

# MERGER CLASS ACTIONS IN DELAWARE AND THE SYMPTOMS OF MULTI-JURISDICTIONAL LITIGATION

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## ABSTRACT

*Recent research on corporate litigation has focused on three trends: the growth in percentage of mergers that result in litigation, the migration of cases away from Delaware, and the increasing prevalence of merger litigation occurring simultaneously in multiple jurisdictions. This Article uses a new and unique dataset of public company litigation to track how these trends have affected filings and litigation tactics in the Delaware Court of Chancery from 2004 to 2011. The data confirm that Delaware appears to have experienced a decline in filings during the early and middle periods of the sample, but the data also shows that there has been a sharp increase in the number of the number of acquisition-related cases filed in Delaware in 2010 and 2011.*

*The rise of concurrent, multi-jurisdictional litigation and the litigation tactics that it encourages are the likely reasons for the growth of acquisition-related cases in Delaware. While some plaintiffs' attorneys may have left Delaware to escape the Chancery's threats of lower attorneys' fees and merit-based selection of lead counsel, in the current environment a Delaware filing may provide strategic advantages as foreign jurisdictions become saturated with filings. For example, lawyers may try to take control of a case by moving for expedited proceedings in Delaware or they may try to complicate negotiations over the selection of lead plaintiffs' counsel. The threat of using these tactics may increase the possibility that a plaintiff will receive some share of a fee award either in Delaware or in a case being litigated elsewhere.*

*This Article explores how the rules Delaware uses to manage deal cases may enable strategic behavior in the context of multi-jurisdictional*

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*litigation. This discussion provides reasons to believe that the use of tactics such as requesting expedited proceedings, contesting consolidation of cases, and involving out-of-state counsel earlier in proceedings should increase as multi-jurisdictional litigation increases. The empirical evidence provides substantial support for these theories. The Article concludes with an assessment of how the observed increase in strategic tactics may affect debates over how and whether to respond to the rise of multi-jurisdictional litigation.*

### INTRODUCTION

Recent scholarship on corporate litigation in the United States has focused on three trends. The first is the substantial growth in the percentage of mergers and acquisitions that have been subject to court challenges. In the 1999–2000 period, a study of all announced mergers and acquisitions offers found that 10% of those deals were subject to litigation.<sup>1</sup> By 2011, that number had climbed to over 94%, at least for larger deals.<sup>2</sup> The second trend traces the increasing threat to Delaware—and specifically the corporate-focused Court of Chancery—as the nerve center of corporate litigation. Recent articles by John Armour, Bernard Black, and Brian Cheffins (“ABC”) argue that, at least until 2009, Delaware has been losing market share in important areas of corporate litigation.<sup>3</sup> The final trend is the recent and striking increase in the number of acquisition-related cases that are litigated across multiple forums. For cases that meet their size threshold, Matt Cain and Steven Davidoff show that the percentages of transactions that have produced lawsuits in more than one jurisdiction has increased from 8.6% in 2005 to 47.6% in 2010.<sup>4</sup>

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1. See C.N.V. Krishnan et al., *Shareholder Litigation in Mergers and Acquisitions*, J. CORP. FIN. (forthcoming 2012) (manuscript at 2, 34), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1722227](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722227).

2. This number is for deals over \$100 million that have a per share price of five dollars or more. See Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2011*, at 1–2 (Feb. 2, 2012) (working paper), available at [http://papers.ssrn.com/papers.cfm?abstract\\_id=1998482](http://papers.ssrn.com/papers.cfm?abstract_id=1998482). It is important to note that the growth in the absolute number of challenges to mergers has not been as dramatic over this time period. See discussion *infra* notes 28–31 and accompanying text.

3. See John Armour et al., *Is Delaware Losing Its Cases?* (Northwestern Law & Econ. Research Paper No. 10-03, 2012), available at [http://papers.ssrn.com/papers.cfm?abstract\\_id=1578404](http://papers.ssrn.com/papers.cfm?abstract_id=1578404); John Armour et al., *Delaware's Balancing Act*, 87 IND. L. J. 1345 (2012). Another recent study by Matthew Cain and Steven Davidoff finds more mixed views with respect to Delaware's loss of market share while also suggesting that states have been competing for these cases through a combination of increased settlement rates and increased attorney awards. See Matthew D. Cain & Steven M. Davidoff, *A Great Game: The Dynamics of State Competition and Litigation* (Apr. 2012) (working paper), available at [http://papers.ssrn.com/papers.cfm?abstract\\_id=1984758](http://papers.ssrn.com/papers.cfm?abstract_id=1984758).

4. Cain and Davidoff, *Takeover Litigation in 2011*, *supra* note 2, at 2.

There are pressing questions as to what accounts for these changes and about how these trends may be affecting the Court of Chancery's status as the preeminent court for corporate litigation.<sup>5</sup> This Article provides insight to these questions by extracting a sizable sample of cases involving public companies from a dataset that consists of every civil case filed in the Delaware Court of Chancery from 2004 to 2011. The dataset allows for the tracking of trends in case mix, party makeup, law firm appearance, the involvement of out-of-state counsel, and the actions taken by the parties and the court in these cases. The dataset's focus on Delaware means that it cannot provide definitive answers to the questions raised by trends in the national case mix or about how precisely Delaware is faring in interjurisdictional competition, it can provide a comprehensive picture of the long-term trends in Delaware's specific case mix and can show how the symptoms of the increase in multi-jurisdictional litigation are affecting Delaware lawsuits.

Several patterns emerge from this examination of eight years worth of docket data. Some of these trends are consistent with previous research and others suggest that there have been some important recent changes in the way corporate litigation proceeds in Delaware. While earlier studies have found indications that acquisition-related class actions are the predominant form of corporate litigation in Delaware,<sup>6</sup> this study shows that the makeup of the Chancery docket has fluctuated quite widely over the course of the sample. Despite the strong growth in the amount of acquisition-related litigation in the United States, ABC's observations that Delaware appears to have been losing cases appear consistent with this study's observation that this segment of cases did not grow during that time period and was not the dominant part of the docket that it had been in earlier times. But acquisition-related cases have returned to Delaware in force, and particularly so in the last two years of the study. As of 2011, acquisition-related class actions form a substantial majority of all public-company cases filed in Delaware and their overall numbers are higher than during any other year in the sample.

Both ABC and Cain and Davidoff have provided accounts of what may be driving the decisions that corporate plaintiffs' attorneys make about

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5. The literature that comments on Delaware's stature as the leading forum for corporate law and litigation is vast. For an overview of the state of this scholarship, see ROBERTA ROMANO, FOUNDATIONS OF CORPORATE LAW 114–51 (2d ed. 2010).

6. See Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 168 (2004) (showing that over the 1999–2000 time period, 61 percent of lead complaints filed against public companies involved acquisition-oriented class actions).

where to file acquisition-related cases. ABC hypothesize that relatively harsh criticism of plaintiffs' lawyers by Delaware courts, the potential for cuts in attorneys' fee awards, and the move away from the pattern of awarding lead counsel status to the first to file a case may have contributed to the decision not to file in Delaware.<sup>7</sup> Cain and Davidoff theorize, and provide some empirical support for, the notion that states compete for acquisition-related cases on the basis of attorneys' fees and settlement rates.<sup>8</sup> They suggest that state courts may adjust these factors to account for the loss of cases. These theories are all plausible and none of the data here refute them.

But the recent boom in Delaware cases supports a narrative that has not been the focus of previous research on Delaware case flow or in the empirical literature on multi-jurisdictional litigation.<sup>9</sup> It appears that filing a case in Delaware may provide a number of strategic benefits to out-of-state counsel who have lost the race to the courthouse in a non-Delaware jurisdiction. Given that foreign jurisdictions often select lead counsel on the basis of the first to file the case, out-of-state counsel who lose the race to the courthouse have little to gain by filing in that foreign jurisdiction. If, however, these counsel have a plausible chance at being named as lead counsel in Delaware—where the selection of lead counsel largely depends on the size of a plaintiffs' shareholdings and the perceived quality of its law firm<sup>10</sup>—they can file in Delaware. Doing so provides the options of

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7. Armour et al., *Delaware's Balancing Act*, *supra* note 3, at 1380.

8. See Cain & Davidoff, *A Great Game*, *supra* note 2.

9. There have already been several thoughtful assessments of the problem of multijurisdictional litigation in the context of merger litigation. Randall Thomas and Robert Thompson argue that the problem should be conceived as litigation over fee distribution rather than a matter of forum shopping. See Randall S. Thomas and Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multi-jurisdictional Litigation*, 106 NW. L. REV. 1753, 1791–1800 (2012) [hereinafter *A Theory of Representative Shareholder Suits*]. They conclude that the social costs associated with this type of litigation are likely to be small because these cases are often not resource intensive. See *id.* at 1800–01. In light of this assessment, the authors conclude that the problem is not dire and that judicial comity is the most attractive manner to address this issue. See *id.* at 1804–06. See also Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, *infra* note 16 (likewise supporting judicial comity as the best approach to the problem).

10. Armour et al., *Delaware's Balancing Act*, *supra* note 3, at 1374. In *TCW Technologies Limited Partnership v. Intermedia Communications, Inc.*, No. 18336, 2000 Del. Ch. LEXIS 147 (Oct. 17, 2000), former Chancellor Chandler expressly dismissed the notion that judges in Delaware consider which party had filed first when awarding lead counsel status. He declared there that such a belief was a “myth” which had “neither empirical nor logical support.” *TCW*, 2000 Del. Ch. LEXIS 147, at \*8–9. A six-factor test was eventually introduced in *Hirt v. U.S. Timberlands Service Company, LLC.*, which collected the various factors that the Delaware judges had been using to make decisions on lead counsel status. No. Civ. A. 19575, 2002 WL 1558342, at \*2 (Del. Ch. July 3, 2002). The factors listed by the court there were:

going forward with the Delaware case or demanding to be part of the leadership structure in the foreign jurisdiction. And even if the plaintiffs' counsel does not have a strong chance of being named lead counsel in Delaware, a Delaware filing may provide some leverage in Delaware or in a foreign jurisdiction. If there are plaintiffs who have a better chance of being named lead counsel in Delaware, other Delaware plaintiffs may be able to receive a small settlement in exchange for not fighting the consolidation of the case.

A Delaware filing may also allow for procedural tactics that increase the expected value of a fee award. For example, a filing in Delaware allows a plaintiff to move for expedited proceedings there.<sup>11</sup> A successful attempt to expedite can shift the focus of the case to the jurisdiction granting such a motion because the need to produce discovery can threaten the viability of the underlying deal. Likewise, a Delaware filing can allow a plaintiff to make a more credible objection to any settlement that occurs in a non-Delaware jurisdiction. This tactic may lead defendants to offer a share of the settlement to anyone threatening to make such an objection in order to end the litigation.<sup>12</sup> These outcomes are better for plaintiffs' counsel than being second to the courthouse in the foreign jurisdiction and getting nothing.

The prospect of using a Delaware filing to counter cases filed in foreign jurisdictions is consistent with the data developed in this Article. The data show an increase in cases in Delaware, the recent growth in the active and early involvement of out-of-state counsel in Delaware cases, and a sharp increase in requests for expedited proceedings in acquisition-related cases. While commentators on multi-jurisdictional litigation have hinted at some of these tactics, this Article is the first empirical effort to

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(1) "the quality of the pleadings . . ."; (2) "the relative economic stakes of the competing litigants in the outcome of the case (to be accorded 'great weight')"; (3) the firm's perceived "willingness and ability . . . to litigate vigorously on behalf of entire class . . ."; (4) "the absence of any conflict between larger, often institutional . . . and smaller stockholders"; (5) "the enthusiasm . . . with which the . . . contestants have prosecuted the lawsuit"; and (6) the perceived "competence of [the involved] counsel . . ."

*Id.* (footnotes omitted). Although the *Hirt* test remains unchanged, in a recent decision Vice Chancellor Glasscock articulated that the factor test was more of a guide and that "the Court's overriding goal is [to] establish a leadership structure that will provide effective representation to the stockholder's class." *In re Delphi Fin. Grp. S'holder Litig.*, C.A. No. 7144-VCG, 2012 WL 424886, at \*1 (Del. Ch. Feb. 7, 2012) (alteration in original) (citation omitted) (internal quotation marks omitted).

11. See Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1077 (2000) (discussing the willingness of Delaware courts to grant expedited proceedings).

12. See discussion of how a foreign filing may aid objections to settlements *infra* at notes 63–66 and accompanying text.

document how this strategic behavior has affected litigation in the Court of Chancery.<sup>13</sup>

The development of these strategies is potentially troubling because it means that the rise of multi-jurisdictional litigation may be increasing procedural burdens on courts. For Delaware, there is some irony in this development because the weight of this burden may be a consequence of adjustments Delaware made to control its docket when it had a quasi-monopoly on corporate litigation. For example, Delaware's move away from first to file in favor of merit-based selection has been attributed to the Chancery's desire to eliminate the low quality of filings that can come with a race to the courthouse.<sup>14</sup> Yet this move to a merit-based standard has created some uncertainty that plaintiffs' counsel may be able to leverage when litigation occurs across jurisdictions.<sup>15</sup> This strategic advantage may draw the very filings that Delaware sought to avoid by moving away from the first-to-file rule. This potential loss of control and the procedural machinations it requires have led to a series of proposals that would address the issues raised by multi-jurisdictional litigation.<sup>16</sup> The evidence developed in this Article helps to situate and evaluate the offered solutions.

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13. Edward B. Micheletti & Jenness E. Parker, *Multi-Jurisdictional Litigation: Who Caused This Problem, and Can it Be Fixed?*, 37 DEL. J. CORP. L 1, 5–12 (2012); Cain & Davidoff, *A Great Game*, *supra* note 2, at 4, 13–14; Armour et al., *Delaware's Balancing Act*, *supra* note 3, at 1384–89.

14. See Thomas & Thompson, *A Theory of Representative Shareholder Suits*, *supra* note 9, at 1805–06 (“Delaware judges have been outspoken in recent years about their perceptions of class counsel's abuses in the deal litigation process. . . . Perhaps as a result, the Delaware Chancery Court moved to implement a form of lead plaintiff provision.”).

15. The Chancery continues to have to deal with what it views as hastily filed, thin complaints. See *infra* note 36.

16. There have been several proposals for how to deal with the potential problems posed by multi-jurisdictional merger litigation. One such proposal would allow companies to use charter amendments or bylaws to designate specific courts for potential merger litigation. See, e.g., Joseph Grundfest, *Choice of Forum Provisions in Intra-Corporate Litigation: Mandatory and Elective Approaches*, 15–16, 24 (Rock Ctr. for Corp. Governance at Stanford Univ. Working Paper No. 91, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1690561](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1690561); Ted Mirvis, *Anywhere But Chancery: Ted Mirvis Sounds an Alarm and Suggests Some Solutions*, M&A J., May 17, 2007, at 17 (citing the endorsement of Wachtell, Lipton, Rosen & Katz's Ted Mirvis to this approach). Other proposals would rely on federal legislation to help centralize merger litigation. See Armour et al., *Delaware's Balancing Act*, *supra* note 3, at 1395–96 (discussing a proposal to consolidate multi-jurisdictional litigation in the state of incorporation), And still other proposals seek to defend the current multi-forum approach, albeit with some improvements to the mechanics of the current system's operation. See Thompson & Thomas, *A Theory of Representative Shareholder Litigation*, *supra* note 9 at 1803–05 (advocating the use of judicial comity to manage multi-jurisdictional litigation); Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. (forthcoming 2013) (arguing for a system of horizontal comity that would minimize opportunism while also improving the coordination and communication across jurisdictions).

