁵ Ultimately, the court denied the motion to expedite.⁸⁶ Shortly thereafter, the defendants began engaging in settlement discussions with the plaintiffs in Arizona, where they still faced a pending motion to expedite.⁸⁷ An agreement to settle based on corrective disclosures was soon reached, and eventually included the Delaware plaintiffs.⁸⁸ When the parties informed the Court of Chancery about the settlement, and the potential impact on the Delaware action, the court called for a status conference.⁸⁹

During that conference, it became readily apparent that the court was upset with defense counsel over their attempt to contend with the multi-

⁷⁹C.A. No. 5890-VCL (Del. Ch. Apr. 12, 2011).

⁸⁰See Transcript of Courtroom Status Conference at 19-20, *Scully v. NightHawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL (Del. Ch. Dec. 17, 2010). The undercurrent of the court's concern in *NightHawk* was the potential for defendant collusion and the concern for a "race to the bottom" where plaintiffs would be forced to settle for the lowest amount possible for fear of being left out of the settlement altogether, and then having their litigation dismissed on *res judicata* grounds once the settlement was approved, leaving them with no fee opportunity. *Id.* at 19-21; Cf. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370-72 (1995) (discussing generally the "reverse auction" concept).

⁸¹Brief of Defendants in Opposition to Plaintiff's Motion for Expedited Proceedings at 6 & n.6, *Scully v. NightHawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL (Del. Ch. Oct. 20, 2010).

⁸²See Brief of Defendants in Response to the Court's December 22, 2010 Order at 17-18, *Scully v. NightHawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL (Del. Ch. Feb. 11, 2011).

⁸³Transcript of Courtroom Status Conference at 3, *NightHawk*, C.A. No. 5890-VCL.

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶Brief of Plaintiffs in Response to Court Order Dated December 17, 2010 at 3, *Scully v. NightHawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL (Del. Ch. Feb. 11, 2011).

⁸⁷Brief of Defendants in Response to the Court's December 22, 2010 Order at 22, *NightHawk*, C.A. No. 5890-VCL.

⁸⁸*Id.* at 2-3.

⁸⁹Transcript of Courtroom Status Conference at 3, *NightHawk*, C.A. No. 5890-VCL.

jurisdictional litigation problem through settlement.⁹⁰ The court believed that the defendants were engaging in forum shopping, by "essentially twisting [Delaware plaintiffs' counsel's] arm to go into Arizona" to settle the action.⁹¹ The court continued by noting that defense lawyers, like plaintiffs' lawyers, benefit from settlements based on corrective disclosures, noting that "[t]hey get to bill hours without any meaningful reputational risk from a loss. They then get to get a cheap settlement for their client. Disclosures are cheap. And as I've suggested, it is readily understood that defendants can play multiple plaintiffs against each other to create the reverse-auction effect."⁹² The court went on to explain that "[s]ome degree of forum shopping necessarily [happens] on the defense side," and that defense counsel can help "promote one jurisdiction over another by giving preferential access to documents, . . . stipulat[ing] to consolidation and certification of a class . . . [or doing] things to try to advance one action over another, and ultimately you can settle with the least-cost player."⁹³ The court then appeared to come to the defense of the "helpless" plaintiffs' counsel by noting that defense counsel "historically seem to have regarded this reverse-auction dynamic as something wonderful to promote for the benefit of their clients. But . . . you're dealing with fiduciaries for a class. And when you knowingly induce a fiduciary breach, you're an aider and abettor. You're not an arm's-length negotiator."⁹⁴

The Court of Chancery has also expressed a concern about settlements in non-Delaware forums because of local practices that permit substantive settlement discussions and fee negotiations to occur simultaneously.⁹⁵

⁹⁰*Id.* at 3-5.

⁹¹*Id.* at 7.

⁹²*Id.* at 19.

⁹³Transcript of Courtroom Status Conference at 20, *NightHawk*, C.A. No. 5890-VCL.

⁹⁴*Id.* at 22. Other Court of Chancery judges, such as former Chancellor Chandler, have acknowledged the "potential" for collusive settlements or "reverse auctions," but have not expressed the same level of concern as Vice Chancellor Laster. For example, in *Allion*, Chancellor Chandler noted that the forum shopping concern "does highlight the potential, at least, for collusive settlements or 'reverse auctions'—even if what defense counsel is ultimately doing is simply attempting to litigate its case in one jurisdiction only, wherever that may be." *In re Allion Healthcare Inc. S'holders Litig.*, 2011 WL 1135016, at *4 (Del. Ch. Mar. 29, 2011). Moreover, the court noted that "[p]laintiffs' counsel may similarly engage in forum shopping for the jurisdiction where the judge is most likely to approve their settlement." *Id.*

⁹⁵Transcript of Settlement Conference and Plaintiffs' Application for Attorneys' Fees at 45-49, *In re Clariant, Inc. S'holder. Litig.*, C.A. No. 5932-CS (Del. Ch. June 15, 2011) (responding to counsel's representation that California practice allows discussion of fees in conjunction with the negotiation and documentation of the MOU, noting that "the concern about that [practice] . . . is, you know, pretty obvious").

Despite these critiques and concerns, many multi-jurisdictional deal litigation matters have settled, and the settlement approach generally has been approved.⁹⁶ Even in *NightHawk*, the court ultimately determined, based on a report by a special counsel appointed to investigate potential collusion among the parties, that defense counsel had done nothing wrong by settling the case.⁹⁷ Indeed, the court apologized to counsel, noting that "[a]fter considering this matter further with the benefit of the submissions from the parties and special counsel, I regard some of the questions that I posed during the [earlier] status conference as regrettable and misplaced" as certain "questions unfairly cast defense counsel in a negative light."⁹⁸ The court concluded by reiterating that it had "no concerns about the conduct of any attorney involved in this matter."⁹⁹ So, even after *NightHawk*, settlement remains a viable option for defendants contending with multi-jurisdictional litigation.

C. Choice of Law Charter or Bylaw Provisions

Some companies are considering a broader solution to the multi-jurisdictional litigation problem than what can be employed within the confines of a particular case—specifically, the use of "choice of forum"

⁹⁶See e.g., *Norton v. Internet Brands, Inc.*, C.A. 5900-CS, at 1 (Del. Ch. Aug. 23, 2011); Transcript of Status Telephone Conference at 4-5, *In re ICx Techs., Inc. S'holder Litig.*, C.A. No. 5769-VCL (Del. Ch. Feb. 2, 2011); Transcript of Status Conference at 49-51, *In re Burger King Holdings, Inc., S'holders Litig.*, C.A. No. 5808-VCL (Del. Ch. Jan. 19, 2011) (approving the settlement as fair and reasonable); Transcript of Settlement Hearing at 17, *In re BJ Servs. Co. S'holders Litig.*, C.A. No. 4851-VCN (Del. Ch. July 15, 2010) (approving a disclosure-based settlement).

⁹⁷See *Scully v. NightHawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL, at 1 (Del. Ch. Apr. 12, 2011). Among other things, the special counsel noted in his report that "forum-shopping for purposes of securing an advantageous settlement is not an independent wrong under existing Delaware law. That is, such forum-shopping should not be equated with a collusive settlement." Brief of Special Counsel at 17, *Scully v. NightHawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL (Del. Ch. Mar. 11, 2011). The special counsel also acknowledged that in *Prezant v. De Angelis*, 636 A.2d 915 (Del. 1994), the Delaware Supreme Court "recognized fully the dangers presented by the reverse auction . . . [b]ut . . . suggested that the protection against and remedy for that wrong lay within this Court's review under Rule 23." Brief of Special Counsel at 17, *NightHawk*, C.A. No. 5890-VCL. The special counsel went on to note that "the Delaware Supreme Court recognized the potential for a reverse auction and then suggested that nothing beyond the scrutiny imposed by this Court under Rule 23 was necessary to address the issue." *Id.* at 18 (footnote omitted). Furthermore, "*Prezant* suggests that any remedy would be confined to the bounds of Rule 23—for example, disapproval of a settlement or attorneys' fees or disqualification of class representatives or counsel." *Id.*

⁹⁸*NightHawk*, C.A. No. 5890-VCL, at 1-2.

⁹⁹*Id.* at 2.

provisions in charters and bylaws.¹⁰⁰ These provisions address typical state law deal litigation claims—such as breach of fiduciary duty and other stockholder-related claims—and require them to be filed in a more manageable single forum (usually the state of incorporation, which is typically Delaware).¹⁰¹ One concern about these provisions is that they have not yet been fully tested in the courts.¹⁰² In one recent decision, the Court of Chancery suggested that such provisions would be upheld under Delaware law.¹⁰³ However, a federal district court in California recently indicated that a choice-of-law bylaw provision adopted unilaterally by a board of directors may not pass muster.¹⁰⁴ There is also a risk that courts in states that are not the designated forum for resolving the dispute will not abide by these provisions, leading to uncertainty.¹⁰⁵

IV. THE COURT OF CHANCERY'S EMERGING VIEWS ON MULTI-JURISDICTIONAL LITIGATION

Recently, the Court of Chancery has taken several opportunities to address multi-jurisdictional litigation concerns. The court's views first began to emerge in transcript rulings from hearings on various subjects ranging from consolidation to settlement.¹⁰⁶ Former Chancellor Chandler was one of

¹⁰⁰Joseph A. Grundfest, *Choice of Forum Provisions In Intra-Corporate Litigation: Mandatory and Elective Approaches (The 2010 Pileggi Lecture)* 3 (Rock Ctr. for Corporate Governance at Stanford Univ., Working Paper No. 91), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1690561 ("There has been a sharp increase in the incidence of forum selection provisions.").