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This Article proceeds as follows: Part I reviews the empirical literature on Delaware corporate litigation and acquisition-related litigation in the United States. It begins with the Thompson and Thomas study, which offers the most comprehensive study to date of the Delaware Chancery Court's docket.<sup>17</sup> That study performed a census of the cases filed in the Chancery Court in 1999 and 2000.<sup>18</sup> While the data in that study show that the trend of acquisition-related litigation making up a large share of the Chancery Court's docket is not a new one, that paper also examined a time period when Delaware was the unquestioned center of corporate litigation. Part of the goal of this Article is to examine this trend in the years when that status has been called into question. ABC have two recent papers that collect empirical evidence bearing on the claim that cases have migrated away from Delaware.<sup>19</sup> ABC do not conduct a census, but they do survey a number of areas across jurisdictions and find that Delaware's market share of derivative cases and stock option backdating cases appears to have declined in the period from the mid-1990s to 2009.<sup>20</sup> ABC have also authored a recent companion paper arguing that part of the reason for this trend is the fragmentation of the plaintiffs' bar.<sup>21</sup> Cain and Davidoff conduct an empirical study that provides an in-depth examination of interjurisdictional competition in cases involving mergers and acquisitions.<sup>22</sup> That paper provides some evidence about trends in merger litigation and about what may be driving interjurisdictional competition.

Part II uses a new dataset that surveys the Chancery Court's docket from a period beginning in 2004 and stretching through 2011. The dataset includes every civil case filed in Delaware during that period, which comprises a total of over 7000 unique case numbers. Through fuzzy matching techniques, a sample of 996 unique cases involving public companies has been extracted. The chief benefit of this dataset relative to those used in the other studies is that it provides a long-term picture of the case mix in the Chancery Court. Each case was coded for topic, uniqueness (i.e., whether any follow-on cases were filed), the presence of

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17. See Thompson & Thomas, *supra* note 6.

18. *Id.* at 165.

19. See Armour et al., *Is Delaware Losing Its Cases?*, *supra* note 3; Armour et al., *Delaware's Balancing Act*, *supra* note 3.

20. See Armour et al., *Is Delaware Losing Its Cases?*, *supra* note 3; Armour et al., *Delaware's Balancing Act*, *supra* note 3.

21. Brian Cheffins et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, 2012 COL. BUS. LAW. REV. 427 (2012).

22. See Cain & Davidoff, *A Great Game*, *supra* note 2.

an institutional plaintiff, the Delaware law firms appearing in the case, the admission of out-of-state counsel (through *pro hac vice* motions), and eventual outcome. This Part reviews the trends that these variables demonstrate over the 2004–11 time frame.

Part III explores the implications of the data developed in Part II. The dataset shows changes in the Chancery Court's case mix that are consistent with the claims that cases have left Delaware, an inference aided by evidence of the amount of litigation going on in other jurisdictions at the time. But the data also show a resurgence of Delaware litigation in 2010 and 2011, with the bulk of this change being due to acquisition-related cases. When one digs into the docket to try and understand what lies behind this change, several trends emerge. First, Delaware's efforts to increase the amount of shares that lead plaintiffs hold by prioritizing institutional plaintiffs does appear to have produced more involvement by these plaintiffs. Second, this effort, along with the threat to cut attorneys' fee awards during settlement has not, ultimately, appeared to have stemmed the practice of piling on Delaware lawsuits in acquisition-related challenges. Filings have exploded in recent years and those trends appear to be driven by out-of-state counsel who may have left Delaware in significant numbers during the early part of the sample period. This Part explores whether the growth of multijurisdiction litigation has led to a situation where the out-of-state plaintiffs use the possibility of Delaware litigation as leverage in the battle for a share of settlement fees.

#### I. RELATED RESEARCH ON CORPORATE LITIGATION

The Thompson and Thomas study of 2004 is the most in-depth study of the Delaware Chancery Court's docket. Through their census of cases filed in that court during 1999 and 2000, Thompson and Thomas found what they called the "new look of shareholder litigation."<sup>23</sup> This look was of acquisition-related cases, which were the predominant type of litigation in the Chancery Court during that time period. Of the 1048 cases filed in the Chancery Court that involved fiduciary duty claims against public companies during these two years, 813 (77.6%) were related to acquisitions and, of those 813 cases, 772 (94.9%) were class actions.<sup>24</sup> This percentage, however, drops to 61.2% when one only considers lead complaints because these complaints tend to draw more follow-on

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23. See Thompson & Thomas, *supra* note 6.

24. *Id.* at 169.

filings.<sup>25</sup> For the purposes of this study, the most important fact developed by the Thompson and Thomas data is that acquisition-related litigation made up a large part of the fiduciary duty-rooted class actions during a period when Delaware was the unchallenged center for corporate litigation in the United States.<sup>26</sup>

Subsequent research has established the three trends identified in the introduction: the growth in the percentage of challenged deals, the migration of cases out of Delaware, and the increase in multi-jurisdictional litigation. With respect to challenged deals, Cain and Davidoff show that the percentage of transactions over \$100 million with an offer price of at least five dollars per share that result in litigation has climbed from roughly 39% in 2005 to over 94% in 2011.<sup>27</sup> The change in the absolute number of cases, however, has not been as dramatic. Between 2005 and 2007 the number of acquisitions that resulted in litigation varied between 70 and 97.<sup>28</sup> During 2008 and 2009, the worst years of the financial crisis, the number of cases was 50 and 60 respectively.<sup>29</sup> That litigation rebounded in 2010 when 105 cases were filed and stayed high in 2011 when plaintiffs filed 97 cases.<sup>30</sup> It is unclear whether these trends portend a world in which nearly every deal gets challenged or a situation which allows for a capacity of about 100 challenged deals a year.<sup>31</sup>

The battlegrounds for acquisition-related cases have been in flux. As ABC document, Delaware—at least for a time—was losing some of these cases. In their studies showing this trend, the authors demonstrate that, when it comes to the largest merger transactions, Delaware has transitioned from being the dominant forum for litigation to being one of a number of players. From 1994 to 2001, every single one of the twenty-five largest deals for each year resulted in a case filed in Delaware when the transaction involved a company incorporated in Delaware.<sup>32</sup> But from

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25. *Id.* at 168.

26. *Id.* at 169.

27. Cain & Davidoff, *Takeover Litigation in 2011*, *supra* note 2, at 1–2.

28. *Id.* at 2.

29. *Id.*

30. *Id.*

31. See Thomas & Thompson, *A Theory of Representative Shareholder Suits*, *supra* note 9, at 1789 (interpreting the Cain and Davidoff data to mean that “the problem we are addressing is an increase in the amount of multi-jurisdictional litigation and not an increase in the number of deals attracting litigation.”).

32. See, e.g., Armour et al., *Delaware’s Balancing Act*, *supra* note 3, at 1356–58.

2006 to 2009, almost half of the deals included in this bracket did not involve a Delaware case at all.<sup>33</sup>

The trend of acquisition-related cases leaving Delaware is also apparent from ABC's analysis of leveraged buyout transactions ("LBOs"). As the authors note, these going-private transactions are "litigation prone, and for good reason."<sup>34</sup> Insiders in the company are often on the side of the company that wants to take the company private and one may wonder whether they will do the utmost to maximize the transaction price. ABC's study reviews the trend of litigation involving LBO targets incorporated in Delaware and finds a pattern similar to that seen in the largest merger transactions. While Delaware used to be the chief locale for this specific sort of litigation, its dominance began to decline around 2002. The study shows that, between 1997 and 2001, 73% of all lawsuits challenging LBOs were filed in Delaware, while that figure dropped to 45% for the period from 2002 to 2009.<sup>35</sup>

ABC offer a number of theories that might explain the observed out-of-Delaware trend. This Article raises four of the arguments that have been put forward by ABC. The first argument focuses on the Chancery Court's criticism of weak filings that some might view as an indication of a pro-defendant orientation.<sup>36</sup> Based on these comments, ABC suggest that this behavior may have led to plaintiffs' attorneys taking cases to courts where the judiciary did not share these sentiments. At the same time, the authors share their own impression that Delaware law has not shifted notably in favor of defendants in the period where the exodus from Delaware was observed. ABC also discuss interviews with plaintiffs' counsel who still favor Delaware as a forum despite the changes that have occurred over the last fifteen or so years.<sup>37</sup>

A second reason ABC cite to explain the loss of cases in Delaware concerns direct financial incentives for plaintiffs' attorneys. The authors note that, in a number of cases, the Chancery has cut the attorneys' fees that plaintiffs and defendants have agreed to in settlements.<sup>38</sup> ABC suggest

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33. *Id.*; see also *id.* at 1347 (citing Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 155–56 (2011), and Jennifer J. Johnson, *Securities Class Actions in State Court*, 80 U. CIN. L. REV. (forthcoming 2012)).

34. Armour, et al., *Delaware's Balancing Act*, *supra* note 3, at 1359.

35. *Id.* at 1360–61.

36. *Id.* at 1367–70. Perhaps the most direct evidence that ABC cite of this claim is a quote by Vice-Chancellor Laster: "a lot of these sue-on-every-deal cases are . . . worthless, they're simply we see the announcement, then we file, okay?" *Id.* at 1369 (quoting Courtroom Status Conference at 16, *Scully v. Nighthawk Radiology Holdings*, C.A. No. 5890–VCL (Del. Ch. Dec. 17, 2010)).

37. See *id.* at 1369–70.

38. *Id.* at 1370–72.

that this type of aggressive scrutiny was not the case during an earlier period. But sometime after 2000, the Chancery began to question the fee requests and fee settlements that lawyers brought to them and sometimes cut these fees in a significant way. ABC suggest that the fee cutting behavior may have contributed to the exit, but they note that the move away from Delaware appears to have started before the increased scrutiny of fees began.<sup>39</sup> It is also noteworthy that, despite apparent additional scrutiny in cases that it determines to be weak, the Chancery has not been shy about awarding very large fees where plaintiffs' attorneys have brought strong cases. For example, the Delaware Supreme Court recently affirmed a \$300 million fee awarded by the Chancery in a derivative lawsuit that challenged a controlling shareholder transaction.<sup>40</sup>

A third theory is that changes to the criteria for the selection of lead counsel have created an incentive for firms to file outside of Delaware. For many years, the tradition of the Chancery was to respect the negotiation among plaintiffs' attorneys to select the lead counsel. If, however, this process did not produce a consensus, it would then be left to the Chancery to make a selection of lead counsel. ABC document that the Chancery used the standards for selection stated in the PSLRA as a guide for developing the appropriate test, with particular emphasis on the presence of institutional shareholders who tend to have more concentrated interests than other plaintiffs and thus may be in a better position to monitor counsel.<sup>41</sup> As this process has evolved, the Chancery has also emphasized its perception of the skill of the law firms seeking the role of lead counsel in making the ultimate determination.<sup>42</sup> While first-to-file status sometimes still matters in close cases in Delaware, ABC argue that it matters more elsewhere, and consequently, these changes may have led to filings elsewhere.

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39. *Id.* at 1372.

40. *See* *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (2012). Controlling shareholder transactions pose a particularly high risk of self-dealing. In a typical transaction of this sort a shareholder with a majority interest will sell one company to another company controlled by the controlling shareholder. The danger in these situations is that the controlling shareholder will sell at an inappropriately low price because that shareholder is on both sides of the transaction. The damages in these types of cases can be very large because they can be based on the difference between the price paid and the price warranted through a neutral evaluation of the price. The relative rarity of these cases means, however, that the large fees they entail tend to be outliers.

41. *Armour et al., Delaware's Balancing Act, supra* note 3, at 1374.

42. *Id.*; *see also id.* n.145 (collecting a series of examples where the Chancery awarded lead counsel status to firms that did not have the largest shareholders as clients based on their perceptions of the abilities of those firms).

A final explanation comes from a related paper on the role of the plaintiffs' bar in driving corporate litigation.<sup>43</sup> ABC argue that the plaintiffs' bar has become increasingly fragmented and that this competition has worn away at the traditional advantages that Delaware offered as a forum for out-of-state counsel. Perhaps the most important of these advantages was a willingness to grant *pro hac vice* motions, which allows out-of-state counsel to appear in a case, with little complication.<sup>44</sup> ABC document that this willingness to admit out-of-state lawyers has become a national trend, the timing of which roughly corresponds with the movement of cases out of Delaware.<sup>45</sup> The authors argue that being at the forefront of this approach allowed out-of-state counsel to forge strong relationships both with in-state counsel and with the Delaware judiciary.<sup>46</sup> As other states have become more willing to allow out-of-state counsel to appear, parallel relationships may be forming elsewhere in a way that contributes to cases leaving Delaware.

The work of Cain and Davidoff also has a close relationship with the dataset used in this Article. In *A Great Game: The Dynamics of State Competition and Litigation*, Cain and Davidoff examine a dataset of the litigation produced by every merger and acquisition where the total consideration is at least \$100 million and the per-share price is at least five dollars from 2005 to 2010. That study develops data on award fees and dismissal rates and attempts to explain how those factors may contribute to the decision of where to file a case.<sup>47</sup> They suggest that there are two possible effects at work: attorneys selecting jurisdictions based on the prospect of a large award—as measured by both the dismissal rate and average award—and the response of courts to try and attract cases by offering higher expected awards.<sup>48</sup> The authors attempt to identify any potential relationship between these mechanisms by calculating the cumulative residuals for regressions that use settlement rates and

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43. Cheffins et al., *supra* note 21.

44. *Id.* at 462–63.

45. *Id.* at 484–89 (noting that, by 2002, the ABA had endorsed a model rule that embraced a generous approach to the granting of *pro hac vice* motions and that, as of 2010, the ABA deemed compliance with the rule “very good.”).

46. *Id.* at 462 (noting that some out-of-state counsel are on a “first-name basis” with Delaware judges) (citing REPORT OF THE MULTI-JURISDICTIONAL PRACTICE SPECIAL COMMITTEE TO DENNIS L. SCHRADER, ESQUIRE, PRESIDENT, DELAWARE STATE BAR ASSOCIATION 21 (Apr. 23, 2001)); *id.* at 465–66 (documenting the book filing system for out-of-state plaintiffs run by Morris & Rosenthal, which has long been a leading Delaware plaintiffs’ firm).