¹⁰¹A number of prominent companies already have adopted such provisions. See Grundfest, *supra* note 100, at 7 (listing companies that have adopted choice of forum provisions since *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940 (Del. Ch. 2010), including: Primerica Inc., Niska Gas Storage Partners LLC, Intrusion Inc., INPHI Corp., Envestnet, Inc., LPL Investment Holdings Inc., KKR & Co. LP, LLC, Oxford Resource Partners LP, Rhino Resource LP, Swift Holdings Corp., AMN Healthcare Services, Inc., Grand Canyon, Chesapeake Midstream Partners, LP, Gordmans Stores Inc., Furniture Brands International Inc., Charter Communications Inc., TMS International Corp., Chemtura Corp., U.S. Concrete Inc., FXCM Inc., AMERCO, Liberty Mutual Agency Corp., and Chevron Corp.).

¹⁰²See Grundfest, *supra* note 100, at 11 (noting that one of the reasons why "choice of forum" provisions in charters and bylaws are so rare is because lawyers are waiting for "judicial affirmation and clarity of the form first made available in *Revlon*").

¹⁰³See *Revlon*, 990 A.2d at 960.

¹⁰⁴See *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1174-75 (N.D. Cal. 2011).

¹⁰⁵Charles Nathan et al., *Designating Delaware's Court of Chancery as the Exclusive Jurisdiction for Intra-Corporate Disputes*, 24 INSIGHTS: THE CORPORATE & SECURITIES LAW ADVISOR 15, 18 (June 2010) (identifying the risk of inconsistent results in the application of forum selection provisions, noting that "[b]ecause a forum selection provision will require enforcement in forums outside of Delaware, there is a risk that courts will not consistently enforce it").

¹⁰⁶See, e.g., Transcript of Status Telephone Conference at 4, *In re ICx Techs., Inc. S'holder*

the first judges to write directly on the subject.¹⁰⁷ Before then, there were very few reported cases that appear to tackle the issue directly.¹⁰⁸ Certainly, there were no hard and fast rules for how defendants, or plaintiffs for that matter, were supposed to conduct themselves when contending with multi-jurisdictional litigation. This issue has become so prevalent that members of the Court of Chancery have begun to address it outside of the courtroom or official opinions.¹⁰⁹

A. *Judicially Identified Problems with Multi-Jurisdictional Litigation.*

In many respects, the Court of Chancery's approach to multi-jurisdictional litigation is still evolving.¹¹⁰ One thing is clear, however: The

Litig., C.A. No. 5769-VCL (Del. Ch. Feb. 2, 2011); Transcript of Argument and Ruling on Motion to Intervene at 50-51, *La. Mun. Police Emps.' Ret. Sys. v. Pyott*, C.A. No. 5795-VCL (Del. Ch. Jan. 21, 2011); Transcript of Settlement Hearing and Rulings at 14-15, *In re Allion Healthcare Inc. S'holders Litig.*, C.A. No. 5022-CC (Del. Ch. Jan. 19, 2011); Transcript of Status Conference at 9, *In re Burger King Holdings, Inc., S'holders Litig.*, C.A. No. 5808-VCL (Del. Ch. Jan. 19, 2011); Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 7, *In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL (Del. Ch. Jan. 13, 2011); Transcript of Courtroom Status Conference at 5, *Scully v. NightHawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL (Del. Ch. Dec. 17, 2010); Transcript of Hearing on Motion to Expedite at 16-18, *In re RAE Sys., Inc. S'holders Litig.*, C.A. No. 5848-VCS (Del. Ch. Nov. 10, 2010); Transcript of Teleconference at 14-15, *Stadium Capital Qualified Partners, L.P. v. Cerberus ABP Investor LLC*, C.A. No. 5707-VCL (Del. Ch. Sept. 22, 2010).

¹⁰⁷*In re Allion Healthcare Inc. S'holders Litig.*, 2011 WL 1135016, at *4 (Del. Ch. Mar. 29, 2011).

¹⁰⁸*See, e.g., In re Topps Co. S'holders Litig.*, 924 A.2d 951, 958-63 (Del. Ch. 2007) (holding that the Delaware Court of Chancery, under the internal affairs doctrine, held a greater interest than a New York court in hearing a suit over a challenge to the Topps merger); *Ryan v. Gifford*, 918 A.2d 341, 349-50 (Del. Ch. 2007) (refusing to stay a later-filed Delaware action raising backdating claims in favor of a similar first-filed California action because Delaware courts have an interest in addressing the novel issues relating to backdating stock options); *see also* Transcript of Telephone Conference on Plaintiffs Leviticus Partners' Motion to Withdraw and Ruling of the Court at 18, *In re Netsmart Techs., Inc. S'holders Litig.*, C.A. No. 2563-N (Del. Ch. Dec. 20, 2006) ("[D]efendants get sued over the same matter in . . . several places and they have to grapple with that. The judicial process has historically tried to minimize that."); *Sensient Colors Inc. v. Allstate Ins. Co.*, 939 A.2d 767, 775 (N.J. 2008) ("The litigation of substantially similar lawsuits in multiple jurisdictions with opposing parties racing to acquire the first judgment is not only wasteful of judicial resources, but anathema in a federal system that contemplates cooperation among the states." (footnote omitted)).

¹⁰⁹Frankel, *supra* note 36 (reporting that Chancellor Strine noted at an academic conference that "lawyers who file cases that will turn on Delaware law in other jurisdictions . . . are engaged in 'forum shopping of the rankest kind,' because they know Delaware won't 'junk up' its corporate laws to compete with [other states]").

¹¹⁰*See Allion*, 2011 WL 1135016, at *4 & n.12 (noting that "[j]udges, defense counsel, and the plaintiffs' bar are now routinely confronted with these sorts of disputes and have yet to come up with a workable solution," and describing that Chancellor Chandler's personal preferred approach was for defense counsel to file a motion in each jurisdiction where the plaintiffs have filed suit, and to ask the judges to confer with one another to agree upon where the case should be litigated).

court clearly believes that the multi-jurisdictional litigation phenomenon is a "problem."¹¹¹ As explained in *Allion*:

The potential problems, as one can imagine, are numerous. Defense counsel is forced to litigate the same case—often identical claims—in multiple courts. Judicial resources are wasted as judges in two or more jurisdictions review the same documents and at times are asked to decide the exact same motions. Worse still, if a case does not settle or consolidate in one forum, there is the possibility that two judges would apply the law differently or otherwise reach different outcomes, which would then leave the law in a confused state and pose full faith and credit problems for all involved. . . .

The problems do not end there. In the event that defense counsel settles in Delaware over another jurisdiction, leaving one set of plaintiffs' counsel out in the cold, the disfavored forum's plaintiffs' lawyers then often flock to Delaware to oppose the settlement (and vice versa). And there are the post-settlement or post-litigation issues as well: class certification, approval of attorneys' fees, and then dividing those attorneys' fees between the various plaintiffs' counsel.¹¹²

For the most part, the driver of the court's concerns about multi-jurisdictional litigation appear to be two-fold: (1) whether the phenomenon of multi-jurisdictional litigation (and the practice of quickly settling such matters for modest benefits) taints the legitimacy of the representational litigation process;¹¹³ and (2) the role of Delaware courts in the development of Delaware corporation law.¹¹⁴

¹¹¹See, e.g., Transcript of Settlement Hearing at 31, *In re Alberto-Culver Co. S'holder Litig.*, C.A. No. 5873-VCS (Del. Ch. Feb. 21, 2011) ("I don't applaud the multiple forum stuff. I don't. I wish there was a cure for it."); Transcript of Settlement Hearing and Rulings at 7, *Allion*, C.A. No. 5022-CC ("[M]y empathies and sympathies are with the defense bar because they're the ones who are caught in the midst of these multi-forum litigations. They aren't there by choice. They simply have to deal with it."); Transcript of Argument and Ruling on Motion to Intervene at 50-51, *Pyott*, C.A. No. 5795-VCL ("Litigation is costly. So if you could envision this totality of stockholders, they would not want to sue willy-nilly and impose on their company the costs of defending multiple actions in multiple fora . . ."); Transcript of Settlement Hearing and Rulings of the Court at 54, *Burlington*, C.A. No. 5043-VCL ("[W]hat we have here is a conflict between individual rationality, . . . where efficiency calls for a single forum.").

¹¹²*Allion*, 2011 WL 1135016, at *4 (citations and footnote omitted).