47. See Cain & Davidoff, *A Great Game*, *supra* note 2.

48. *Id.* at 4–5.

attorneys' fee awards as the dependent variables on the basis of a number of case-specific independent variables.<sup>49</sup>

Cain and Davidoff use the residuals from the first set of regressions as independent variables in logistic regressions that use the decision whether to file in the headquarters state or the incorporation state as the dependent variable. Their analysis finds some mixed support for the view that there is a correlation between the higher rates of settlement/higher average amount of awards and the rate at which attorneys file suit in these jurisdictions.<sup>50</sup> With regard to how courts respond, the authors find weaker support for the hypothesis that a loss of cases has a correlation with a subsequent increase in settlements and/or average awards.<sup>51</sup> The authors do, however, have a result that suggests that Delaware courts may raise their settlement rates if cases have recently been migrating to other jurisdictions.<sup>52</sup>

The ability of Cain and Davidoff to make causal claims depends, in some ways, on their ability to control for case quality. Indeed, the authors state that their results must "be viewed with caution, as it is difficult to fully control for endogeneity in the competition arena."<sup>53</sup> The variables that they use to control for case-specific factors include many that one would ideally use to assess the quality of a case. But some other factors, such as the presence of institutional shareholders as parties and some measure of the ability of the lawyers filing the case, are not included. Any uncontrolled-for factors might be an issue because the selection effects that are potentially at play here provide some potential alternative explanations for the patterns that the paper documents. One particular concern is that plaintiffs' attorneys seek to file cases of different quality in different jurisdictions. For example, plaintiffs' lawyers may be bringing higher quality lawsuits in Delaware over time, which could account for the higher settlement rates that the authors observe, rather than their suggestion that "Delaware responds to losing cases by raising its settlement rates."<sup>54</sup> In other words, it is possible that Delaware judges base

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49. *Id.* at 17–19. These independent variables include the size of the transaction, whether the consideration was cash, the presence of a management buyout, the use of tender offers, whether the case had a low offer premium, and number of cases filed. *Id.* The authors suggest that the number of cases filed "may proxy for the merits of a case along dimensions that we fail to capture in the other variables." *Id.* at 18.

50. *Id.* at 22–24.

51. *Id.* at 24–26.

52. *Id.* at 25.

53. *Id.* at 26.

54. *Id.* at 25.

their attorneys' fee awards or settlement decisions largely on the merits rather than on their potential effect on interjurisdictional competition.

A follow-up paper by Cain and Davidoff develops important evidence of overall trends in merger litigation and also provides some indications that cases are returning to Delaware. That paper, which adds 2011 numbers to their *Great Game* study, shows that the percentage of \$100 million-plus deals with prices over five dollars per share resulting in Delaware litigation may have bottomed out in the 2007–2008 stretch. In those years, the percentage of deals where related litigation could conceivably go to Delaware—either because the company was headquartered there, incorporated there, or both—was 34.4% and 26.9%, respectively.<sup>55</sup> For 2009–2011, the equivalent numbers were 58.1%, 44.1%, and 64.3%, respectively.<sup>56</sup>

The Cain and Davidoff update also speaks to the third important trend in corporate litigation: the rather dramatic recent increase in multi-jurisdictional litigation.<sup>57</sup> The percentage of cases that meet Cain and Davidoff's threshold and have involved litigation in multiple states has grown from 8.6% in 2005 to 47.4% in 2011.<sup>58</sup> Whether this development is a problem that warrants a regulated solution remains to be seen, but the lack of central coordination has prompted some concerns. One lawyer told the Chancery that there are “no rules” when it comes to resolving multi-jurisdictional litigation and a number of Delaware judges have expressed their frustration on this issue.<sup>59</sup> Some commentators have suggested a cautious approach to regulation that allows the process of judicial comity to manage litigation across different jurisdictions. For example, Former-Chancellor Chandler expressed his desire that defense counsel file a motion in all the courts with cases pending asking that “those

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55. Cain & Davidoff, *Takeover Litigation in 2011*, *supra* note 2, at 5.

56. *Id.*

57. For one take on the causes and possible consequences of multi-jurisdictional litigation by two practicing attorneys, see Micheletti and Parker, *supra* note 13.

58. *Id.* at 2.

59. See David Marcus, *Delaware's Chancery Grapples with Multijurisdictional Litigation*, THE DEAL MAG. (Dec. 9, 2011, 12:00 PM), <http://www.thedeal.com/magazine/ID/043316/2011/delaware's-chancery-grapples-with-multi-jurisdictional-litigation.php> (noting that Delaware lawyer, Gregory Williams, prepared a special report for Vice-Chancellor Laster in the *Nighthawk* litigation suggesting that multi-jurisdictional litigation is an “inevitable byproduct of [the] federal system.”); Armour et al., *Delaware's Balancing Act*, *supra* note 3, at 1386 nn.218–20 (noting Vice Chancellor Laster's refusal to stay the case in *Parcell v. Southwall Technologies* and his accompanying statements indicating that he regretted that the internal affairs doctrine was not more strictly adhered to so that Delaware's handling of Delaware corporation cases would not be so frequently challenged.) (citing Teleconference, *Parcell v. Southwall Techs., Inc.*, C.A. No. 7003–VCL, at \*11–15 (Del. Ch. Nov. 7, 2011)).

judges. . . confer and agree upon, in the interest of comity and judicial efficiency, . . . what jurisdiction is going to proceed and go forward and which jurisdictions are going to stand down and allow one jurisdiction to handle the matter.”<sup>60</sup>

Several scholars have endorsed an approach that is similar to the one put forward by Chancellor Chandler. Thomas and Thompson argue that judicial comity is likely to be able to address the problem and, if it cannot, is easily reversible. Lahav and Griffith argue that this approach may allow Delaware to reserve the most important cases for itself while leaving the less important cases to courts that do not specialize in corporate law. At the same time, some current members of the Chancery appear to believe that its members should be more aggressive about ensuring that important corporate cases remain in Delaware.<sup>61</sup>

Multijurisdictional litigation creates new strategic possibilities for plaintiffs’ counsel. Two options that are available to attorneys are pressing for expedited proceedings and filing a case in another jurisdiction to buttress an objection in a similar case filed elsewhere. Requests for fast tracking litigation have long been part of merger litigation; a successful motion for expedited discovery or for a preliminary injunction can threaten a deal, which can create intense pressure to settle.<sup>62</sup> Fast-tracking may take on added significance in the context of multi-forum litigation. If competing groups of attorneys are challenging a deal in different jurisdictions, the value of winning a motion to expedite proceedings in one of them may be even larger because the leverage that the court order provides may allow those attorneys to seize control over negotiations with defense counsel. As multi-forum litigation increases, the value of winning a motion to expedite proceedings should also increase because it can convert a situation where a group of lawyers faces a low possibility of a fee award to a situation where there is a much higher probability that those lawyers will obtain an award.

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60. *In re Allion Healthcare Inc. S’holders Litig.*, C.A. No. 5022–CC, 2011 WL 1135016, at \*4 n.12 (Del. Ch. Mar. 29, 2011) (internal quotation marks omitted). See also Peter B. Ladig, *Multi-Jurisdictional Litigation a Rich Vein of Issues for Chancery Court*, DEL. BUS. CT. INSIDER (Apr. 20, 2011), <http://www.morrisjames.com/news/xprNewsDetail.aspx?xpST=NewsDetail&news=185>.

61. See *infra* note 131 and accompanying text.

62. See Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. (forthcoming 2013) (manuscript at 12), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2155809](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2155809) (explaining that a preliminary injunction to enjoin a merger or the grant of a motion for expedited discovery can undermine a transaction thus creating an environment where defense counsel want to settle the case quickly).

If winning a motion to expedite creates greater returns in a world of multi-jurisdictional litigation, plaintiffs' lawyers should be more willing to take a chance on these motions. Indeed, this prospect of winning a motion to expedite may be a motivating reason for filing a case in a different jurisdiction and may, accordingly, be a contributing factor to the growth of multi-forum litigation. Courts worried about losing market share may follow a similar logic. By being more willing to grant expedited motions, these courts may be a more attractive location to litigate.

While the strategic dynamics associated with expedited proceedings across multiple jurisdictions have not been the subject of much commentary, there has been a fairly significant amount of discussion about the costs and benefits associated with objectors.<sup>63</sup> In non-acquisition related class actions, objectors to any settlement can sometimes be uninformed or inactive in the litigation process.<sup>64</sup> In the context of merger litigation, however, those who object to settlements are often those who have a stake in litigation proceeding in another jurisdiction.<sup>65</sup> In these situations, the objectors have the potential to guard against the practice of collusive settlements that may occur when defense counsel deal with groups of plaintiffs' attorneys that are competing across multiple jurisdictions.<sup>66</sup> The fact that the objectors have filed a case in another jurisdiction may make any argument they bring against settlement a stronger claim than an average member of the class might have. And, of

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63. See, e.g., Hillary A. Sale, *Judges Who Settle*, 89 WASH. U. L. REV. 377, 405, 411 (explaining that objectors to class action and derivative suits can improve the evidentiary record associated with settlements).

64. See Griffith & Lahav, *The Market for Preclusion in Litigation*, *supra* note 16, at 31 (citing Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. L. F. 403; Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2010)).

65. Hillary Sale has argued that one of the best protections against the potential for collusion is aggressive gatekeeping by judges during settlement proceedings. See Sale, *supra* note 63, at 414 (advocating that judges place "greater scrutiny of the role of defense counsel and insurers, both of whom amplify agency costs and contribute to collusive settlements."). As an example of this more aggressive approach, Sale details Judge Posner's rejection of a collusive settlement in *Reynolds v. Beneficial National Bank*. *Id.* at 393–96 (citing 288 F.3d 277 (2002)). She argues that Judge Posner directed appropriate scrutiny to the role of the plaintiffs' attorneys, but should have conducted a more exacting examination of the conduct of defense counsel. *Id.* at 393.

66. Griffith & Lahav, *supra* note 16, at 31–32. Jack Coffee coined the phrase "reverse auction" to describe this practice. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370–72 (1995) ("[The] 'reverse auction' [is] a jurisdictional competition among different teams of plaintiffs' attorneys in different actions that involve the same underlying allegations. . . . The practical impact of this approach is that it allows the defendants to pick and choose the plaintiff team with which they will deal. Indeed, it signals to the unscrupulous plaintiffs' attorney that by filing a parallel, shadow action in state court, it can underbid the original plaintiffs' attorney team that researched, prepared and filed the action. The net result is that defendants can seek the lowest bidder from among these rival groups and negotiate with each simultaneously.").

course, the better this claim is, the more likely it is that objectors will be given some share of any settlement to drop their objection. Given that filing a case in another jurisdiction can increase the potential to receive part of any ultimate settlement, one should expect this possibility to increase the likelihood that counsel will want to file a case in another jurisdiction.

Delaware's impact on corporate law should not, of course, be measured solely by case filings and litigation outcomes. Part of Delaware's dominance derives from the choice of its law in major financial transactions. Two recent studies document that, perhaps in contrast to litigation measures, Delaware's role is on the rise in transactional contexts. One of these papers, by Cain and Davidoff, tracks the use of Delaware law in merger agreements from 2004 to 2008.<sup>67</sup> The authors find that over this period, merger agreements increasingly selected Delaware law to govern the agreement and chose Delaware as a forum to litigate any dispute, a trend that accelerated during the financial crisis.<sup>68</sup> Broughman, Fried, and Ibrahim also look at the prevalence of Delaware law outside of the litigation context by examining the incorporation and reincorporation decisions of venture capital backed startups.<sup>69</sup> They find that these firms often choose Delaware law because it acts as a "lingua franca" for investors that come from different states.<sup>70</sup> The authors infer from this finding that one reason for Delaware's endurance may not be its inherent quality, but instead the fact that it is a common language among financially sophisticated parties.<sup>71</sup>

## II. LONG TERM TRENDS IN DELAWARE PUBLIC COMPANY LITIGATION

This Article uses a dataset that begins with every docket entry in the Delaware Chancery Court for cases categorized as "Civil" from the beginning of 2004 through the end of 2011. The data come from Westlaw's electronic coverage of that docket, which began in October 2003. Because the 2003 entries largely involve cases that were in progress, and hence often do not provide electronic access to the complaints, the

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67. See Matthew D. Cain & Steven M. Davidoff, *Delaware's Competitive Reach*, 9 J. EMPIRICAL LEGAL STUD. 92 (2012).

68. *Id.*

69. See Brian J. Broughman, Jesse M. Fried & Darian M. Ibrahim, *Delaware Law as Lingua Franca: Evidence from VC-Backed Startups* (Harvard Pub. Law Working Paper No. 12-38, 2012), available at [http://papers.ssrn.com/sol3/pa pers.cfm?abstract\\_id=2117967](http://papers.ssrn.com/sol3/pa pers.cfm?abstract_id=2117967).

70. *Id.*

71. *Id.*

dataset used in this Article omits those observations from the analysis. This docket data includes 7418 unique case numbers and involves 43,441 parties. From this initial dataset, a subset of cases involving publicly traded companies was extracted. A “fuzzy” matching algorithm compared the names of parties from the docket with the names of publicly available companies extracted from the US Stock database put together by the Center for Research in Security Prices (“CRSP”).<sup>72</sup> The results of these fuzzy matches were then hand-checked to confirm actual matches. This process resulted in a total of 1380 non-unique cases involving 1649 public companies. To be sure, this method does not ensure that the resulting dataset includes all of the public companies involved in litigation in the Chancery Court. The subset should be regarded as a sample of public company litigation, although there does not appear to be any compelling reason to believe that the matching method would bias the sample in a discernable way.<sup>73</sup>

The dataset offers several advantages over the existing studies. First, it begins with every case filed in the Chancery, which allows a level of depth that most studies cannot provide because other approaches often focus on cases that produce opinions or involve deals that are over a given threshold of money. This feature allows the study to examine whether the trends in smaller stakes cases track the trends in larger stakes cases. Second, this dataset faces fewer bounds on topic areas than many other litigation-based studies use. For example, the ABC papers and the Cain and Davidoff studies focus on specific topic areas of litigation.<sup>74</sup> Third, this study covers a significant time frame and thus can track long-term trends.

There are, of course, some disadvantages to this approach. The study uses a sample rather than a census so it cannot provide the same level of detail and the same level of certainty about the trends that the Thompson and Thomas study provides in the 1999–2000 time period.<sup>75</sup> Another disadvantage is that the study does not track trends in other states as both

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72. The algorithm used is Michael Blasnik’s RECLINK package for Stata. See Michael Blasnik, *RECLINK: Stata Module to Probabilistically Match Records*, Statistical Software Components S456876, Boston College Dep’t of Econ., available at <http://EconPapers.repec.org/RePEc:boc:bocode:s456876> (revised Jan. 18, 2010).

73. However, bias may be possible if the cases involving public company subsidiaries, which are sometimes difficult to pick up through fuzzy matching, tend to differ in important ways from the cases that involve the parent companies.

74. See Armour et al., *Delaware’s Balancing Act*, *supra* note 3; Cain & Davidoff, *A Great Game*, *supra* note 2.

75. See Thompson & Thomas, *supra* note 6.

the ABC papers and the Cain and Davidoff studies do.<sup>76</sup> The lack of this feature means that the data can provide only limited insight about how litigation across multiple jurisdictions has affected the Delaware docket.

For each case the complaint was coded for case topic and the number of follow-on cases filed.<sup>77</sup> It is relatively common for plaintiffs to file multiple complaints based on the same set of facts and, accordingly, the presentation of the data distinguishes between the number of unique cases, which does not count any of the follow-up cases filed, and the overall number of cases, which does include the follow-up cases. The docket includes information on all parties to the action, the law firms involved, and a record of almost every action taken in the case. This section uses each of these sources of information to examine changes in the makeup of litigation over the period of the study with an emphasis on trying to understand how the parties and their lawyers have contributed to important shifts in corporate litigation in Delaware.

The analysis begins with a discussion of the types of cases that have been filed over the study period with a focus on acquisition-related class actions. The ABC work suggests that, relative to the overall amount of acquisition-related activity and resulting court challenges, one should expect some decrease in the amount of this litigation during the early part of the study period if indeed Delaware lost cases to other jurisdictions. One should also expect a decrease in acquisition-related litigation in the period surrounding the financial crisis due to the overall decline in acquisitions during that period of constrained liquidity. The data are generally consistent with this picture, with the exception that there appears to be a substantial spike in the number of cases in the 2010 to 2011 time period. This subsection discusses several trends in the data that may be related to this apparent growth.

The section continues with an examination of the parties and lawyers involved in public company litigation with an eye toward understanding how these features contributed to the observed trends in the Chancery's case mix. Public companies involved in Delaware litigation are usually defendants, as one might expect. Indeed, over the course of the time period studied, public companies were defendants about 85% of the time. Perhaps a more interesting part of this analysis involves the role of institutional

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76. See Armour et al., *Delaware's Balancing Act*, *supra* note 3; Cain & Davidoff, *A Great Game*, *supra* note 2.

77. In a handful of cases the window of exclusion was extended beyond thirty days when it was apparent that the case involved the same issue as another recently filed case.

players, such as pension funds, in corporate litigation. In the securities arena, statutory changes have resulted in a more pronounced role for institutional plaintiffs in driving the course of litigation.<sup>78</sup> There is some evidence that the Chancery is moving in this direction in non-securities corporate cases, and ABC argue that this effect may be one of the contributing factors to the migration of cases away from Delaware.<sup>79</sup> Indeed, there is some evidence that plaintiffs' counsel have reacted to Delaware's suggestion that they recruit institutional clients, as the numbers of cases involving these types of clients has increased over the course of the sample.<sup>80</sup>

The apparent return of acquisition-related cases to Delaware may also be related to changes in the makeup of the plaintiffs' bar. Corporate litigation in Delaware has long involved a complex interplay between local Delaware firms and out-of-state counsel who often have coordinated, nationwide practices. For many years, the law firm now known as Rosenthal, Monhait & Goddess P.A. was thought to have a near-monopoly on filings by out-of-state counsel in Delaware.<sup>81</sup> That firm appears to have lost this monopoly in the late 1990s and there are some open questions about what has happened since that time.<sup>82</sup> The docket data help to answer those questions by providing information firms involved in these cases and how the makeup of the dominant firms may have been changing over time.

One specific issue that the information in the docket helps to clarify is the connection between the presence of out-of-state counsel and the state of the Delaware docket. Delaware courts have long been generous in admitting out-of-state counsel to work in a given case.<sup>83</sup> The usual process for doing so, the filing of a *pro hac vice* motion, almost always results in the motion being granted. The docket data contain information about these motions and, accordingly, the data can show the number of cases that involve out-of-state counsel.

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78. See Armour et al., *Delaware's Balancing Act*, *supra* note 3, at 1380.

79. *Id.*

80. See TCW Tech. Ltd. P'ship v. Intermedia Commc'ns, Inc., No. 18336, 2000 WL 1654504 at \*1 (Del. Ch. Oct. 17, 2000) ("[T]he Court should give weight to the shareholder plaintiff that has the greatest economic stake in the outcome of the lawsuit.").

81. Cheffins et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, *supra* note 21, at 463.

82. *Id.* at 480.

83. *Id.* at 485.

ABC speculate that out-of-state counsel could be one of the driving forces behind the apparent transition of cases outside of Delaware because these firms may find that their chances of bringing successful cases are greater in other venues.<sup>84</sup> If cases did leave Delaware and—as some evidence developed here suggests—have made a return, one might expect this trend to be reflected in the level of involvement of outside counsel. Specifically, one would expect to see decreased involvement of outside counsel in the early part of the study, followed by an increase in the later periods, if in fact cases have returned to Delaware. And, indeed, the data show this pattern.

The discussion in the previous section developed reasons why one might expect an increase in requests for expedited proceedings to appear in the data. As multi-jurisdictional litigation has increased, plaintiffs and their counsel may be making requests for expedited proceedings at a more rapid clip to try and seize control of litigation that is taking place across different courts. The docket data here allow for an identification of which cases have included some type of request for expedited proceedings. As the theory suggests, the general trend shows a substantial increase in the number of cases that involve requests to expedite.

This section also codes each case for its eventual outcome. The focus of this information is, in large measure, on the presence of settlement hearings. These are the outcomes that plaintiffs' attorneys desire in class action and derivative cases because they tend to produce the largest awards. The data on case outcomes also suggest that the battle over the designation of lead counsel has become a more contested matter because out-of-state counsel have been appearing earlier in cases than they have as a matter of historical practice.

#### *A. Trends in the Types of Cases Filed in Delaware*

For the cases in the sample, each complaint was coded for the type of case, including whether there were claims arising out of alleged breach of fiduciary duties, claims related to an acquisition, or contract claims. The complaints were also coded for whether they asserted class action or derivative claims. Figure 1 shows the proportion of unique cases (i.e. excluding cases that are based on the same underlying facts) by each case type. There is, naturally, some overlap among the categories of cases because some of these categories are not mutually exclusive. Indeed, with

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84. *See id.* at 490.

some of the categories one usually implies the other. For example, acquisition cases are almost always filed as class action suits and derivative suits frequently involve fiduciary duty matters (as do acquisition-related class actions).

FIGURE 1

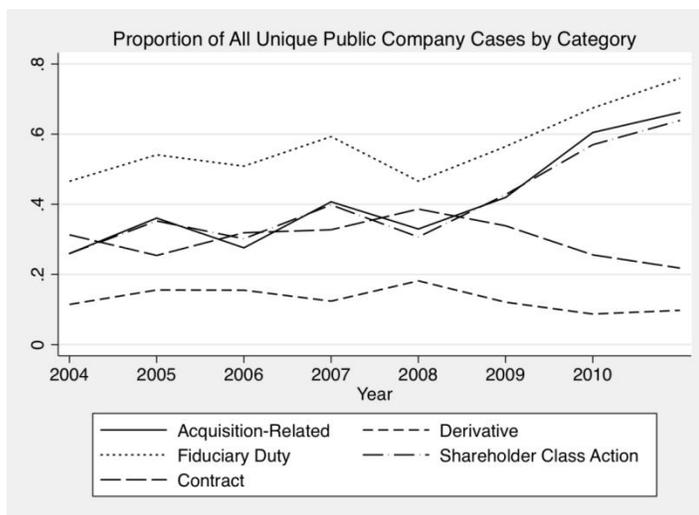


Figure 1 has a number of noteworthy features. The first is the degree of overlap of class actions and acquisition-related litigation. To a large extent, those two classes of cases are synonymous; there are very few class actions that do not involve challenges to acquisitions and there are very few acquisition-related cases that are not class actions. This is similar to the Thompson and Thomas finding in the 1999–2000 time period, and that trend appears to be very much intact.<sup>85</sup> There is also an overlap between the fiduciary duty cases and the acquisition-related cases because most challenges to acquisitions include fiduciary duty claims. Similarly, derivative cases almost always involve fiduciary duty claims; thus, while almost all acquisition-related cases involve fiduciary duty claims, not all fiduciary duty cases are related to acquisitions.

85. See Thompson & Thomas, *supra* note 6.

Another feature of the figure is the substantial increase in the proportion of cases that involve acquisitions over the course of the sample. In that time frame, the proportion of cases that involve acquisition-related claims more than doubled from around 25% to over 60%. Keep in mind that this proportion includes only unique cases (i.e., it does not count follow-up cases that might be filed based on the same set of facts). Were all complaints included, this proportion would be substantially higher. The sharp increase in the proportion of acquisition-related cases has naturally meant that the proportion of some other cases has fallen. Contract cases and derivative cases in the sample have seen a relative decline over the period, although it should be noted that derivative claims address acquisition-related matters with some frequency.<sup>86</sup> Indeed, in 2004 the number of contract cases was higher than the number of acquisition-related cases.<sup>87</sup>

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86. The number of derivative cases has not fluctuated that much over the course of the sample. Previous scholarship has suggested that the number of derivative cases in Delaware declined in an earlier period due to the interaction of the PSLRA and Delaware's rules that limit discovery in derivative proceedings. See Armour et al., *Delaware's Balancing Act*, *supra* note 3, at 1377–78. ABC argue that the PSLRA caused cases that would otherwise have been filed as securities class-actions to be filed as derivative claims. *Id.* at 1379. Because Delaware generally does not permit discovery in derivative actions prior to a motion to dismiss—in contrast to some states that do permit this discovery—plaintiffs may be seeking out the more liberal discovery rules when they file these types of derivative cases outside of Delaware. *Id.*

87. The contract cases are not central to the analysis in this piece. Nevertheless, it is noteworthy that the Chancery hears a substantial number of these cases. This observation buttresses the impression that the Chancery's equity-focused approach to contract interpretation enjoys some demand. See Adam B. Badawi, *Interpretive Preferences and the New Formalism*, 6 BERKELEY BUS. L.J. 1, 40–43 (2009) (explaining how Delaware's contextually-oriented approach to contract interpretation may be attractive in some circumstances).

FIGURE 2

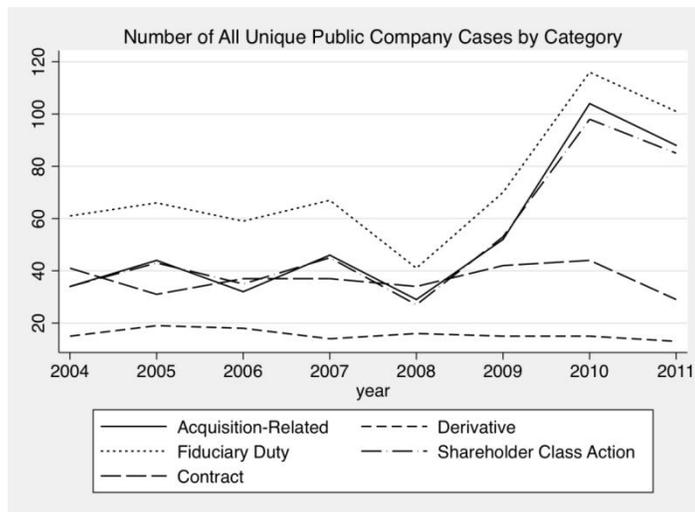


Figure 2 provides the absolute numbers of each type of case in the sample. This figure shows the dramatic spike in acquisition-related cases even more vividly than Figure 1. From 2004 to 2007 the number of cases in each category remains relatively stable. After that period, the trend with respect to acquisition-related cases spikes dramatically, with the number increasing over threefold. The trends depicted in Figure 2 are consistent with those observed in other studies. While nationwide acquisition-related litigation involved roughly 100 cases per year in 2006 and 2007, only about a third of cases that could have been litigated in Delaware resulted in a Delaware case.<sup>88</sup> In 2010 and 2011, the number of acquisition-related cases was 105 and 97 respectively.<sup>89</sup> As Figure 2 indicates, many more of these cases resulted in a Delaware filing.<sup>90</sup>

The use of unique cases in Figure 2 masks a different trend in the follow-up cases filed. When one accounts for the total number of cases, including first-filed and later-filed actions involving the same claims, the trend from 2010 to 2011 reverses with respect to acquisition-related cases, as Figure 3 shows. Rather than a decline year over year, there was an

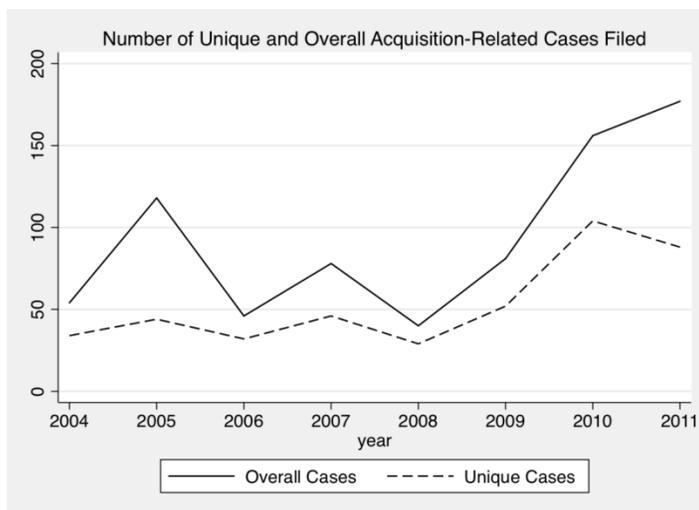
88. See Cain & Davidoff, *Takeover Litigation in 2011*, *supra* note 2, at 2, 5.

89. *Id.*

90. *Id.* at 5 (note that these numbers are not exactly comparable because Cain and Davidoff impose a size threshold on the deals that they include in their dataset and because the data used in this Article are based on a sample rather than a census).

increase in the overall number of acquisition-related cases filed in Delaware. The reason for the difference, of course, is that the number of follow-up cases filed increased in 2011 on a per-case basis. Indeed, Figure 3 shows that the number of follow-up cases has varied substantially over the course of the sample. From 2004 to 2009, the ratio of overall cases to unique cases remained relatively close to one, except for a substantial spike in 2005. That ratio increased in 2010 and continued doing so in 2011. One suspects that this trend may show that some element of the race to the courthouse endures.<sup>91</sup>

FIGURE 3



### B. Parties and Their Lawyers in the Court of Chancery

The docket contains information about the identities of the parties in each case, their party type (e.g., plaintiff, defendant, etc.), the law firms that appeared in the case, and whether out-of-state counsel were admitted

91. See Cheffins et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, *supra* note 21, at 482 ("The hasty filing habit persists in Delaware."). Part of the explanation for why plaintiffs still file cases quickly after announcement may be related to the strategic dynamics associated with multi-forum litigation. If a non-Delaware case is proceeding quickly, plaintiffs' counsel who are not involved in that matter may wish to file quickly in Delaware in order to move for expedited proceedings before the Chancery or in order to buttress any attempt to object to a settlement in the non-Delaware jurisdiction.

to appear for the purposes of the case. This section reviews the trends in the types of parties and the lawyers who represented them in the 2004 to 2011 time period with an eye toward understanding the large recent spike in acquisition-related cases observed in the review of case types filed.