¹¹³See, e.g., Transcript of Courtroom Status Conference at 30, *Scully v. NightHawk*

On the former point, it has not been lost on the Court of Chancery that plaintiffs' counsel can benefit from multi-jurisdictional litigation (and any resulting settlement). Indeed, in the court's oral ruling in *In re Compellent Technologies, Inc.*, Vice Chancellor Laster defined the problem as the "diversion of interests between entrepreneurial plaintiffs' counsel and the class."¹¹⁵ The court explained that plaintiffs' counsel "maximize by getting the most fee for the least work," and that "[t]he class maximizes by getting a recovery" so plaintiffs' counsel "have an incentive to do less."¹¹⁶ The court further noted that "[s]tockholders don't have any reason to want multiple forums."¹¹⁷

This perception of a "diversion of interest" came to the forefront in *NightHawk*, where counsel had agreed to a disclosure-based settlement in a non-Delaware forum after the Delaware court had "made clear that [it] thought that there were meaningful, litigable process [claims] in this deal."¹¹⁸

It was also not lost on the court that the settlement consideration consisted of resolving the disclosure claims that the court already said were not colorable, and that "[t]here was no apparent effort to address the claims that [the court] thought were colorable."¹¹⁹ Further compounding the court's concern in *NightHawk* was the notion that when a plaintiffs' lawyer "makes a rush" to petition the court for a scheduling hearing, it signals that they are "trying to get control of the case, not that they're acting for the benefit of the stockholders."¹²⁰ This then taints the representation litigation process. As Vice Chancellor Laster noted, the negotiation of collusive settlements "undermines the legitimacy of the entire representational litigation process."¹²¹

Radiology Holdings, Inc., C.A. No. 5890-VCL (Del. Ch. Dec. 17, 2010).

¹¹⁴See, e.g., Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 15, *In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL (Del. Ch. Jan. 13, 2011); Transcript of Settlement Hearing and Rulings of the Court at 56, *Burlington*, C.A. No. 5043-VCL; Transcript of Scheduling Office Conference, *In re Medco Health Solutions S'holders Litig.*, C.A. No. 6720-CS (Del. Ch. Oct. 21, 2011) (noting that "we essentially now have the U.S. Magistrate, the U.S. District Judge, and the Third Circuit all involved. And as a result, the Court of Chancery, which is prepared to do what it has historically done, which is to address these things in an expedited way and give the plaintiffs a fair shot before a deal . . . we're waiting. Our Delaware Supreme Court, which would hear the merits of any appeal in a timely and expedited way, is waiting.").

¹¹⁵Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 7, *Compellent*, C.A. No. 6084-VCL.

¹¹⁶*Id.*

¹¹⁷*Id.* at 19.

¹¹⁸Transcript of Courtroom Status Conference at 3, *NightHawk*, C.A. No. 5890-VCL.

¹¹⁹*Id.* at 4.

¹²⁰Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 23, *Compellent*, C.A. No. 6084-VCL.

¹²¹Transcript of Courtroom Status Conference at 30, *NightHawk*, C.A. No. 5890-VCL; see

In regard to what the court initially perceived to be collusive forum shopping and settlement practices, especially in the context of the *NightHawk* matter, the court noted that it "does more than undercut the fairness of the proceedings."¹²² Rather, "[i]t takes away the proceedings from the Court that has started to oversee the case and is given a preliminary assessment adverse to defense counsel, and it puts the settlement before a different court that doesn't yet have familiarity with the matter and may never learn what went down."¹²³

Separately, the Court of Chancery appears rightfully mindful of its important role in the development of Delaware's corporation law.¹²⁴ Though the court recognizes the importance of "comity among the states for the peaceful and efficient conduct not only of public regulation, but also of private commerce,"¹²⁵ the court has adamantly and repeatedly noted that "[t]he state of incorporation has a paramount interest in the internal governance of the corporation."¹²⁶ The court explains "[i]t's not that we're smarter, it's not that we're better judges. It's just that we do it a lot and see it a lot. It's the basic idea of comparative advantage. When you do something over and over again, you develop expertise."¹²⁷

The Court of Chancery has noted that it does not "believe that [other state courts] have a similar interest in the internal affairs of a Delaware corporation."¹²⁸ It is well-settled that one of the most significant aspects of the Delaware Court of Chancery's areas of expertise, and is of paramount interest to the state of Delaware, is expedited litigation involving corporate internal affairs.¹²⁹ As the court articulated in *In re RAE Systems, Inc. Shareholders Litigation*:

also Scully v. NightHawk Radiology Holdings, Inc., C.A. No. 5890-VCL, at 1-2 (Del. Ch. Apr. 12, 2011) (concluding that the parties did not engage in any wrongdoing, and that the defense counsel did not collude in the settlement of the case).

¹²²Transcript of Courtroom Status Conference at 22, *NightHawk*, C.A. No. 5890-VCL.

¹²³*Id.* at 22-23.

¹²⁴*See supra* note 12; Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 15, *Compellent*, C.A. No. 6084-VCL (noting that matters involving the internal affairs of a Delaware corporation are where Delaware's interests are at their highest); *see also* Transcript of Settlement Hearing and Rulings of the Court at 56, *In re Burlington N. Santa Fe S'holder Litig.*, C.A. No. 5043-VCL (Del. Ch. Oct. 28, 2010) (noting that there is a comparative advantage in having expedited litigation happen in the state where the corporation is incorporated, which is often Delaware, because the judges are familiar with the law through repeated application).

¹²⁵*Third Ave. Trust v. MBIA Ins. Corp.*, 2009 WL 3465985, at *1 (Del. Ch. Oct. 28, 2009).

¹²⁶Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 15, *Compellent*, C.A. No. 6084-VCL.

¹²⁷*Id.*

¹²⁸*Id.* at 16.

¹²⁹*Id.* at 25, 31.

I believe in the value of the representative litigation process for investors. It is not in the interests of diversified investors to have food fights about -- and have litigation in three different places. . . . I happen to believe -- and it's no secret -- that in expedited litigation, that -- and there is a choice between two forums, the forum whose law is at stake ought to go forth. . . . And my view in expedition, that's when, frankly, it's most important that things be heard -- you kind of stay in your own lane.¹³⁰

Indeed, many deal lawyers feel the same. As one commentator put it: "Company-side lawyers [have] said . . . that judges in state courts outside of Delaware were far less likely to be expert in corporate law and that their reaction to shareholder suits was far harder to predict -- never a good thing."¹³¹

Moreover, the Court of Chancery has recently explained the importance of allowing the Delaware Supreme Court, the highest authority on Delaware state law, to apply Delaware law. In addressing the tactic of avoiding filing a Delaware law-based lawsuit in Delaware simply to avoid how the Delaware Supreme Court would apply its own law, Chancellor Strine characterized this practice as "the rankest form of forum shopping because it is a confessed desire to undermine the governing law by bypassing the highest authority on that law, which is whatever the highest court is that deals with that governing law."¹³² The Chancellor emphasized the ability of the Delaware Supreme Court to provide definitive rulings on matters of law promptly, stating:

There could be no more authoritative ruling on Delaware state law, whether you like it or not, than from the Delaware Supreme Court, which makes itself available for expedited appeals. It is not in my view a legitimate reason to not have a

¹³⁰Transcript of Hearing on Motion to Expedite at 16-17, *In re RAE Sys., Inc. S'holders Litig.*, C.A. No. 5848-VCS (Del. Ch. Nov. 10, 2010).

¹³¹David Marcus, *The case of Travis Laster*, DEAL MAG., Mar. 25, 2011, available at <http://www.thedeal.com/magazine/ID/038817/2011/the-case-of-travis-laster.php>.

¹³²Transcript of Office Conference at 14-15, *In re Medco Health Solutions, Inc. S'holders Litig.*, C.A. No. 6720-CS (Del. Ch. Aug. 11, 2011); see also Transcript of Teleconference at 13, *Parcell v. Southwall Techs., Inc.*, C.A. No. 7003-VCL (Del. Ch. Nov. 7, 2011) ("Under our federal system, the Delaware Supreme Court is the only body that can give a definitive ruling as to what Delaware law is.").

case in a forum . . . [if you] don't like how the highest court of that state will apply its own law.¹³³

The procedural posture of *In re Medco Health Solutions Inc. Shareholders Litigation* provides an example of how multi-jurisdictional litigation, even when appropriately or successfully handled, can lead to a missed opportunity for Delaware courts to rule on Delaware law issues. In *Medco*, after an approximately \$30 billion proposed transaction involving the target Medco Health Solutions, Inc. ("Medco") and acquirer Express Scripts, Inc. ("Express Scripts") was announced, Medco stockholder lawsuits quickly emerged. The primary claim raised in all of the cases was that a \$950 million termination fee was an improper deal protection provision under Delaware law, and that the Medco board of directors breached their fiduciary duties by agreeing to include it in the merger agreement. The first lawsuit was filed in Delaware, and subsequently an additional twenty lawsuits were filed in Delaware, New Jersey federal court, and New Jersey state court.¹³⁴ As the procedural jockeying for lead position commenced, the New Jersey state court plaintiffs volunteered to stay their action in deference to the Delaware Action.¹³⁵ In contrast, the New Jersey federal court plaintiffs refused, and began to aggressively forge ahead with their case in an effort to outrun the Delaware action, claiming that they could not obtain prompt relief on their claim concerning the termination fee provision in the Delaware courts. Defendants moved the District Court to abstain in deference to the ongoing Delaware proceedings. Defendants also moved to dismiss the Federal Action for lack of subject matter jurisdiction and failure to state a claim. The District Court denied, without oral argument, all of the motions.¹³⁶

Meanwhile, the Delaware action was advancing in a fashion typical for deal litigation of this sort. The Court of Chancery consolidated the cases filed in Delaware, ordered a stipulation governing the exchange of confidential and highly confidential information, certified a class of Medco stockholders, appointed lead plaintiffs (who collectively held approximately ten times the number of shares owned by the plaintiff in the New Jersey federal action, and appointed lead counsel to represent the class. The Court

¹³³Transcript of Office Conference at 13, *Medco*, C.A. No. 6720-CS.