Table 1 shows the yearly totals of identified public companies in unique cases and breaks down those cases by party status. The table reflects a slight decline in the total number of unique cases from 2004 to 2007 before a substantial drop in 2008. This trend is consistent with the observation that acquisition-related cases are one of the most important parts of the Chancery Court docket and, during the period from roughly 2004 to 2007, Delaware appears to have been losing these types of cases given that merger activity was substantial during that time period. The significant drop in 2008 tracks the observations by other studies showing a steep decline in acquisition-related cases filed that year. This decline is presumably related to the drop in the number of acquisitions during the financial crisis.<sup>92</sup> The level of public-company litigation in the sample increased after this drop, reaching the highest total number of parties for any year in the sample in 2010. While the total numbers dipped in 2011, that year involved the second-highest number of public companies involved in litigation during the period of study.

TABLE 1

| Year  | Public Companies by Party Type in Delaware Cases |      |           |      |       |     |       |
|-------|--|------|-----------|------|-------|-----|-------|
|       | Defendant  |      | Plaintiff |      | Other |     | Total |
|       | N  | %    | N         | %    | N     | %   | N     |
| 2004  | 127  | 84.1 | 19        | 12.6 | 5     | 3.3 | 151   |
| 2005  | 122  | 84.7 | 16        | 11.1 | 6     | 4.2 | 144   |
| 2006  | 110  | 81.5 | 16        | 11.9 | 9     | 6.7 | 135   |
| 2007  | 107  | 86.3 | 15        | 12.1 | 2     | 1.6 | 124   |
| 2008  | 81   | 77.1 | 18        | 17.1 | 6     | 5.7 | 105   |
| 2009  | 123  | 82.6 | 20        | 13.4 | 6     | 4.0 | 149   |
| 2010  | 180  | 86.1 | 25        | 12.0 | 4     | 1.9 | 209   |
| 2011  | 156  | 87.6 | 16        | 9.0  | 6     | 3.4 | 178   |
| Total | 1006   | 84.2 | 145       | 12.1 | 44    | 3.7 | 1195  |

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92. See Cain & Davidoff, *Takeover Litigation in 2011*, *supra* note 2, at 2 (showing that between 2005 and 2011 the year that had the lowest number of deals that met their threshold and produced litigation was 2008, when only 50 such cases were filed).

As one might expect, public companies involved in Chancery Court litigation tend to be defendants. Even in the lowest percentage in the sample, about 77% in 2008, a strong majority of the public companies involved in litigation are defendants. That number reached as high as about 88% in 2011. The remainder of the categories involve lawsuits where public companies are plaintiffs—a number that ranges from a low of below 10% in 2011 to a high of just over 17% in 2008—and a handful of “other” statuses such as intervenor, interested party, and the like.

As discussed in Part I, the role of institutional plaintiffs in corporate litigation is a matter of some interest. Delaware courts have borrowed loosely from the reforms to securities law in the process for selecting lead plaintiffs.<sup>93</sup> Those reforms have emphasized the size of the shareholdings of parties to the case over other factors, such as which plaintiff was the first to file a complaint. One might expect that these changes would lead to a larger number of institutional shareholders appearing in Delaware cases because these shareholders tend to have larger holdings than other potential plaintiffs.

Table 2 tracks the presence of institutional plaintiffs, many of which are pension funds, across the time period of the study. The table focuses only on acquisition-related cases and derivative cases because these are the cases where there is a significant chance that the selection of lead counsel will be contested. The data show that there has been a noticeable increase, beginning in 2007, in the percentage of these types of cases that have involved an institutional plaintiff. This jump from a percentage around 20% to at least 30% perhaps provides some evidence that plaintiffs’ counsel have responded to the demands of the Chancery: that plaintiffs have larger shareholdings in order for their lawyers to be competitive in the selection of lead counsel. In terms of absolute numbers, the changes are even more stark. Between the years of 2004 and 2008, no year had more than thirty institutional plaintiffs involved in the cases in the sample, but from 2009 to 2011 that number has been in the low fifties.

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93. Armour et al., *Delaware’s Balancing Act*, *supra* note 3, at 1374.

TABLE 2

| Percentage of Acquisition & Merger-Related Cases<br>involving Institutional Plaintiffs |       |                                 |      |
|--|-------|---------------------------------|------|
| Year   | Total | Institutional Plaintiff Present |      |
|  | N     | N                               | %    |
| 2004   | 73    | 15                              | 20.5 |
| 2005   | 137   | 25                              | 18.2 |
| 2006   | 67    | 11                              | 16.4 |
| 2007   | 94    | 29                              | 30.9 |
| 2008   | 56    | 17                              | 30.4 |
| 2009   | 94    | 51                              | 54.3 |
| 2010   | 170   | 51                              | 30.0 |
| 2011   | 189   | 52                              | 27.5 |
| Total  | 1098  | 304                             | 27.7 |

A number of scholars have examined the role of the law firms most often involved in Chancery Court litigation.<sup>94</sup> Much of this work has focused on the plaintiffs' counsel that tend to bring cases. The following analysis provides information on all of the Delaware firms that appear and reveals the amount of concentration in the Delaware bar on both sides of public-company litigation. The docket does not, unfortunately, identify which law firm acts for which party, but it is possible to make some inferences based on previous work in the area. Table 3 shows the top ten law firms appearing in the cases for each of the years in the sample and the number of cases in which they appeared.<sup>95</sup>

TABLE 3

| Firm                             | Cases | Firm                             | Cases |
|----------------------------------|-------|----------------------------------|-------|
| <b>2011</b>                      |       | <b>2010</b>                      |       |
| Richards Layton & Finger<br>P.A. | 102   | Richards Layton & Finger<br>P.A. | 101   |

94. See, e.g., *id.*; David H. Webber, Private Policing of Mergers and Acquisitions: An Empirical Assessment of Institutional Lead Plaintiffs in Transactional Class and Derivative Actions (draft Sept. 10, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1879647](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1879647).

95. Delaware firms are listed in a routinized way in the docket, while the names of out-of-state firms that get admitted get entered as a line entry noting the granting of a *pro hac vice* motion. These line entries are not systematic in a way that allows for confident collection of the out-of-state firms that appear in a case.

| <b>Firm</b>                           | <b>Cases</b> | <b>Firm</b>                          | <b>Cases</b> |
|---------------------------------------|--------------|--------------------------------------|--------------|
| Morris Nichols Arsht & Tunnell        | 89           | Morris Nichols Arsht & Tunnell       | 95           |
| Rosenthal Monhait & Goddess P.A.      | 83           | Rosenthal Monhait & Goddess P.A.     | 79           |
| Potter Anderson & Corroon LLP         | 71           | Rigrodsky & Long P.A.                | 59           |
| Rigrodsky & Long P.A.                 | 63           | Potter Anderson & Corroon LLP        | 58           |
| Faruqi & Faruqi LLP                   | 54           | Skadden Arps                         | 45           |
| Young Conaway Stargatt & Taylor LLP   | 42           | Cooch & Taylor P.A.                  | 37           |
| Cooch & Taylor P.A.                   | 38           | Grant & Eisenhofer P.A.              | 30           |
| Grant & Eisenhofer P.A.               | 37           | Young Conaway Stargatt & Taylor LLP  | 27           |
| Labaton Sucharow LLP                  | 33           | Abrams & Bayliss LLP                 | 26           |
| Total                                 | 612          | Total                                | 557          |
| <b>2009</b>                           |              | <b>2008</b>                          |              |
| Morris Nichols Arsht & Tunnell        | 80           | Richards Layton & Finger P.A.        | 48           |
| Richards Layton & Finger P.A.         | 64           | Morris Nichols Arsht & Tunnell       | 41           |
| Rosenthal Monhait & Goddess P.A.      | 54           | Potter Anderson & Corroon LLP        | 25           |
| Rigrodsky & Long P.A.                 | 43           | Rosenthal Monhait & Goddess P.A.     | 21           |
| Potter Anderson & Corroon LLP         | 30           | Chimicles & Tikellis LLP             | 18           |
| Chimicles & Tikellis LLP              | 25           | Skadden Arps                         | 17           |
| Skadden Arps Slate Meagher & Flom LLP | 22           | Prickett Jones & Elliott             | 16           |
| Abrams & Bayliss LLP                  | 17           | Young Conaway Stargatt & Taylor LLP  | 15           |
| Grant & Eisenhofer P.A.               | 16           | Rigrodsky & Long P.A.                | 15           |
| Prickett Jones & Elliott              | 15           | Bouchard Margules & Friedlander P.A. | 12           |
| Total                                 | 366          | Total                                | 228          |
| <b>2007</b>                           |              | <b>2006</b>                          |              |
| Richards Layton & Finger P.A.         | 68           | Richards Layton & Finger P.A.        | 61           |
| Rosenthal Monhait & Goddess P.A.      | 56           | Rosenthal Monhait & Goddess P.A.     | 46           |
| Morris Nichols Arsht & Tunnell        | 52           | Morris Nichols Arsht & Tunnell       | 45           |
| Potter Anderson & Corroon LLP         | 38           | Potter Anderson & Corroon LLP        | 35           |

| <b>Firm</b>                          | <b>Cases</b> | <b>Firm</b>                         | <b>Cases</b> |
|--------------------------------------|--------------|-------------------------------------|--------------|
| Abrams & Bayliss LLP                 | 28           | Young Conaway Stargatt & Taylor LLP | 23           |
| Rigrodsky & Long P.A.                | 27           | Abrams & Bayliss LLP                | 21           |
| Skadden Arps                         | 27           | Ashby & Geddes                      | 21           |
| Young Conaway Stargatt & Taylor LLP  | 24           | Chimicles & Tikellis LLP            | 20           |
| Chimicles & Tikellis LLP             | 20           | Prickett Jones & Elliott            | 18           |
| Prickett Jones & Elliott             | 12           | Rigrodsky & Long P.A.               | 14           |
| Total                                | 352          | Total                               | 304          |
| <b>2005</b>                          |              | <b>2004</b>                         |              |
| Rosenthal Monhait & Goddess P.A.     | 124          | Rosenthal Monhait & Goddess P.A.    | 76           |
| Morris Nichols Arsht & Tunnell       | 75           | Richards Layton & Finger P.A.       | 68           |
| Richards Layton & Finger P.A.        | 59           | Morris Nichols Arsht & Tunnell      | 62           |
| Milberg Weiss Bershad & Schulman LLP | 50           | Potter Anderson & Corroon LLP       | 39           |
| Potter Anderson & Corroon LLP        | 36           | Prickett Jones & Elliott            | 25           |
| Skadden Arps                         | 32           | Young Conaway Stargatt & Taylor LLP | 18           |
| Chimicles & Tikellis LLP             | 28           | Skadden Arps                        | 15           |
| Young Conaway Stargatt & Taylor LLP  | 24           | Chimicles & Tikellis LLP            | 14           |
| Prickett Jones & Elliott             | 24           | Ashby & Geddes                      | 13           |
| Biggs & Battaglia                    | 24           | Bayard Firm                         | 10           |
| Total                                | 476          | Total                               | 340          |

Several trends emerge from this law firm data. Note that for all eight years of the study, the top three firms remain the same (except for 2008) with some jockeying as to their specific rank.<sup>96</sup> Two of these firms, Richards, Layton & Finger P.A. and Morris, Nichols, Arsht & Tunnell, generally represent defendants<sup>97</sup> while Rosenthal, Monhait & Goddess P.A. is a well-known plaintiffs' firm.<sup>98</sup> Commentators have discussed the

96. Note that several law firms have changed names over the course of the study. Each law firm is listed as it appeared most recently in the data. For example, the law firm of Abrams & Laster LLP changed names to Abrams & Bayliss LLP when Travis Laster was appointed as a Vice Chancellor. Every appearance of Abrams & Laster was counted as an appearance for Abrams & Bayliss.

97. See MARTINDALE-HUBBELL (Sept. 15, 2012), <http://www.martindale.com>.

98. See Cheffins et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, *supra* note 21, at 480–81.

concentration of the Delaware plaintiffs' bar, but these data also show that the defense bar involves several players that dominate appearances in cases. The continued prominence of Rosenthal Monhait is also noteworthy because that firm was thought to have a near-monopoly on cases filed by out-of-state plaintiffs' counsel during the late nineties.<sup>99</sup> That monopoly may have been broken, but Rosenthal Monhait has still enjoyed the highest number of cases by a plaintiffs' law firm in every single year of the study.<sup>100</sup>

Other work has suggested that the other two leading plaintiffs' law firms in Delaware are Chimicles & Tikellis and Rigrotsky Long.<sup>101</sup> This account seems generally correct for the 2006 to 2009 time period but, beginning in 2010, Chimicles & Tikellis dropped off the list of top-ten law firms.<sup>102</sup> In 2011, Faruqi & Faruqi was close on the heels of Rigrotsky Long for the position of second-most-active plaintiffs' firm, a fact that suggests there has been some significant shift in the Delaware plaintiffs' bar in recent years. Indeed, Faruqi & Faruqi may be emblematic of the return to Delaware; the firm first appears in the sample in 2010, with seven cases, and appears in fifty-four cases in 2011.

At the same time, some prominent plaintiffs' firms appear to be quite selective in bringing cases. Given that the Chancery's perception of the quality of law firms is a factor in the selection of lead counsel,<sup>103</sup> it is unsurprising that some firms may be fiercely protective of a reputation for filing a complaint only in cases with substantial merit. For example, Prickett, Jones & Elliott ("Prickett") enjoys a strong reputation among Delaware plaintiffs' firms.<sup>104</sup> Prickett served as co-lead counsel in the *Southern Peru Copper* case, which produced an attorneys' fee award of \$300 million that the Delaware Supreme Court recently affirmed.<sup>105</sup>

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99. *Id.* at 466.

100. *Id.* at 480.

101. *Id.*

102. Note that this dropoff may be an indication that the firm has become more selective in bringing cases—rather than, for example, a weakening of the connections the firm has with shareholders that may be able to act as potential plaintiffs.

103. See Cheffins et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, *supra* note 21.

104. See, e.g., Abigail Caplovitz Field, *The Legal Impact of Delaware Forum Selection*, Corporate Secretary (June 11, 2012) (calling Prickett, Jones & Elliott a "venerable Delaware law firm"), available at <http://www.corporatesecretary.com/articles/regulation-and-legal/12252/legal-impact-delaware-forum-selection/>.

105. See *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1218 (Del. 2012) (affirming attorneys' fee award and listing Prickett as co-lead counsel).

In awarding those fees, Chancellor Strine noted the quality of the counsel's work and the difficulty of that case.<sup>106</sup> It should be noted, however, that this case should not be considered standard fare for acquisition-related cases. The allegations involved self-dealing by a controlling shareholder and, accordingly, were subject to a more exacting legal standard than would apply to an acquisition approved by a board without a controlling shareholder.<sup>107</sup>

The pattern of Prickett's filings is consistent with a careful approach to the selection of cases. Throughout the sample, Prickett's number of filed cases has varied between twelve and twenty-five cases. Indeed, the firm filed twenty-five cases in both 2004 and 2011, which suggests that the firm has not been part of the substantial expansion of filings in the last two years of the study.<sup>108</sup>

Law firms appearing in the Chancery are often acting on behalf of out-of-state counsel.<sup>109</sup> In many cases, out-of-state counsel will appear in the case in order to argue motions, attend settlement hearings, and file papers. In order to do so, these out-of-state counsel must be admitted to practice for the purposes of the case through a *pro hac vice* motion. As discussed in Part I, Delaware grants these motions as a matter of course, and they are often unopposed. The docket contains an entry every time the court grants one of these motions, and each case has been coded for the presence of the term "pro hac vice."<sup>110</sup> Table 4 shows the annual percentage of cases

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106. See *id.* at 1256 (quoting Chancellor Strine: "Did the plaintiffs have to do a lot of good work to get done and have to push back against a judge who was resistant to their approach? They did.>").

107. The entire fairness standard requires a showing of fair dealing and fair price. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983). This standard applies where a controlling shareholder attempts a cashout merger of minority shareholders or, as in *Southern Peru*, a controlling shareholder proposes a merger with a company owned by the controlling shareholder. *In re S. Peru Copper Corp. S'holder Derivative Litig.*, 52 A.3d 761, 763 (Del. Ch. 2011). This review is more exacting than the intermediate scrutiny applied to defensive measures that boards take in the context of takeovers. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985) (intermediate scrutiny requires a board to show a threat to the corporation and a proportional response).

108. Not all plaintiffs' firms with strong reputations have stayed within such a narrow band of complaints filed. Grant & Eisenhofer ("Grant") enjoys an estimable reputation among Delaware firms, having been lead or co-lead counsel in cases such as *Louisiana Municipal Employees' Retirement System v. CBOT Holdings Inc.*, C.A. No. 2803-VCN (Del. Chan. 2007), and *In re Tyson Foods Inc.*, C.A. No. 1106-CC (Del. Chan. Aug. 15, 2007). Prior to 2009, Grant filed less than ten cases a year. From 2009 to 2011, the respective number of cases filed has been sixteen, thirty, and thirty-seven.

109. See Armour et al., *Fragmentation of the Plaintiffs' Bar*, *supra* note 21, at 463 ("Filings are often prepared primarily by out-of-state counsel, although Delaware counsel will normally review all filings to ensure they reflect Delaware procedures or customs.>").

110. The docket does not always code the granting of a *pro hac vice* motion in the same way so it was not feasible to code the actual grant of a motion rather than the presence of the term. Given that these motions are almost always granted there should be a very high overlap between the presence of the term and the granting of one of these motions.

where the docket contains that term across all the acquisition-related and derivative cases in the sample, the first-filed of such cases, and the later-filed of these cases. Though unreported, the overall number of cases that involve *pro hac vice* motions mirrors quite closely the number of such motions in all acquisition-related and derivative cases in every year in the sample.

TABLE 4

| Percentage of Acquisition-Related & Derivative Cases involving<br>Pro Hac Vice Motions |                |            |      |                   |            |      |                   |            |      |
|--|----------------|------------|------|-------------------|------------|------|-------------------|------------|------|
| Year of<br>Case<br>Filing  | All Such Cases |            |      | First-Filed Cases |            |      | Later-Filed Cases |            |      |
|  | Total          | PHV Motion |      | Total             | PHV Motion |      | Total             | PHV Motion |      |
|  | N              | N          | %    | N                 | N          | %    | N                 | N          | %    |
| 2004   | 73             | 35         | 47.9 | 49                | 32         | 65.3 | 24                | 3          | 12.5 |
| 2005   | 137            | 42         | 30.7 | 61                | 40         | 65.6 | 76                | 2          | 2.6  |
| 2006   | 67             | 34         | 50.7 | 49                | 31         | 63.3 | 18                | 3          | 16.7 |
| 2007   | 94             | 56         | 59.6 | 60                | 42         | 70.0 | 34                | 14         | 41.2 |
| 2008   | 56             | 33         | 58.9 | 43                | 30         | 69.8 | 13                | 3          | 23.1 |
| 2009   | 94             | 61         | 64.9 | 64                | 49         | 76.6 | 30                | 12         | 40.0 |
| 2010   | 170            | 98         | 57.6 | 113               | 86         | 76.1 | 57                | 12         | 21.1 |
| 2011   | 189            | 117        | 61.9 | 97                | 69         | 71.1 | 92                | 48         | 52.2 |
| Total  | 880            | 476        | 54.1 | 536               | 379        | 70.7 | 344               | 97         | 28.2 |

One of the starkest patterns in Table 4 is the shift in the number of *pro hac vice* motions filed in later-filed cases, with an especially large spike in 2011. In order to understand what the data may show, it is helpful to discuss two points. First, cases often get consolidated into the first-filed case number even if the counsel to be selected as lead did not file it.<sup>111</sup> Second, it is almost certainly the case that calling in the aid of outside counsel will only be worth the time and expense to do so when a potentially-contested matter arises.<sup>112</sup> These two factors combine to

111. Interview with Delaware attorney on file with author.

112. While both plaintiffs and defendants make use of counsel that have been admitted *pro hac vice*, defense counsel will almost always wait until consolidation occurs to do so. The reason for this practice is that otherwise they must pay the *pro hac vice* fee for every case in which they bring this type of motion. By waiting for consolidation, defense counsel only need to pay the fee once for every admitted lawyer. *Id.*

suggest that the selection of lead counsel has become more contested in the later part of the sample.

If plaintiffs' counsel agree to appoint lead counsel, consolidating the other cases case will be a formality that is unlikely to need the admission and support of the out-of-state counsel who may be directing the case. But if plaintiffs' counsel cannot agree on who will be the lead, a contested motion to consolidate is where this battle will likely play out. These proceedings are likely to include the presence of out-of-state counsel because, if that battle is lost, those counsel are unlikely to receive any fee award. The outcome data discussed below provide further support for this suggestion; consolidated cases are, indeed, more likely to involve *pro hac vice* motions.

There is also an upward trend in the presence *pro hac vice* motions across all cases. This pattern is consistent with suggestions that out-of-state counsel preferred to file elsewhere in the early part of the sample followed by a stronger preference for Delaware as a forum in the later part of the sample. The low point of out-of-state counsel involvement is cases filed in 2005, when only about 31% of cases had the presence of a *pro hac vice* motion. Recall from Figure 3 that 2005 involved a relatively high number of follow-up cases, a pattern that would not return until 2009. But, unlike the later period in the sample, 2005-filed cases did not include much involvement from out-of-state counsel. This observation suggests that in 2005, plaintiffs were able to agree on lead counsel and did not have to contest consolidation motions. Note from Table 3 that Rosenthal Monhait filed more cases in that year than any other firm at any point in the sample. This data point corroborates the potential for a lack of lead counsel battles given that firm's traditional role as referee for out-of-state counsel.

### C. Case Outcomes

The amount of value that plaintiffs and their lawyers see in a case likely depends on the value attached with the case's expected outcome. While the docket does not include exhaustive and systematic information on how much each case produces in awards and attorneys' fees, it does provide information on how cases get resolved. As with most other American jurisdictions, a majority of the acquisition-related and derivative cases in Delaware end through voluntary actions that are usually part of a

settlement.<sup>113</sup> These agreed-upon outcomes take various shapes in the Court of Chancery.<sup>114</sup> The parties can reach an agreement that entails filing a voluntary or stipulated dismissal with the court. This outcome may occur when plaintiffs realize that a case is not worth pursuing, perhaps due to the loss of an early motion such as one for expedited discovery. Alternatively, dismissals of this sort can occur when plaintiffs' attorneys have made arrangements to proceed in another jurisdiction.<sup>115</sup>

Consolidation is another possible outcome in the Chancery Court. These consolidations can be either contested or uncontested. When plaintiffs' lawyers are able to agree on lead counsel, the resulting uncontested consolidation is a relatively simple process in which attorneys enter a request to combine cases that the court will almost always approve.<sup>116</sup> A contested consolidation takes place when plaintiffs' attorneys cannot agree on who will serve as lead counsel—the court must then decide who will play that role.<sup>117</sup> If derivative or class action lawsuits result in a settlement that will terminate the case and require an award of attorneys' fees, that agreement must be approved by the court in a settlement hearing, which is another potential outcome in these cases.<sup>118</sup>

Table 5, below, shows the trends in outcomes for all acquisition-related and derivative cases. The table focuses on these cases because the trends here are not that different from the overall trends and there is little of interest that comes from focusing on the outcomes of cases that do not fall into these categories. There are two details about the table that are worth noting. First, sometimes consolidation orders occur in the case that will become the lead case in a derivative or class action (the order consolidating all other cases into that lead case). These cases have not been coded as consolidated because that is not the ultimate outcome of the case; these cases will typically go on to result in settlement hearings or voluntary dismissals. Second, the "other" field captures a number of quite

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113. On general settlement trends, see Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339–40 (1994) (noting that estimations of the settlement rate of cases in the United States range from two-thirds to between 85 and 95 percent).

114. Interview with Delaware lawyer on file with author.

115. Note that Delaware Court of Chancery Rule 23(e) only allows the dismissal of a class action without notice to the class if there has been a showing that no compensation has been paid by the defendant to the plaintiff or the plaintiffs' attorney. A deal among plaintiffs' attorneys to cut a Delaware filer into the leadership structure in another state is unlikely to trigger any concern because it does not involve the payment of compensation from the defendant to the plaintiffs' attorney seeking dismissal. See DEL. CT. CH. R. 23(e).

116. Interview with Delaware lawyer on file with author.

117. *Id.*

118. *See id.*

different categories. In some small number of these instances, the Chancery will make a ruling dismissing a case and that ends the matter (more often an opinion or order will result in a subsequent voluntary dismissal or settlement). In other cases, the matter is still ongoing or has been transferred to another court.

TABLE 5

| Outcomes of Acquisition-Related and Derivative Cases |              |            |                     |                      |                    |                      |       |                      |       |
|--|--------------|------------|---------------------|----------------------|--------------------|----------------------|-------|----------------------|-------|
| Filing Year  | Consolidated |            | Voluntary Dismissal |                      | Settlement Hearing |                      | Other |                      | Total |
|  | N            | % of Cases | N                   | % of Unconsol. Cases | N                  | % of Unconsol. Cases | N     | % of Unconsol. Cases |       |
| 2004   | 21           | 28.8%      | 12                  | 23.1%                | 23                 | 44.2%                | 17    | 32.7%                | 73    |
| 2005   | 66           | 48.2%      | 22                  | 31.0%                | 23                 | 32.4%                | 26    | 36.6%                | 137   |
| 2006   | 17           | 25.4%      | 21                  | 42.0%                | 17                 | 34.0%                | 12    | 24.0%                | 67    |
| 2007   | 28           | 29.8%      | 34                  | 51.5%                | 19                 | 28.8%                | 13    | 19.7%                | 94    |
| 2008   | 12           | 21.4%      | 20                  | 45.5%                | 11                 | 25.0%                | 13    | 29.5%                | 56    |
| 2009   | 30           | 31.9%      | 30                  | 46.9%                | 27                 | 42.2%                | 7     | 10.9%                | 94    |
| 2010   | 65           | 38.2%      | 48                  | 45.7%                | 33                 | 31.4%                | 24    | 22.9%                | 170   |
| 2011   | 89           | 47.1%      | 35                  | 35.0%                | 28                 | 28.0%                | 37    | 37.0%                | 189   |

A number of trends emerge from the table. Consolidations have been especially high in the last two years of the study, as they were in 2005. This pattern likely reflects the large number of follow-up cases filed in those years. If a case is not unique, they are often combined into one case that designates lead or co-lead plaintiffs and counsel either through an agreement of the plaintiffs' attorneys or a decision of the court. There has been a general increase in the number of unconsolidated cases that have resulted in voluntary dismissals. The percentage of unconsolidated cases that ended this way dropped in 2011, but this may be a reflection of the fact that some of these cases are still ongoing and have been classified as "other." Insofar as cases appear likely to be dismissed through agreement, this trend may be related to the documented trend of multiple cases being filed in multiple jurisdictions. If the plaintiffs' counsel involved in multiple jurisdictions can strike a deal that includes an agreement to proceed outside of Delaware, they can be expected to voluntarily dismiss the Delaware action rather than pursue it all the way to a settlement hearing.

Given the interest in the role of out-of-state counsel, it is worth looking at the outcomes in those specific instances. Table 6 provides these details, and three trends are worth discussing. First, *pro hac vice* motions have become more common in consolidated cases in the last two years than at any other time in the sample. This pattern provides some evidence that the consolidation of cases has become a more combative matter because it would probably not be a worthwhile endeavor to engage out-of-state counsel to file an uncontested motion to consolidate.<sup>119</sup>

Second, the trends with respect to the involvement of out-of-state counsel do not appear to be as dramatic in cases that result in settlement hearings.<sup>120</sup> Indeed, in every year of the sample, almost all of the cases with settlement hearings involved cases with *pro hac vice* motions. It is difficult to know what this information means, however, because it is not possible to tell from the docket whether the out-of-state counsel were involved in the filing of these cases. It may be that the out-of-state counsel directed the case from the very beginning, or that they were recruited once it became clear that the case would be a significant one.

Finally, the number of cases that result in voluntary dismissals has also seen an increase in the involvement of out-of-state counsel. This trend suggests that out-of-state-counsel are litigating these sorts of cases with more vigor. This increased effort may be symptomatic of increased multi-jurisdictional litigation; plaintiffs' attorneys may be pressing to get results more quickly so that they can settle with defendants before other groups of plaintiffs are able to do so. Of course, these efforts may not work out—for example, a motion for expedited discovery may be denied—in which case, a voluntary dismissal may occur.

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119. See, e.g., Transcript of Teleconference Motion to Consolidate Feb. 15, 2012 Teleconference, *Volpe v. Hale*, C.A. No. 7201-VCP (Del. Ch. Jan. 31, 2012) (in commenting on a contested consolidation Vice Chancellor Parsons explained “I am distressed by the fact that now we have four sets of lead counsel and no cooperation between the two major sides. This is my least favorite aspect of this job, getting involved in these types of disputes. I really rely strongly on counsel to get them resolved. When they don't get it resolved, we end up with results like this.”).

120. It looks like there is a decline in 2008, but recall from Table 5 that only eleven settlement hearings occurred in the sample and eight of them involved a *pro hac vice* motion.