¹³⁴See Stipulation and Agreement of Compromise, Settlement and Release, *In re Medco/Express Scripts Merger Litig.*, No. 2:11-cv-4211 (D.N.J. Nov. 25, 2011).

¹³⁵Consent Order Resolving Motion for Expedited Discovery and Motion to Stay, *Levinson v. Snow*, No. C-215-11 (N.J. Super. Ct. Aug. 26, 2011).

¹³⁶*La. Mun. Police Emps.' Ret. Sys. v. Medco Health Solutions, Inc.*, 2011 WL 4386774, at *1 (D.N.J. Sept. 19, 2011).

of Chancery also resolved a number of discovery, scheduling and other disputes related to the litigation in both open court and office conferences.¹³⁷ The Court of Chancery also made known at these various hearings and conferences its concern that inconsistent judgments could result if both the New Jersey federal action and the Delaware action were to proceed, that it was important that these Delaware corporate law issues be resolved by the Delaware courts, and encouraged the plaintiff in the New Jersey federal action to join the Delaware Action.¹³⁸ The Court of Chancery also flatly rejected the notion that it could not timely resolve the claim concerning the termination fee provision, noting that "the Delaware Court of Chancery is geared up to and constitutionally required to address matters in a timely fashion."¹³⁹

The Court of Chancery ultimately scheduled a preliminary injunction hearing, which prompted the plaintiffs in the New Jersey federal action to request a preliminary injunction hearing on a faster basis than in Delaware. Before the New Jersey federal court ruled on that request, it certified an interlocutory appeal on a number of issues, including in connection with the denial of the request to abstain in deference to Delaware, but did not stay the proceedings pending appeal.¹⁴⁰ The Third Circuit ordered expedited briefing on the interlocutory appeal and whether to stay the proceedings below pending appeal.¹⁴¹ Shortly after the briefing on appeal was completed, but before the Third Circuit decided the appeal, the parties in both the Delaware and New Jersey federal actions reached an agreement in principle to settle the actions, in part, by reducing the termination fee provision from \$950 million to \$650 million.¹⁴²

¹³⁷See *In re Medco Health Solutions, Inc. S'holders Litig.*, No. 6720-CS (Del. Ch. Aug. 11, 2011); *In re Medco Health Solutions, Inc. S'holders Litig.*, No. 6720-CS (Del. Ch. Aug. 23, 2011).

¹³⁸See Transcript of Office Conference at 14-15, *In re Medco Health Solutions, Inc. S'holders Litig.*, No. 6720-CS (Del. Ch. Aug. 11, 2011).

¹³⁹See *In re Medco Health Solutions, Inc. S'holders Litig.*, No. 6720-CS at 28 (Del. Ch. Oct. 21, 2011).

¹⁴⁰*In re Medco/Express Scripts Merger Litig.*, C.A. 2:11-cv-4211 (D.N.J. Oct. 27, 2011) (certifying an interlocutory appeal to the Third Circuit of the district court's refusal to abstain in deference to Delaware's first-filed stockholder litigation).

¹⁴¹*In re Medco/Express Scripts Merger Litig.*, No. 11-8088 (3d Cir. 2011)

¹⁴²Stipulation and Agreement of Compromise, Settlement and Release, *In re Medco/Express Scripts Merger Litig.*, No. 2:11-cv-4211 (D.N.J. Nov. 25, 2011).

B. *Preliminary Judicial Considerations for Handling Multi-Jurisdictional Litigation*

The above-described cases are exemplary instances of where the court has been struggling with some of the problems underlying multi-jurisdictional litigation.¹⁴³ In some cases, the court has offered glimpses of potential solutions. For example, in *In re ICx Technologies, Inc. Shareholder Litigation*, the Court of Chancery did not stand in the way of a disclosure-based settlement of deal litigation in a non-Delaware jurisdiction, even at a time when actions were still pending in the Court of Chancery.¹⁴⁴ In *In re ICx Techs.*, the court differentiated the present situation from other cases, such as *NightHawk*, where it had recently criticized counsel for settling in a different jurisdiction.¹⁴⁵ The court explained that it was "not a case where I expressed any view that any claims in front of me had merit. To the contrary. I expressed precisely the opposite view. So this isn't a situation where presenting a settlement elsewhere represents an effort . . . to shop away from a particular forum."¹⁴⁶ In addition, the court noted that to the extent that there were stronger claims elsewhere, "what would be odd would have been if instead of settling elsewhere, you-all were to bring the settlement here and, notwithstanding my prior ruling, . . . attempt to settle on some appraisal or top-up issue, even though I'm told that wasn't meritorious."¹⁴⁷

Similarly, in *In re Burger King Holdings, Inc.*, during a status conference where counsel informed the court that a purely disclosure-based settlement of both Delaware and Florida actions would be presented to the Florida court, the Court of Chancery determined that, based on the facts of that case, there was "no problem" with the settlement being presented in Florida instead of Delaware.¹⁴⁸ The court noted that the Florida action was "slightly [more] advanced" in posture than the Delaware action.¹⁴⁹ However, no depositions had been taken, but "a not insubstantial document production

¹⁴³See generally Transcript of Courtroom Status Conference, *Scully v. NightHawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL (Del. Ch. Dec. 17, 2010); Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling, *Compellent*, C.A. No. 6084-VCL.

¹⁴⁴Transcript of Status Telephone Conference at 4-5, *In re ICx Techs., Inc. S'holder Litig.*, C.A. No. 5769-VCL (Del. Ch. Feb. 2, 2011).

¹⁴⁵See generally Transcript of Courtroom Status Conference, *NightHawk*, C.A. No. 5890-VCL.

¹⁴⁶Transcript of Status Telephone Conference at 4, *ICx Techs.*, C.A. No. 5769-VCL.

¹⁴⁷*Id.* at 4-5.

¹⁴⁸Transcript of Status Conference at 8-9, *In re Burger King Holdings, Inc., S'holders Litig.*, C.A. No. 5808-VCL (Del. Ch. Jan. 19, 2011).

¹⁴⁹*Id.* at 5.

[was] made prior to the settlement," which were reviewed prior to signing the Memorandum of Understanding.¹⁵⁰ In this case, although the court did not take issue with the settlement, the court was nonetheless concerned that this seemed "like a pro forma disclosure-based settlement that we see a lot of."¹⁵¹ As a result, the court ordered the parties to present the transcript to the Florida court so that the Florida judge would be aware that the Court of Chancery would routinely "price" the fee award in the four to five hundred thousand dollar range for the types of disclosures made in this settlement.¹⁵²

In *Allion*, Chancellor Chandler advised that his "personal preferred approach" for dealing with multi-jurisdictional litigation problems was the "one forum" motion approach, which essentially has defendants asking the judges in the various forums to communicate and decide where the litigation should land.¹⁵³ In addition, the Court of Chancery has shown a willingness to certify a shareholder class at early stages of a multi-jurisdictional litigation.¹⁵⁴ Further, in the recent *Revlon* decision, Vice Chancellor Laster strongly signaled that "choice of forum" charter (and bylaw) provisions might offer a solution.¹⁵⁵

V. POTENTIAL SOLUTIONS FOR PARTIES, COUNSEL, AND THE COURTS TO CONSIDER

One thing is clear: there is no easy solution to the complications posed by multi-jurisdictional litigation. Given that the multi-jurisdictional litigation phenomenon was not caused by defendants, but was borne from a plaintiff tactic with entrepreneurial underpinnings,¹⁵⁶ it does not seem fair or

¹⁵⁰*Id.* at 7.

¹⁵¹*Id.* at 9.

¹⁵²Transcript of Status Conference at 9, 11, *Burger King*, C.A. No. 5808-VCL (Del. Ch. Jan. 19, 2011).

¹⁵³*In re Allion Healthcare Inc. S'holders Litig.*, 2011 WL 1135016, at *4 n.12 (Del. Ch. Mar. 29, 2011); *see also* Transcript of Teleconference at 11, *Parcell v. Southwall Techs., Inc.*, C.A. No. 7003-VCL (Del. Ch. Nov. 7, 2011) (ruling on a one-forum motion and determining that the action should proceed in Delaware because "it makes sense that the case should proceed in the jurisdiction whose law governs the dispute").

¹⁵⁴*See, e.g., In re Medco Health Solutions, Inc. S'holders Litig.*, C.A. No. 6720-CS (Del. Ch. Aug. 23, 2011); *In re Lawson*, C.A. No. 6443-VCN (Del. Ch. May 27, 2011); *Krieger v. Wesco Fin. Corp.*, C.A. No. 6176-VCL (Del. Ch. Feb. 22, 2011).

¹⁵⁵*In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010) ("[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.").

¹⁵⁶*See* Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 20, *In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL (Del. Ch. Jan. 13, 2011)

appropriate that the court swing the ax down on defendants and their counsel as a potential solution.¹⁵⁷ That said, there is really no easy way to prevent this problematic tactic from continuing. With this in mind, here are some potential ways to address the multi-jurisdictional litigation problem that parties, counsel, and the courts may potentially consider.