TABLE 6

| Outcomes of Acquisition-Related and Derivative Cases involving |              |       |                     |       |                    |       |       |       |
|--|--------------|-------|---------------------|-------|--------------------|-------|-------|-------|
| Pro Hac Vice (PHV) Motions                                     |              |       |                     |       |                    |       |       |       |
|  | Consolidated |       | Voluntary Dismissal |       | Settlement Hearing |       | Other |       |
|  | N            | %     | N                   | %     | N                  | %     | N     | %     |
| 2004   | 2            | 5.7%  | 4                   | 11.4% | 21                 | 60.0% | 8     | 22.9% |
| 2005   | 1            | 2.4%  | 9                   | 21.4% | 22                 | 52.4% | 10    | 23.8% |
| 2006   | 2            | 5.9%  | 8                   | 23.5% | 16                 | 47.1% | 8     | 23.5% |
| 2007   | 13           | 23.2% | 19                  | 33.9% | 16                 | 28.6% | 8     | 14.3% |
| 2008   | 3            | 9.1%  | 13                  | 39.4% | 8                  | 24.2% | 9     | 27.3% |
| 2009   | 12           | 19.7% | 19                  | 31.1% | 24                 | 39.3% | 6     | 9.8%  |
| 2010   | 21           | 21.4% | 24                  | 24.5% | 31                 | 31.6% | 22    | 22.4% |
| 2011   | 49           | 41.9% | 20                  | 17.1% | 25                 | 21.4% | 23    | 19.7% |

A final pattern to note is the trend with respect to requests for expedited proceedings. As discussed above, winning a motion to fast track proceedings can be advantageous if parallel litigation is proceeding across multiple jurisdictions. A successful motion for expedited proceedings is likely to get the attention of defense counsel quickly in merger cases because the need to respond rapidly to discovery requests can threaten a deal. Insofar as multi-forum litigation has expanded over the course of the sample, one should expect an increase in the number of requests to expedite. As Table 7 shows, there has been a general increase in this trend. The percentage of all merger and derivative cases that involve a request to expedite increased from about a quarter in the early part of the sample to more than half in 2011. When one restricts the analysis to those cases that involve a *pro hac vice* motion, and hence are likely driven by out-of-state counsel, the numbers are even more dramatic. The increase is from roughly a third of cases in 2004 to over seventy percent in 2011. These trends provide more evidence that out-of-state counsel may be driving the back-to-Delaware pattern and that they may be doing so because a favorable ruling in Delaware may allow them to gain leverage in litigation that is going on elsewhere.

TABLE 7

| Percentage of Acquisition-Related and Derivative Cases<br>Involving Requests for Expedited Proceedings |                  |       |  |       |
|--|------------------|-------|--|-------|
| Filing Year  | Expedite Request |       | Expedite Request in Cases<br>with a PHV motion |       |
|  | N                | %     | N  | %     |
| 2004   | 20               | 27.4% | 11   | 31.4% |
| 2005   | 41               | 29.9% | 20   | 47.6% |
| 2006   | 18               | 26.9% | 17   | 50.0% |
| 2007   | 37               | 39.4% | 32   | 57.1% |
| 2008   | 22               | 39.3% | 18   | 54.5% |
| 2009   | 44               | 46.8% | 38   | 62.3% |
| 2010   | 65               | 38.2% | 59   | 60.2% |
| 2011   | 98               | 51.9% | 83   | 70.9% |

### III. ACCOUNTING FOR THE APPARENT RETURN OF CASES TO DELAWARE

Perhaps the most pressing question raised by this study and related research is why the acquisition-related cases appear to have left Delaware for a time, followed by an apparent return. This Part uses the data from Part II to explore what may explain this recent return. A natural place to start looking for an explanation is in the existing theories from the ABC papers and the Cain and Davidoff studies discussed in Part I. This Part explores these accounts and discusses how they appear to fit the data. This Part then offers some new theories to see how they complement both the existing approaches and information developed in this study and concludes with thoughts on the apparent persistence of the importance of being first to file.

Available data from 2005 through 2007 show a rather sharp increase in acquisition-related cases on a nationwide level that coincided with an increase in dealmaking at the time.<sup>121</sup> The number of acquisition-related cases in Delaware was more-or-less flat during that time period. This observation is consistent with ABC's findings that Delaware had been falling out of favor with plaintiffs' for some time.<sup>122</sup> The dataset in this study cannot provide much insight to two of ABC's theories, namely that criticism from the Chancery and the threat of fee cuts led plaintiffs'

121. Cain & Davidoff, Takeover Litigation in 2011, *supra* note 2, at 2.

122. *See infra* notes 25–31.

lawyers to file in other jurisdictions.<sup>123</sup> The docket data simply do not provide much information along these lines.

But the dataset does allow exploration into two of ABC's other theories—that the party that files first has been deprioritized in selecting lead counsel<sup>124</sup> and that fragmentation of the plaintiffs' bar has led to more cases outside of Delaware.<sup>125</sup> ABC show how the Chancery has altered the test for awarding lead counsel status by moving from a process that deferred to the deals struck by plaintiffs' attorneys to one that emphasizes the quality of the pleading, the attorney's skill, and the presence of institutional clients.<sup>126</sup> It is, of course, not possible to measure the effect of these factors on cases that were not filed in Delaware. Those lawyers who thought they might fare poorly under this new standard may have moved on to jurisdictions where their ability to get to the courthouse quickly was more likely to produce lead counsel status.<sup>127</sup> And, indeed, the number of institutional plaintiffs has increased over time in the sample. If these institutional plaintiffs actually do draw higher quality counsel, this could be a desirable result for the Chancery. As David Webber shows, institutional clients were often designated as lead plaintiffs in the period from 2004 to 2009.<sup>128</sup>

But the number of acquisition-related class actions in Delaware grew substantially in 2010 and 2011. What could account for this change? This increase does not appear to be driven by institutional plaintiffs, as their relative numbers declined during this time. There has been, however, substantial growth in the number of follow-up filings. It is possible that this change has a relationship with the recent increase in multi-jurisdictional litigation in acquisition-class actions.<sup>129</sup> Cain and Davidoff

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123. Armour et al., *Delaware's Balancing Act*, *supra* note 3, at 1370–80.

124. *Id.* at 1370–76.

125. See Cheffins et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, *supra* note 21.

126. *Id.* at 482–83.

127. *Id.* at 483–84.

128. See Webber, *supra* note 94.

129. ABC have attributed some of the move away from Delaware as a response to Delaware's shift to merit-based selection of lead counsel and the threat to trim attorneys' fees. Armour et al., *Delaware's Balancing Act*, *supra* note 3, at 1380. Some members of the Chancery have expressed similar theories. In *Scully v. Nighthawk Radiology Holdings*, Vice Chancellor Laster commented 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 plaintiff’s lawyers . . . rationally responded to that by increasing the frequency with which they file elsewhere.” Micheletti & Parker, *supra* note 13, at 13 (quoting Transcript of Courtroom Status Conference at 18–19, *Scully v. Nighthawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL (Del. Ch. Dec. 17, 2010)).

show that, for deals that meet their threshold, the percentage involving litigation in more than one jurisdiction has increased from 8.6% in 2005 to 47.4% in 2011.<sup>130</sup>

As one Delaware lawyer explained in an interview, if out-of-state counsel lose the race to the courthouse in a foreign jurisdiction that follows the first-to-file rule—which means they have little chance of being named lead counsel<sup>131</sup>—there may still be value in filing in Delaware. This is especially true for counsel with strong reputations. These lawyers can file in Delaware, where speed is less important for the selection of lead counsel,<sup>132</sup> and they can credibly threaten to move forward in Delaware because their reputations give them a possibility of being named lead counsel.<sup>133</sup> They can either use this threat to demand that the counsel in the foreign jurisdiction let them into the leadership structure in that forum—in exchange for dismissing the Delaware case—or they can simply move forward in Delaware. Indeed, this scenario may be a contributing factor to the observed increase in voluntary dismissals over the course of the sample.

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130. Cain & Davidoff, *Takeover Litigation in 2011*, *supra* note 2, at 2.

131. John Armour et al., *Is Delaware Losing Its Cases?* *supra* note 3, at 42 (noting that “[o]ur interviewees told us that the first-to-file custom remains important elsewhere”); Mark Lebovitch et al., *Making Order Out of Chaos: A Proposal To Improve Organization and Coordination in Multi-Jurisdictional Merger-Related Litigation* 4, BERNSTEIN, LITOWITZ, BERGER AND GROSSMAN LLP (Sept. 15, 2012), available at [http://www.blbgilaw.com/misc\\_files/MakingOrderoutofChaos](http://www.blbgilaw.com/misc_files/MakingOrderoutofChaos) (stating that “[d]espite what we believe is a close link between the identity of lead counsel and the quality of case outcome for shareholders, many jurisdictions still determine lead plaintiff and lead counsel through a rule of absolute priority.”). *But see* Griffith & Lahav, *The Market for Preclusion in Merger Litigation*, *supra* note 16, at 34 (arguing that “While some jurisdictions may follow the traditional first-to-file rule for awarding leadership roles, the law in most jurisdictions seems to be that appointment of lead counsel is at the discretion of the court if counsel cannot agree.”).

132. Cheffins et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs’ Bar*, *supra* note 21, at 479–84.

133. It helps matters that these out-of-state counsel do not file in a foreign jurisdiction because the Chancery frowns on the practice of firms filing in multiple jurisdictions and doing so may weigh against a firm’s selection as lead counsel. Micheletti & Parker, *supra* note 13, at 11–12 n.37 (noting that in *In re BJ Services Co. Shareholder Litigation*, C.A. No. 4851-VCN (Del. Ch. Sept. 25, 2009), the court awarded lead counsel to a party that filed exclusively in Delaware over one that filed identical lawsuits in Delaware as well as a non-Delaware jurisdiction); *id.* at 26 n.109, (citing Alison Frankel, *Strine to M&A Bar: Don’t Stop Believing . . . in Delaware*, THOMSON REUTERS NEWS & INSIGHT (Nov. 14, 2011), available at [http://newsandinsight.thomsonreuters.com/Legal/News/2011/11\\_-\\_November/Strine\\_to\\_M\\_A\\_bar\\_Don\\_t\\_stop\\_believing\\_\\_\\_\\_\\_in\\_Delaware/](http://newsandinsight.thomsonreuters.com/Legal/News/2011/11_-_November/Strine_to_M_A_bar_Don_t_stop_believing_____in_Delaware/)) (quoting Chancellor Strine’s comment 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]”) (alterations in original); *id.* at 39 (concluding that “[p]erhaps 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.”).

The lack of a clear standard to determine what will happen when litigation proceeds in multiple jurisdictions may facilitate the strategy of filing in Delaware. As mentioned in Part I, former-Chancellor Chandler expressed a desire that defense counsel move to have the judges in different jurisdictions confer and come to a resolution.<sup>134</sup> The present Chancellor, Leo Strine, Jr., does not seem to be as favorably inclined to this approach. As a Vice Chancellor he expressed his belief that, at least in expedited proceedings, when “there is a choice between two forums, the forum whose law is at stake ought to go forth” and that those jurisdictions without this interest can “stay in [their] own lane.”<sup>135</sup>

Some have suggested that the desire to protect Delaware’s say over cases that implicate its law has contributed to the evolving application of the *McWane* doctrine, which determines whether the court will stay a case in Delaware in favor of litigation elsewhere.<sup>136</sup> As articulated, this doctrine favors the grant of a stay in cases that are second-filed in Delaware. The Chancery appears, however, to have found a number of reasons that warrant not granting such a stay. Many of these justifications focus on the importance of Delaware hearing potentially meaningful corporate law cases.<sup>137</sup> As one commentator has explained: “In almost all the recent,

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134. See *supra* note 60 and accompanying text.

135. Micheletti & Parker, *supra* note 13, at 30 (citing 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)).

136. The *McWane* doctrine was introduced in 1970 and thus forms part of a legal framework that developed long before the advent of multi-jurisdictional litigation and the related problems it has caused the Delaware courts. See *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng’g Co.*, 263 A.2d 281, 283 (Del. 1970). The doctrine in its original configuration simply required that second-filed equitable claims in Delaware be stayed in favor of equivalent first-filed claims in front of competent tribunals. Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware’s Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 107 (2009).

137. The Chancery Court has rejected the importance of filing first by finding, on several occasions, that second-filed Delaware lawsuits were “effectively *contemporaneously* filed.” Stevelman, *supra* note 136, at 109 (emphasis in original). The court has found Delaware suits to be effectively contemporaneously filed in several cases, including a case in which the Delaware claim was not filed until 3 weeks after the original lawsuit. *Id.* (citing *Ryan v. Gifford*, 918 A.2d 341 (Del. Ch. 2007)). In the same vein, the court has relegated the impact and scope of the *McWane* doctrine. See *CA, Inc. v. Ingres Corp.*, C.A. No. 4300-VCS, 2009 WL 4575009 (Del. Ch. Dec. 7, 2009) (holding that a Forum Selection Clause choosing Delaware should control even if application of the *McWane* doctrine would lead to a different result). The court has also indicated that it will not stay second-filed Delaware cases in favor of first-filed lawsuits in foreign jurisdictions where it perceives that the plaintiff’s lawyers have attempted to expedite proceedings in the foreign jurisdiction for the purpose of securing lead counsel status rather than representing the class of plaintiffs as effectively as possible. In *Dias v. Purches*, where the foreign plaintiff’s lawyers had filed motions for expedited discovery and an expedited hearing, the court responded by holding that these measures were not “so extensive as to require a stay” and that “[d]iscounting, as I find appropriate, the (barely) first-filed nature of the Florida Action, I find nothing that indicates that this matter should be stayed in deference to the Florida Action.” C.A. No. 7199-VCG, 2012 WL 689160 at \*2 (Del. Ch. Mar. 5, 2012). One

salient cases (M&A and fiduciary loyalty breach cases involving Delaware public companies), the court has deployed its new standards to keep forum and proceed with the litigation.”<sup>138</sup> This uncertainty about how courts will resolve disputes over where to proceed gives a party’s threat to go forward in Delaware even more weight because there is some possibility, and perhaps a strong possibility, that the Chancery will refuse to stay actions that have been filed first elsewhere.

But even for those plaintiffs’ counsel who do not have a plausible claim to being named lead counsel in Delaware, a Delaware filing can still provide some hope for a share of the fees. If these out-of-state plaintiffs’ counsel have lost the race to the courthouse in a first-to-file jurisdiction, they have nothing to gain by filing second there. If they file in Delaware, even if they are not first, these out-of-state lawyers can threaten to fight a consolidation motion against those who have filed in Delaware and are likely to be named lead counsel. Delaware’s use of a standard-like framework for the selection of lead counsel means that this threat is not entirely trivial. If counsel cannot agree on who will be lead counsel and leave lead counsel selection to the court, the process is likely to require more time and expense than it would if Delaware followed a straightforward first-to-file rule. Counsel who are likely to win a contested lead counsel motion may prefer to offer a small share of any potential settlement in exchange for an agreement not to contest a dismissal. This pattern would help to explain the increase in Delaware follow-up cases and it is consistent with anecdotal accounts from Delaware counsel of how multi-jurisdictional cases sometimes proceed.

The full picture of incentives driving the filing of strategic follow-up complaints emerges only when considering their use in the context of multi-jurisdictional litigation: not only can counsel use the filing to impose a tax on those who would act as lead counsel in Delaware, but they can also use the Delaware filing for leverage in a foreign jurisdiction. The Chancery has noted this specific trend. As Chancellor Strine explained when a plaintiff objected to the dismissal of a Delaware action: “To be

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commentator has noted that these actions may simply reflect the Court’s belief that cases involving the internal affairs of companies incorporated in Delaware belong in Delaware. *See* Stevelman, *supra* note 136, at 119 (concluding that based on the principles of the Internal Affairs Doctrine and basic efficiency, “[i]n 2007, in its *Topps* decision, the Court of Chancery makes something of a universal claim of right to keep forum over Delaware corporate lawsuits in parallel proceedings.”). The same commentator observed that “[a]s other courts become more aware of Delaware’s new, more aggressive approach to resolving (and keeping) forum in parallel proceedings, there are likely to be more ‘standoffs’ between Delaware and other jurisdictions.” *Id.* at 110.