A. *Solutions for Parties*

As discussed above, one solution corporations can employ to eliminate plaintiffs' counsel's tactics, is to adopt a "choice of forum" provision in the charter that would require state law deal litigation claims to be filed in the corporation's state of incorporation.¹⁵⁸ Though one court has cast doubt on the validity of director-adopted bylaws in this context,¹⁵⁹ there is Delaware authority that suggests a charter provision on this topic, which requires stockholder approval, would be upheld.¹⁶⁰ Proponents of private ordering strongly favor this approach because it would provide each company, on a company-by-company basis, the ability to decide whether to adopt such a provision, and would not constitute a "one-size-fits-all" solution.¹⁶¹ Moreover, there is a substantial body of case law with United States constitutional underpinnings that suggests other state courts would have to

(noting that entrepreneurial plaintiffs' counsel "maximize by getting the most fee for the least work").

¹⁵⁷The Court of Chancery was initially upset at certain attorney conduct in *Scully v. NightHawk Radiology Holdings, Inc.*, and threatened revocation of one counsel's pro hac vice status for not only the *NightHawk* action but potentially for a year, and added that he was considering referring the action to the Office of Disciplinary Counsel. See Transcript of Courtroom Status Conference at 27-28, *Scully v. NightHawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL (Del. Ch. Dec. 17, 2010). To that end, the court ordered "each set of counsel [to] provide [the court] with a submission detailing their roles in the forum selection settlement process," so that the court could determine whether disciplinary action was merited. *Id.* at 26-28. Ultimately, the court concluded that no counsel in the case did anything wrong. See *Scully v. NightHawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL, at 1-2 (Del. Ch. Apr. 12, 2011).

¹⁵⁸See *supra* Part II.C.

¹⁵⁹See *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1174-75 (N.D. Cal. 2011).

¹⁶⁰See *Revlon*, 990 A.2d at 960 & n.8; see also *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 234-35, 240 (Del. 2008) (analyzing a shareholder proposed expense reimbursement bylaw, noting that "[i]t is well-established Delaware law that a proper function of bylaws is not to mandate how the board should decide specific substantive business decisions, but rather, to define the process and procedures by which those decisions are made," and holding further that those shareholders who believe that they "should be permitted to make the proposed Bylaw as drafted part of CA's governance scheme, have two alternatives. They may seek to amend the Certificate of Incorporation to include the substance of the Bylaw; or they may seek recourse from the Delaware General Assembly") (emphasis added).

¹⁶¹See Nathan et al., *supra* note 104, at 19 (recommending that Delaware corporations consider adopting choice of forum provisions in their charter or bylaws because "the vast benefits a forum selection provision would offer to publically traded companies outweigh any risks").

abide by these provisions.¹⁶² That said, choice of forum provisions have not been fully tested, and it may be a long time before that happens.¹⁶³

One potential way to provide more certainty that forum selection charter (or bylaw) provisions (discussed above) are permissible under Delaware law would be for the Delaware legislature to adopt an express statutory provision (or amend an existing provision) that puts the issue to rest.¹⁶⁴ For example, the legislature could amend Section 102(b) of the DGCL to clarify that forum selection charter provisions are valid and enforceable under Delaware law. For example, a new subsection under Section 102(b) could read as follows: "A provision requiring that claims relating to (i) director or officer conduct (which includes fiduciary duties owed to stockholders), (ii) the interpretation or application of any section of this title, or (iii) any other matters arising out of the internal affairs of the corporation, be raised exclusively in the state of incorporation." Such a provision would provide certainty that forum selection provisions are valid under Delaware law.

B. *Solutions for Counsel*

As zealous advocates, defense counsel will likely remain proactive and involved in the jurisdiction battle and outcome. To that end, counsel will likely continue to consider filing motions to stay or dismiss actions in the non-Delaware forum in deference to a Delaware action, whether on first-filed or *forum non-conveniens* grounds, or simply on the ground that a Delaware court is the more appropriate forum to address important matters of Delaware corporation law.¹⁶⁵ Proponents of the one-forum motion, which

¹⁶²See *supra* note 5 and accompanying text. It is possible that if a non-Delaware forum refuses to abide by a charter choice of law provision, the issue would likely be appealed all the way to the United States Supreme Court for final resolution given the constitutional underpinnings.

¹⁶³See Nathan et al., *supra* note 104, at 16-17, 19.

¹⁶⁴Recently, the Delaware legislature adopted statutory provisions addressing stockholder access to proxy solicitation materials and proxy expense reimbursement in an effort to clarify that a corporation may provide for such matters in its bylaws, subject to certain procedures and conditions. See, e.g., DEL. CODE ANN. tit. 8, § 112 (Supp. 2010) (regarding access to proxy solicitation materials); DEL. CODE ANN. tit. 8, § 113 (Supp. 2010) (regarding proxy expense reimbursement); see also DEL. CODE ANN. tit. 8, § 102(b)(1) (2001) (permitting that "[i]n addition to the matters that are required to be set forth in the certificate of incorporation, the certificate of incorporation may also contain . . . [a]ny provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, . . . if such provisions are not contrary to the laws of this State").

¹⁶⁵See *supra* Part II.A.1.

involves less advocacy by counsel and leaves more to chance, will likely continue that approach as well.¹⁶⁶

Meanwhile, counsel can do more. At the same time counsel is moving to stay or dismiss actions in the non-Delaware forum, or moving things forward in the Delaware forum,¹⁶⁷ counsel may attempt to settle all the lawsuits early and on the best terms available, ideally on a global basis.¹⁶⁸ Indeed, as zealous advocates, "[m]ost lawyers believe they should strike the best deal they can for their client."¹⁶⁹ As discussed above, from a defense standpoint, this makes the most sense given that the costs of defending litigation in multiple fora is typically substantial, and the costs and risks only expand as the litigation proceeds.¹⁷⁰ Assuming a global settlement is not possible, where a settlement is reached in one forum, counsel would then likely seek dismissal of all other pending actions on ground of *res judicata*.¹⁷¹

Though the concern over "collusive forum shopping" was raised early in the *NightHawk* matter,¹⁷² raising doubts over the continued viability of the settlement solution for multi-jurisdictional litigation, those concerns were largely mitigated by the special counsel's report issued in that proceeding,¹⁷³ which was adopted by the Court of Chancery when concluding that defense counsel in *NightHawk* did nothing wrong.¹⁷⁴

¹⁶⁶See *supra* Part II.A.2.

¹⁶⁷This may be in the form of an answer, discovery, motions for class certification, dispositive motions pursuant to Rule 12(c) or Rule 56, or other applicable motions.

¹⁶⁸See, e.g., Brief of Defendants in Response to the Court's December 22, 2010 Order at 2, *Scully v. NightHawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL (Del. Ch. Feb. 11, 2011) ("[I]t [is] counsel's obligation, on its clients' behalf, to pursue settlement, on the best terms possible, consistent with the clients' wishes and counsels' ethical obligations.").

¹⁶⁹Marcus, *supra* note 129.

¹⁷⁰See *supra* Part II.B; see also Charles M. Nathan, *New Challenges and Strategies for Designating Delaware as Jurisdiction for Corporate Disputes*, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (May 11, 2011, 9:31 AM), <http://blogs.law.harvard.edu/corpgov/2011/05/11/new-challenges-and-strategies-for-designating-delaware-as-jurisdiction-for-corporate-disputes/> ("Multi-forum litigation has become an increasing and expensive problem in intra-corporate disputes, especially in the context of suits challenging the acquisition of publicly traded Delaware entities.").

¹⁷¹See *supra* note 66 and accompanying text.

¹⁷²See Transcript of Courtroom Status Conference at 5, *Scully v. NightHawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL (Del. Ch. Dec. 17, 2010).

¹⁷³See Brief of Special Counsel at 17, *Scully v. NightHawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL (Del. Ch. Mar. 11, 2011).

¹⁷⁴See *Scully v. NightHawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL, at 1 (Del. Ch. Apr. 12, 2011). Since *NightHawk*, a number of cases that involved multi-jurisdictional deal litigation in Delaware and elsewhere, settled in the non-Delaware forum and the Delaware courts agreed to dismiss the Delaware action on *res judicata* grounds. See, e.g., *Norton v. Internet Brands, Inc.*, C.A. No. 5900-CS (Del. Ch. Aug. 23, 2011); *N.J. Carpenters Annuity Fund v. Smith Int'l Inc.*, C.A., No. 5292-VCL (Del. Ch. Aug. 24, 2011). However, the Delaware courts remain vigilant in

C. Possible Solutions for Courts

1. Communication and Increased Awareness

The courts have suggested (and employed) various solutions to the problems associated with the multi-jurisdictional litigation phenomenon.¹⁷⁵ Many of these solutions involve increased communication and awareness by the parties and courts in the multiple forums where deal litigation is pending.¹⁷⁶ Variations on this theme include:

- The court's willingness to communicate with the judge in the other jurisdiction about the issue;¹⁷⁷
- The court's willingness to favorably entertain an application from plaintiffs in another state court to intervene in a Delaware action;¹⁷⁸
- Urging plaintiffs from the non-Delaware jurisdiction to communicate with Delaware counsel because of their expertise as a result of being repeat players;¹⁷⁹
- Ordering the parties to present the Court of Chancery's transcript to the non-Delaware court approving of the settlement and fee awards to demonstrate to that court the

reviewing situations arising in the settlement context concerning counsel motivation. *See, e.g.*, Transcript of Settlement Conference and Plaintiffs' Application for Attorneys' Fees at 45-49, *In re Clariant, Inc. S'holder. Litig.*, C.A. No. 5932-CS (Del. Ch. June 15, 2011) (leaving open the decision on whether to approve settlement after consideration of the apparent differing practices in California and Delaware as to timing of negotiation of attorney's fees in deal litigation matters). The settlement was ultimately approved. *See In re Clariant, Inc. S'holder Litig.*, C.A. No. 5932-CS (Del. Ch. Aug. 8, 2011); *see also In re Dynegy Inc. S'holders Litig.*, C.A. No. 5739-VCS (Del. Ch. Mar. 16, 2011) (dismissing as moot, over plaintiff's objection, a deal litigation complaint filed in Delaware where: (1) litigation had proceeded in Texas (with Delaware plaintiff's agreement); (2) the challenged merger was never consummated and the merger agreement was terminated; and (3) the substantive challenges to the merger were dropped in the Texas action leaving only the question of fees there). Chancellor Strine, in *In re Dynegy*, noted that "the plaintiffs' objection to dismissal [of the Delaware action] actually proves why dismissal is required. Plaintiffs are not entitled to file placeholder actions, choose not to prosecute them at all, and to keep them on file because they perceive that gives them some leverage in litigation elsewhere." *Id.* at 2.

¹⁷⁵*See supra* Part III.B.

¹⁷⁶*See infra* notes 156-63.

¹⁷⁷*See supra* note 56 and accompanying text; *In re Allion Healthcare Inc. S'holders Litig.*, 2011 WL 1135016, at *4 n.12 (Del. Ch. Mar. 29, 2011); Transcript of Courtroom Status Conference at 25, *NightHawk*, C.A. No. 5890-VCL.

¹⁷⁸*See* Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 31-32, *In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL (Del. Ch. Jan. 13, 2011).

¹⁷⁹*Id.* at 32.

Court of Chancery's concern over the possibility of forum shopping for higher fee awards;¹⁸⁰

- Urging all of the parties to keep the court informed of settlements in non-Delaware jurisdictions;¹⁸¹
- Urging judges to keep each other informed;¹⁸² and
- Urging plaintiffs' counsel to use the time before the preliminary proxy to organize and litigate in one forum.¹⁸³

Perhaps as more non-Delaware judges understand the tactics that compel counsel to file multi-jurisdictional deal litigation, the less likely it will be for Delaware deal litigations filed in non-Delaware forums to gain traction.¹⁸⁴

2. Attorneys' Fees

Similarly, another way to make the multiple forum option less attractive to plaintiffs' counsel would be for non-Delaware forums to be less receptive to large fee awards for therapeutic-based settlements. As explained earlier, the Delaware courts have historically been conservative when approving fee awards for disclosure-based or other therapeutic settlements.¹⁸⁵

One potential reason for the multi-jurisdictional litigation problem stems from the entrepreneurial tendencies of plaintiffs' counsel to file a deal

¹⁸⁰See Transcript of Status Conference at 9-11, *In re Burger King Holdings, Inc.*, S'holders Litig., C.A. No. 5808-VCL (Del. Ch. Jan. 19, 2011); Transcript of Courtroom Status Conference at 25, *NightHawk*, C.A. No. 5890-VCL.

¹⁸¹See Transcript of Status Telephone Conference at 4, *In re ICx Techs., Inc.* S'holder Litig., C.A. No. 5769-VCL (Del. Ch. Feb. 2, 2011); Transcript of Status Conference at 11, *Burger King*, C.A. No. 5808-VCL.

¹⁸²See Transcript of Status Conference at 10, *Burger King*, C.A. No. 5808-VCL ("I think it's important in these situations that all the judges keep each other informed about what is going on, so that the possibility of forum shopping and jurisdictional arbitrage is minimized.").

¹⁸³See Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 30-31, *Compellent*, C.A. No. 6084-VCL.

¹⁸⁴One commentator suggests as a possible solution that "states that are major players in the class action arena could enter into a multi-state (or state/federal) compact that mimics the federal MDL Panel." Johnson, *supra* note 2, at 54.

¹⁸⁵See *supra* note 24 and accompanying text; Nathan, *supra* note 157. There are few exceptions to this historical practice. See *In re Del Monte Foods Co.* S'holders Litig., 2011 WL 2535256, at *1 (Del. Ch. June 27, 2011) (granting interim fee award of \$2.75 million for corrective disclosures); *In re Compellent Techs., Inc.* S'holders Litig., 2011 WL 6382523, at *1 (Del. Ch. Dec. 9, 2011) (awarding \$2.4 million in fees where the "settlement consideration consisted of modifications to the deal protections in the merger agreement, including the rescission of a stockholder rights plan adopted in connection with the transaction, and six supplemental disclosures").

litigation raising Delaware law in a non-Delaware forum, where plaintiffs believe it will be easier to have a large fee award approved for disclosure-based or other therapeutic benefits.¹⁸⁶ Thus, a possible solution would be for non-Delaware courts to adopt Delaware's approach to awarding attorney's fees—whether in the settlement or mootness context—for disclosure-based settlements. Recently, more non-Delaware courts appear willing to reduce fees for disclosure-based or other therapeutic settlements,¹⁸⁷ a trend that may be the result of a growing awareness of the judiciary in non-Delaware forums of the problems inherent with multi-jurisdictional deal litigation.¹⁸⁸

¹⁸⁶See *supra* notes 21-25 and accompanying text.

¹⁸⁷*Ward v. Lance*, 10 CVS 16553, at 2 (N.C. Super. Ct. Feb. 28, 2011) (finding that "\$250,000 is the top going rate for stinky fees"); *In re XTO Energy S'holder Litig.*, No. 352-242403-09, at 7 (Tex. Dist. Ct. Oct. 1, 2010) (cutting fees in connection with a global, disclosure-based settlement of Texas and Delaware lawsuits by more than half, from \$8.8 million to \$3.972 million). The court of appeals in *XTO* later modified the trial court's award of attorneys' fees to \$8.6 million. *Stratton v. XTO Energy Inc.*, 2012 WL 407385, at *10 (Tex. App. Feb. 9, 2012).

¹⁸⁸Other commentators have suggested that the way to solve the problem is for Delaware courts to award higher fees. See John Armour, Bernard S. Black & Brian R. Cheffins, *Delaware's Balancing Act* 44, 49 (Univ. of Cambridge Faculty of Law Research Paper No. 37, 2011) available at <http://ssrn.com/abstract=1677400> (offering that one way to "reverse the out-of-Delaware trend" is that "Delaware courts could move back towards their former fee-friendly posture"); Matthew D. Cain & Steven M. Davidoff, *A Great Game: The Dynamics of State Competition and Litigation* 4 (Working Paper, Jan. 16, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984758 ("[W]hen attorneys face a choice in where to bring litigation, they respond to lower prior fee awards and settlement rates in one particular state by moving to other state jurisdictions to file. In other words, attorneys are highly responsive to the incentives provided by differential fee awards and settlements . . . across multiple jurisdictions."). Some have recently noted that Delaware courts may indeed be employing this tactic based on fees awarded in recent cases. See Gina Chon & Joe Palazzolo, *An Early Christmas for These Lawyers; \$300 Million in Fees for Shareholder Case Sets Off Debate*, WALL ST. J., Dec. 28, 2011, http://online.wsj.com/article/SB100014240529702042968045_77124772580624142.html (noting that for some legal experts, the Southern Peru fee "raises questions about whether Delaware judges, who have criticized the plaintiffs' bar for bringing corporate cases in other courts, are trying to show that Delaware is friendly to plaintiffs"); see also *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, C.A. No. 961-CS (Del. Ch. Dec. 20, 2011) (awarding over \$300 million in fees for significant post-trial monetary recovery); *In re Compellent*, 2011 WL 6382523, at *1 (Del. Ch. Dec. 9, 2011) (awarding \$2.4 million in fees for therapeutic benefits). This may serve as a band-aid on the problem, but it is not a substantive solution, and may ultimately serve to further the multi-jurisdictional litigation problem. There is no guarantee that, if Delaware fee awards trend higher, the members of the plaintiffs' bar that have perceived an entrepreneurial advantage to filing in non-Delaware forums will stop that practice. In fact, it is just as plausible that some plaintiffs' lawyers may perceive that their multi-jurisdictional tactic is a success, and thus continue to file in non-Delaware forums to drive up fee awards even higher.

3. The "State of Incorporation Rule"

Perhaps the best solution would be for the following rule to be adopted by the courts: If litigation is commenced in connection with a proposed merger or acquisition (or other transaction arising under state corporation law), and raises claims for breach of fiduciary duty (or other such claims relating to the corporate governance or internal affairs of the corporation), the litigation should proceed in the state of incorporation (if a lawsuit is filed there), and stayed in all other locations.¹⁸⁹

Let's call it the "State of Incorporation Rule." The primary benefit of this rule is that it would provide an immediate solution to any tactical maneuvering on both sides of the litigation that appear to be attracting the attention of the courts. It would also better serve efficiency and comity for all constituents to deal litigation, including the courts, because deal litigation would proceed only in one forum.¹⁹⁰ There is a logical and common sense elegance associated with the State of Incorporation Rule; companies that elect to incorporate under a certain state's laws, and stockholders that invest in such companies, deserve to have their corporate governance-related disputes heard in the state of incorporation. This proposed rule also has a much more solid basis than rules of dubious underpinnings, such as the "first-filed" rule, which simply rewards plaintiffs who race to the courthouse, usually with the least developed complaints.¹⁹¹ As the Court of Chancery explained in *In re Topps Co. Shareholders Litigation*,¹⁹² "the fact that a particular plaintiff filed the first complaint in a wave of hastily-crafted class action complaints attacking a just-announced transaction has no rational

¹⁸⁹This rule could be applied by members of the judiciary as part of a common law analysis, through the legislature as a statutory measure, or by the courts as a promulgated rule.

¹⁹⁰As one prominent member of the plaintiffs' bar has explained: "[T]he current system [which permits multi-jurisdictional deal litigation] is prone to manipulation and gamesmanship. The best way to eliminate, or at least mitigate, these problems is to adopt a system that centralizes deal-related litigation into a single forum." Lebovitch et al., *supra* note 2, at 4. In his article, Mark Lebovitch proposes a solution for multi-jurisdictional litigation by developing a new system for selecting lead counsel in the Delaware Court of Chancery, but acknowledging that such a system "would not solve all multi-jurisdictional issues," and that the proposed system could result in the "unusual" circumstance of having a deal litigation find its leadership issues resolved in the Delaware Court of Chancery, but proceed in a different forum on the merits. *Id.* at 7-10. These types of proposed solutions, however, will only work if the members of the plaintiffs' bar abide by them. See Transcript of Scheduling Office Conference, *In re Medco Health Solutions, Inc. S'holders Litig.*, C.A. No 6720-CS (Del. Ch. Oct. 21, 2011).

¹⁹¹See *supra* notes 45-46 and accompanying text.

¹⁹²924 A.2d 951 (Del. Ch. 2007).

force in determining where a motion to enjoin that transaction should be heard."¹⁹³

Rather, the State of Incorporation Rule is based squarely on well-settled principles of due process and comity under the United States constitution.¹⁹⁴ According to the United States Supreme Court, "[t]he internal affairs doctrine is a . . . principle which recognizes that only 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."¹⁹⁵ Similarly, the United States Supreme Court has acknowledged that it is "an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares."¹⁹⁶ From here, members of the Delaware Court of Chancery that have analyzed this issue have strongly indicated their belief that the constitutional underpinnings of the internal affairs doctrine warrants deal litigation being resolved in the forum where the subject company is incorporated.¹⁹⁷ In addition, this would support the important policy of

¹⁹³*Id.* at 957.

¹⁹⁴*See supra* note 5 and accompanying text.

¹⁹⁵*Edgar v. Mite Corp.*, 457 U.S. 624, 645 (1982).

¹⁹⁶*CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 91 (1987).

¹⁹⁷*See* Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 25, *In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL (Del. Ch. Jan. 13, 2011) ("It's therefore my conclusion that under the internal affairs doctrine, as a matter of the appropriate allocation of responsibility among the several states, and as shown by federal policy, as evidenced by the legislative history of [the Securities Litigation Uniform Standards Act], this case should go forward here."); Transcript of Hearing on Motion to Expedite at 17, *In re RAE Sys., Inc. S'holders Litig.*, C.A. No. 5848-VCS (Del. Ch. Nov. 10, 2010) (noting that when there is expedited litigation and there is a choice between two forums, that is when courts should "stay in [their] own lane" and the parties should litigate in the forum whose law is at stake). An argument could be made, based on the legislative history of both the United States House and Senate, that the Securities Litigation Uniform Standards Act's ("SLUSA") so-called "Delaware carve out" was intended to require state law deal litigation to be filed in the state of incorporation. *See* S. REP. NO. 105-182, at 6 (1998) ("[T]he Committee expressly does not intend for suits excepted under [the Delaware carve out to the SLUSA] to be brought in venues other than in the issuer's state of incorporation. . . ."); H.R. REP. NO. 105-803, at 13-14 & n.2 (1998) (Conf. Rep.) (noting that the legislation should preserve state jurisdiction over certain actions that are based on state law in which the issuer of the security is incorporated, and further stating that "[i]t is the intention of the managers that the suits under this exception be limited to the state in which [the] issuer of the security is incorporated"). However, certain federal courts that have interpreted this point have not reached this result. *See, e.g.*, *Gibson v. PS Grp. Holdings, Inc.*, 2000 WL 777818, at *6 (S.D. Cal. June 14, 2000) (determining that the language of the Delaware carve-out of the SLUSA was unambiguous, and that the court could not resort to the Act's legislative history to determine congressional intent). In *Gibson*, the District Court held:

Although the Delaware carve-out clearly limits preserved actions to those that are

allowing the Delaware courts—including, most significantly, Delaware's highest court—to apply and interpret Delaware law.¹⁹⁸

To the extent that a non-Delaware court desired to retain some oversight over the matter—whether because the company at issue plays an important local or community role, or otherwise—the stay of such litigation, rather than dismissal, would permit the non-Delaware court that option. For example, the non-Delaware court could require monthly updates about the progress in Delaware, and could record its views on a transcript that the non-Delaware court might require the parties to submit to the Delaware court.¹⁹⁹ The courts in both forums could also communicate with each other, a practice that the Delaware Court of Chancery has repeatedly indicated might offer a practical salve for the multi-jurisdictional litigation problem.²⁰⁰ And by focusing the State of Incorporation Rule on corporate governance-related matters—as opposed to matters of community interest (such as employment

"based upon the statutory or common law of the State in which the issuer is incorporated," the statute provides that such actions "may be maintained in a State or Federal court by a private party." Nothing in this language suggests that Congress intended to restrict the venue of preserved class actions to the issuer's state of incorporation.

Id. (citation omitted). See also Class Action Fairness Act of 2005 (codified in 28 U.S.C. § 1332(d)(9)(B)) (containing a so-called "Delaware carve-out" from removal provision, which applies to class actions that solely involve claims that relate to matters of corporate governance arising out of state law).

A commentator has noted that "[o]ne potential result of the proliferation of multi-forum M&A objection suits" is potential modifications to "the SLUSA Delaware Carve-Out" or other similar federal laws, such as "the internal affairs/corporate governance exception in CAFA." Johnson, *supra* note 2, at 53 (identifying, among other issues, that the SLUSA Delaware Carve-Out could be repealed, or modified, to require class action deal cases to be filed in the state courts where the company is incorporated).

¹⁹⁸See Transcript of Office Conference at 13, *In re Medco Health Solutions, Inc. S'holders Litig.*, C.A. No. 6720-CS (Del. Ch. Aug. 11, 2011). In discussing the importance of allowing the Delaware Supreme Court to apply and interpret Delaware law, Chancellor Strine stated:

There could be no more authoritative ruling on Delaware state law, whether you like it or not, than from the Delaware Supreme Court, which makes itself available for expedited appeals. It is not in my view a legitimate reason to not have a case in a forum . . . [if you] don't like how the highest court of that state will apply its own law.

Id.

¹⁹⁹Similar practices have been utilized at times by the Court of Chancery. See, e.g., Transcript of Status Telephone Conference at 4, *In re ICx Techs., Inc. S'holder Litig.*, C.A. No. 5769-VCL (Del. Ch. Feb. 2, 2011) (urging the parties to keep the court informed of settlements in non-Delaware jurisdictions); Transcript of Status Conference at 9-11, *In re Burger King Holdings, Inc., S'holders Litig.*, C.A. No. 5808-VCL (Del. Ch. Jan. 19, 2011) (ordering the parties to present the Court of Chancery's transcript to the non-Delaware court).

²⁰⁰*In re Allion Healthcare Inc. S'holders Litig.*, 2011 WL 1135016, at *4 n.12 (Del Ch. Mar. 29, 2011); Transcript of Status Conference at 10, *Burger King*, C.A. No. 5808-VCL ("I think it's important in these situations that all the judges keep each other informed about what is going on, so that the possibility of forum shopping and jurisdictional arbitrage is minimized.").

or environmental disputes)—non-Delaware forums that have an interest in policing their own backyards would not be prevented from doing so.²⁰¹

The State of Incorporation Rule could also readily be incorporated into a federal court's analysis under the *Colorado River* doctrine.²⁰² The benefits of such an approach are gleaned from the recent decision in *Krieger v. Atheros Communications, Inc.*²⁰³ In that case, the Northern District of California determined that, under Ninth Circuit authority, a stay of federal securities law disclosure claims under Section 14(a) of the Securities Exchange Act of 1934 in deference to similar state law claims (under Delaware law) was not appropriate.²⁰⁴ However, the court acknowledged a concern that the outcome, compelled by Ninth Circuit and other similar authority, "permits forum-shopping and may encourage plaintiffs to add Exchange Act claims solely for the purpose of securing a separate federal forum and avoiding consolidation with previously filed state court actions."²⁰⁵ The *Atheros* court also recognized an earlier decision by the Northern District of Illinois in *International Jensen Inc. v. Emerson Radio Corp.*,²⁰⁶ which determined it was not without power to exercise its discretion to abstain from hearing federal claims in deference to similar state law

²⁰¹This notion was acknowledged by Vice Chancellor Laster. See Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 15-17, *Compellent*, C.A. No. 6084-VCL. Vice Chancellor Laster, referring to competing interests between states involving a Delaware company with its headquarters in Minnesota, stated:

With all deference to my colleague in Minnesota and to that state, I do not believe that they have a similar interest in the internal affairs of a Delaware corporation. Now, I understand that the locus of part of the operations are up there, and there's certainly areas where that would give Minnesota the greater interest. One obvious one would be labor law; another obvious one would be environmental law. . . .

Now, theoretically, you could file a suit under any one of those subject matters in Delaware because it's a Delaware corporation and so it can be sued here. But the fact that you could name the corporation here would not give Delaware the paramount interest in resolving those questions which would be, in fact, of decidedly greater importance to the State of Minnesota. In fact, even without a parallel proceeding in Minnesota, I would think that it would be appropriate to dismiss in favor of Minnesota. Certainly, if it were a situation where there [were] multiple contemporaneously filed lawsuits, it would be a situation where I would freely defer to Minnesota. Under those circumstances, Minnesota would have the superior interest. Under those circumstances, Minnesota would have the comparative advantage in applying their law.

Id.

²⁰²See *supra* note 57 for a description of the *Colorado River* doctrine.

²⁰³776 F. Supp. 2d 1053 (N.D. Cal. 2011).

²⁰⁴*Id.* at 1060.

²⁰⁵*Id.*

²⁰⁶1996 WL 494273 (N.D. Ill. Aug. 27, 1996).

disclosure claims, and commented that "*Jensen* is on point and [the court] finds its reasoning persuasive."²⁰⁷ Indeed, the increased awareness by the judiciary of multi-jurisdictional tactics warrants reconsideration of Ninth Circuit authority (or any similar authority from other federal circuits) that does not permit copy-cat deal litigation claims, cloaked in the guise of Section 14(a) claims, from being stayed in favor of deal litigation filed in the state of incorporation.²⁰⁸

The State of Incorporation Rule would also not favor Delaware in any special respect. The rule could be applied by Delaware courts when faced with a deal litigation not involving a Delaware company. As Chancellor Strine once wrote:

Of all the states of the union, Delaware should be most sensitive to the need to afford comity to the courts of the jurisdiction that charters an entity. As is well understood, it is more than the statutory words on paper that give life to a system of entity law. Much often depends on the extent to which specific disputes are consistently handled by courts, thus giving businessmen predictable guidance by which to order their relations.²⁰⁹

²⁰⁷*Atheros Commc'ns, Inc.*, 776 F. Supp. 2d at 1059. The *Atheros* court noted, however, that it was constrained to follow conflicting Ninth Circuit authority. *Id.* However, the *Atheros* court continued, remarking on *Jensen* by stating that "more recent Northern District of Illinois cases have distinguished *Jensen* and found that if a federal claim cannot be asserted in state court, abstention as to that claim ordinarily is not appropriate." *Id.* at 1059 n.2. The court went onto note that these cases, nonetheless, "suggest that the decision in *Jensen* may be justified on grounds that 'both the state and federal courts in *Int'l Jensen* would have had to engage in precisely the same analysis applying essentially the same legal standards.'" *Id.* (quoting *Prominent Consulting LLC v. Allen Bros., Inc.*, 543 F. Supp. 2d 877, 883 (N.D. Ill. 2010)).

²⁰⁸Ultimately, the court in *Atheros* decided to stay the state law class action claims in deference to virtually identical class claims pending in the Delaware Court of Chancery, noting that one of its reasons was that the claims "fall within the Delaware court's unique expertise in Delaware corporate law." *Atheros Commc'ns, Inc.*, 776 F. Supp. 2d at 1063.

²⁰⁹*Diedenhofen-Lennartz v. Diedenhofen*, 931 A.2d 439, 442 (Del. Ch. 2007).

Chancellor Strine went on to state that:

If we expect that other sovereigns will respect our state's overriding interest in the interpretation and enforcement of our entity laws, we must show reciprocal respect. In particular, that means giving more respect to the shared expectations of the owners and managers of a business entity that their internal affairs should [be] governed by expert determinations made by jurists in the domicile of the entity, and much less to the desires of a plaintiff who for tactical reasons seeks to have a Delaware judge make a determination of foreign law.

Id. at 452; see also Transcript of Office Conference at 14-15, *In re Medco Health Solutions, Inc. S'holders Litig.*, C.A. No. 6720-CS (Del. Ch. Aug. 11, 2011); *In re Topps Co. S'holders Litig.*, 924

The State of Incorporation Rule could also be applied in a multi-jurisdictional deal litigation that does not involve a Delaware company at all.

For example, a company incorporated under Pennsylvania law that is sued in both Pennsylvania and New Jersey could look to this rule to have their case heard in Pennsylvania and not in New Jersey.²¹⁰

Of course, one limitation of the State of Incorporation Rule is that it would need to be universally adopted in order to be universally effective. That said, to those that favor the concept of private ordering within a corporation, even if it is adopted by less than fifty states, or a subset of federal courts, it would be better than having a change made at the federal level. To the extent such a change were to be made (and this Article should not be construed to advocate such a change), adopting the State of Incorporation Rule as part of the federal securities laws would at least provide a solution that acknowledges the important differences and distinctions among state corporation laws, and would be squarely supported by United States constitutional underpinnings.²¹¹

A.2d 951, 962 & n.41 (Del. Ch. 2007) (identifying cases that have shown the Court of Chancery's willingness to defer to the primacy of other states' interests in the evolution and enforcement of their laws); IM2 Merch. and Mfg., Inc. v. Tirex Corp., 2000 WL 1664168, at *10-*11 (Del. Ch. Nov. 2, 2000) (deferring to Canadian courts on issues of Canadian law.); TA Instruments-Waters, LLC v. Univ. of Conn., 2011 WL 6116451, at *1 (Del. Ch. Nov. 8, 2011) (deferring to a Connecticut court on issues of Connecticut law). *But see* Berger v. Intelident Solutions, Inc., 906 A.2d 134, 135 (Del. 2006) (reversing the Court of Chancery's dismissal of an action involving novel issues of Florida law, and finding no hardship created by having a Delaware court interpret Florida's law even though stockholders chose to be governed by Florida law by buying stock in a Florida corporation).

²¹⁰*See, e.g.*, Stipulation and Agreement of Settlement, Jackson v. Penwest Pharm. Co., No. 10-2-29162-8-SEA (Wash. Super. Ct. Feb. 10, 2011) (agreeing to a settlement of multi-jurisdictional deal litigation involving a Washington corporation sued in a Washington state court and in New York state and federal courts, where the company had its headquarters); Fernicola v. Duchess, 2008 WL 833965, at *3 (N.J. Super. Ct. App. Div. Mar. 28, 2008) (staying a New Jersey action in favor of a Florida action); Yancoskie v. Del. River Port Auth., 395 A.2d 192, 193 (1978) (staying a New Jersey action in favor of a Pennsylvania action).

²¹¹One prominent group of securities and business lawyers identified early on the growing problems associated with multi-jurisdictional litigation, and proposed two potential solutions. One was advocating that public companies should be permitted to contract with their investors to limit venue for deal litigation to the state of incorporation. The other potential solution was a proposed rule similar to the State of Incorporation Rule that they believed should be considered for adoption at the federal level. *See* Comm. on Sec. Litig., Ass'n of the Bar of the City of New York, *Coordinating Related Securities Litigation: A Position Paper* 9 (April 17, 2008) (identifying that a "potential way to eliminate the costs of duplicative litigation would be to enact federal legislation requiring all deal litigation to be brought in the state of incorporation," and that "authority for such legislation is found in the Commerce Clause of the U.S. Constitution . . . [because] [s]hares of stock in publicly listed corporations are bought and sold nationally and are held by investors all across the country, thereby satisfying the requirement that the regulated activity substantially affect interstate commerce").

VI. CONCLUSION

As explained above, multi-jurisdictional deal litigation poses many problems for which there is no easy solution. From our vantage point, the best possible solution is the one in which deal litigation disputes involving questions of internal corporate governance (such as breach of fiduciary duty claims or other matters of internal governance) are resolved in the jurisdiction of incorporation. That many of these disputes would be resolved in the Delaware courts, because many public companies are incorporated there, does not weigh against the persuasive logic, efficiency, and constitutional authority that justifies such a result. Significantly, it would provide corporate America with the "predictable guidance" regarding corporate governance that is essential for business to thrive. This Article identifies many possible ways for a corporate governance dispute to land in the state of incorporation. Among these include the proposed State of Incorporation Rule, which would ensure that all states would retain jurisdiction over corporate governance disputes for corporations incorporated under their laws, thus ensuring that such disputes would all "stay in [their] own lane."²¹²

²¹²Transcript of Hearing on Motion to Expedite at 17, *In re* RAE Sys., Inc. S'holders Litig., C.A. No. 5848-VCS (Del. Ch. Nov. 10, 2010).