138. *Id.* at 108.

candid, the plaintiff's 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 that gives them some leverage in litigation elsewhere."<sup>139</sup> The Chancery will, of course, not always be able to detect and police this kind of behavior because, at least in that case, it took a dispute over dismissal to bring attention to the tactic. In cases without these sorts of disputes, counsel may be able to file a placeholder complaint and use it as leverage for litigation occurring elsewhere.<sup>140</sup> As discussed earlier, plaintiffs can point to a Delaware filing as a reason for objecting to a settlement reached in a different state by a different group of lawyers.<sup>141</sup>

ABC's second theory suggests that other states have made it easier for out-of-state lawyers to be admitted through *pro hac vice* motions.<sup>142</sup> Insofar as the previous difficulty of this process deterred cases, these lawyers are more likely to file cases in these other jurisdictions.<sup>143</sup> The dataset in this Article can provide some insight to this potential trend through measuring the presence of *pro hac vice* motions, although the

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139. Micheletti & Parker, *supra* note 13, at 21 n.78, (quoting *In re Dynegy Inc. S'holders Litig.*, C.A. No. 5739-VCS, at 2 (Del. Ch. Mar. 16, 2011)).

140. Note that this process can also work the other way. Counsel can leverage the threat of proceeding in an alternative jurisdiction as a way to get a cut of a fee in exchange for dismissing that case and allowing the Delaware action to proceed. Mark Lebovitch has explained that this often happens when Delaware plaintiffs are close to reaching a favorable settlement which is conditioned on its acceptance by all other plaintiffs in the other jurisdictions, "including those who simply filed an action and then stipulated to a stay of their case[.]. Sensing leverage, the plaintiffs in the alternate and stayed forum refuse to join the settlement unless they are paid a significant 'tax' disproportionate to any efforts or actual contributions toward the outcome of the case." Mark Lebovitch et al., *Improving Multi-Jurisdictional, Merger-Related Litigation* (May 19, 2011), available at <http://blogs.law.harvard.edu/corpgov/2011/05/19/improving-multi-jurisdictional-merger-related-litigation/>. Because Delaware plaintiff's lawyers "are barred by Delaware practice from negotiating a fee with defendants, [they] are forced to give significant credit for achieving the shareholder-benefits in the settlement with third parties who did little or nothing." *Id.*

141. An example of this practice, without any comment on whether the underlying objection had merit, occurred in the parallel litigation that contested Bank of America's acquisition of Merrill Lynch. Separate groups of plaintiffs filed parallel derivative actions in the Court of Chancery and in the Southern District of New York. On April 12, 2012, Bank of America and the New York plaintiffs filed a Memorandum of Understanding in the New York courts that purported to be a global release of all derivative claims. The Delaware plaintiffs moved to enjoin the settlement proceedings and, after that motion was denied (*see In Re Bank of America Corporation Stockholder Derivative Litigation*, Del. Ct. Chan. 4307-CS (May 4, 2012)), the Delaware plaintiffs have attempted to contest the settlement in New York. Those attempts have thus far been unsuccessful, but the court has yet to approve the settlement. *See In re Bank of Am. Sec., Derivative, and ERISA Litig.*, 1:09-md-02058-PKC (S.D.N.Y. May 14, 2012) (denying Delaware plaintiffs motion to intervene).

142. *See* Armour et al., *Fragmentation of the Plaintiffs' Bar*, *supra* note 21, at 488–89 (describing the current ease with which lawyers can get *pro hac vice* motions approved in most states).

143. *Id.* at 485–88 (describing the earlier difficulty of getting *pro hac vice* motions in states other than Delaware).

coverage of the dataset does not cover the entire time period that ABC analyze. Their data suggests that this trend began around 2000, which is before the first year of this study.<sup>144</sup> Nevertheless, the years that involve the lowest percentage of cases with *pro hac vice* motions are in the earliest year of the study, when other information corroborates that Delaware was losing cases in a relative sense.<sup>145</sup>

The presence of *pro hac vice* motions rises in the later years of the study. Given the sharp increase in the number of acquisition-related cases, this pattern is consistent with the possibility that out-of-state counsel have played a role in the return of these cases to Delaware. But the pronounced increase in the numbers of *pro hac vice* motions in cases that get consolidated suggests that plaintiffs' lawyers may be finding it more difficult to agree on who will serve as lead counsel. Imagine, for example, a situation where two out-of-state law firms direct a complaint to be filed in Delaware and it is clear that one of the firms would be named lead counsel due to its sterling reputation. The two firms can strike a deal where the strong firm offers a small slice of any settlement to the other firm in exchange for that firm's agreement not to contest consolidation. A *pro hac vice* motion is unlikely to be needed for the consolidation motion in this situation because nothing is disputed. But if ten out-of-state firms file complaints, this sort of negotiation may become much more difficult because it becomes more likely that one of the firms will hold out. In this situation, one might expect more contested consolidations and, given the high stakes, it makes sense to go through the expense of bringing in out-of-state counsel through a *pro hac vice* motion to argue the consolidation proceeding.

The pattern of increasingly contested consolidation motions may be consistent with the increasing fragmentation of the plaintiffs' bar. One potential account is that this fragmentation contributed to the decision to file outside of Delaware. But as time went on and the competition among the plaintiffs' bar increased, the benefits of filing outside of Delaware diminished, this being especially true if a firm were not the first to file in a foreign jurisdiction. Competition may have driven firms to return to Delaware because the possibility of getting some portion of an attorneys' fee award there or of gaining leverage in foreign jurisdictions is higher. Insofar as the competition is still increasing, this phenomenon suggests that caseloads in Delaware may continue to grow, especially with respect

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144. *Id.* at 488–89.

145. See Armour et al., *Is Delaware Losing Cases?*, *supra* note 3.

to the number of follow-up cases filed. Delaware courts can only do so much to affect this competition and, consequently, this increasing growth may be contributing to the Chancery's loss of some control over Delaware filings.

Even in advance of consolidation, a Delaware complaint can provide some strategic leverage to the lawyers who file it. Indeed, some attempts to expedite often happen in advance of, or sometimes simultaneously with, a motion to consolidate.<sup>146</sup> The ability of a plaintiff to move for a motion to expedite even before being named lead counsel may provide some explanation for why the race to the courthouse persists in Delaware. If litigation has already started in another jurisdiction, a Delaware filing followed shortly by a motion to expedite provides some chance of catching the attention of the defense counsel who are handling the multiple fronts of litigation. The increase in the requests to expedite observed in the docket data provide reason to believe that plaintiffs' counsel are making use of this tactic. The fact that a growing number of these cases involve out-of-state counsel is further evidence that Delaware may be an increasingly attractive option for those lawyers that have lost the race to the courthouse elsewhere. It can be burdensome and expensive for out of state lawyers to go to the trouble and cost of filing a *pro hac vice* motion and arguing a motion in the Court of Chancery. The evidence that out-of-state counsel appear to be taking these steps at an increasing clip suggests that they must perceive some expected benefit from doing so.

Cain and Davidoff premise their account of competition between states for acquisition-related cases on the theory that plaintiffs seek the highest expected rewards.<sup>147</sup> They measure these expected rewards through settlement rates and attorneys' fees, both of which are likely to be prominent in the minds of lawyers when they decide where to file.<sup>148</sup> But other factors may be driving the decision where to file. As explored above, it may be the case that lawyers file in Delaware not due to a higher expected reward in Delaware, but because that filing can give them leverage in other jurisdictions. This effect could deflate Delaware

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146. For example, in *Pontiac General Employees Retirement System v. Kevin Brine*, C.A. No. 7144-VCG (Del. Ch. Dec. 22, 2011), the plaintiffs filed a complaint on December 22, 2011 and moved to expedite proceedings on December 27, 2012. The following day the plaintiffs moved for consolidation and appointment of lead counsel status. Likewise in *Lehigh County Employees Retirement Plan v. Illumina, Inc.*, C.A. No. 7251-VCP (Del. Ch. Feb. 17, 2012) one of the plaintiffs brought a motion to expedite discovery on February 20, 2012 and did not move to be designated as lead plaintiff until March 1, 2012.

147. See generally Cain & Davidoff, *A Great Game*, *supra* note 2.

148. See *id.*

settlement rates and attorneys' fee awards in a somewhat artificial way because the lawyers have little intention of moving forward with the case. Given that observation of this motive is difficult to discern, it might prove quite challenging to account for this effect empirically.

Likewise, courts may be responding to increased competition through mechanisms other than settlement rates and attorneys' fees. Perhaps the most important response that has not yet been the subject of the systematic comparative analysis that Cain and Davidoff perform is the rates at which courts grant motions to expedite. If, for example, Delaware courts have concerns about losing cases, an increased willingness to grant motions to expedite would help bring the focus of cases back to Delaware even if they are being litigated in other jurisdictions at the same time. By taking this tack, Delaware courts could remain competitive for complaints even if they are not increasing settlement rates or refraining from cutting agreed-upon attorneys' fees.<sup>149</sup>

Finally, it is worth exploring whether there really has been a return to Delaware. An alternative scenario would be that the increase of case filing in Delaware is an artifact of the more general increase in acquisition-related litigation. As detailed above, the percentage of significant acquisitions that have produced litigation has exploded from 38.7% in 2005<sup>150</sup> to 94.2% in 2011.<sup>151</sup> Similarly, the percentage of these deals involving litigation filed in multiple states has increased from 8.6% to 47.4% over the same period.<sup>152</sup> These trends make it likely that, even if Delaware were actively trying to repel litigation, more cases would be filed there for the simple reason that more cases are being filed everywhere.

But this possible explanation only raises more questions for observers of corporate litigation. One of these questions is: what has the net effect of this increase in litigation meant for Delaware? Perhaps this trend is masking an ongoing net loss of cases for Delaware. Other questions include: how is Delaware faring in situations where multiple cases have been filed in multiple states? Is Delaware winning the battle for the best

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149. To be sure, Cain and Davidoff marshal an impressive amount of data to try to control for the quality of cases, which may capture some of the dynamics related to placeholder complaints and the types of cases that are more and less likely to warrant a grant of expedited proceedings. *See id.* at 17–18 (describing controls for the size of the transaction, whether the consideration was cash, the presence of a management buyout, the use of tender offers, whether the case had a low offer premium, and the number of cases filed).

150. *Id.* at 3.

151. Cain & Davidoff, *Takeover Litigation in 2011*, *supra* note 2, at 2.

152. *Id.*

and most interesting of these cases? The answers to these questions remain to be seen, although future, cross-jurisdictional studies should be able to shed some light on these issues.

### CONCLUSION

Striking the right balance of authority and accountability is one of the defining problems of corporate law.<sup>153</sup> The centralized and hierarchical nature of the corporation allows the board to pursue the economic interests of a disparate group of shareholders. But this structure also creates the danger that managers and members of the board may privilege their own ends rather than those of shareholders. Shareholders have a number of means to hold members of the board accountable for their actions: they may sell their shares, they may vote their shares, or they may initiate lawsuits that seek redress for potential violations of fiduciary duties by directors.<sup>154</sup> These mechanisms are not perfect, but they provide shareholders with some means to minimize the agency costs that come with centralized management of the corporation.

Litigation works to constrain directors by imposing liability when they act in a self-seeking way. When this litigation takes the class action and derivative forms it seeks to counter the agency costs created by centralized control of the corporation with the centralized representation of shareholder interests.<sup>155</sup> This control often lies in the hands of the attorneys who direct this class action and derivative litigation.

But just as the centralization of corporate authority creates a concern that management will pursue their own interests over those of shareholders, the centralization of litigation authority poses the potential threat of conflict between the aims of attorneys and those they represent.<sup>156</sup> In designing the role that litigation plays, an appropriate goal is to harness the ability of representative litigation to constrain corporate actors while

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153. See, e.g., Stephen M. Bainbridge, *Director Primacy in Corporate Takeovers: Preliminary Reflections*, 55 STAN. L. REV. 791, 795 (2002) (calling the “tension between the authority and accountability [of directors] the central problem of corporate law.”).

154. See Robert B. Thompson, *Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell, and Sue*, 62 LAW & CONTEMP. PROBS. 215, 216 (1999).

155. See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 (1949) (discussing how derivative lawsuits are “the chief regulator of corporate management”).

156. See Hillary A. Sale, *Judges Who Settle*, *supra* note 63, at 384 (noting that the “agency problems [associated with representative litigation] are not unlike those inherent in corporate law and the separation of ownership and control more generally.”); Thomas & Thompson, *A Theory of Representative Shareholder Suits*, *supra* note 9, at 1755 (explaining that in derivative and class action lawsuits “plaintiffs’ lawyers typically have a greater economic stake in the litigation than the individual representative shareholder, so litigation agency costs may ensue.”).

minimizing the agency costs created through use of the representative form. The current debate over how and whether to address the growth in multi-jurisdictional litigation that challenges acquisitions should be answered with this goal in mind.

The empirical research developed in this Article and by others has identified two distinct Delaware trends: the migration of cases away from Delaware and the apparent return of cases to Delaware as part of the rise of concurrent, multi-jurisdictional litigation. These two trends may have different normative implications for optimal design of merger litigation. As other research has documented, Delaware used to hold a virtual monopoly on the adjudication of corporate claims.<sup>157</sup> It is quite possible that the migration of some cases away from Delaware has improved the incentives that litigation provides through the introduction of competitive pressure on a quasi-monopolist.<sup>158</sup> These alternative jurisdictions may be able to improve litigation through their application of substantive Delaware law or through the procedures they use to select lead counsel, approve attorneys' fees, or otherwise manage litigation.<sup>159</sup> Competition is, of course, no guarantee of these improvements. These alternative forums may apply the law or manage cases in a way that reduces the effectiveness of litigation as a check on agency costs. Nevertheless, there is at least a possibility that providing multiple fronts for litigation improves substantive outcomes and hones plaintiff incentives in a way that improves the regulatory effect of litigation.

While the possibility of competition may have a salutary effect, the normative desirability of concurrent, multi-jurisdictional litigation is less clear. As Thomas and Thompson have argued, the details of this litigation often focus on the distribution of fees.<sup>160</sup> This sort of pie-splitting activity has the potential to increase the costs of litigation to all parties. The data developed in this Article suggest that as multi-jurisdictional litigation has

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157. As Chancellor Strine has noted, some may view Delaware as "a bit of a fat and happy monopolist." Leo E. Strine, Jr., *Delaware's Corporate-Law System: Is Corporate America Buying an Exquisite Jewel or a Diamond in the Rough? A Response to Kahan & Kamar's Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1257, 1265 (2001). Strine makes it clear that he does not agree with this view. *Id.* at 1265–72.

158. Delaware, of course, faces competition from multiple sources. As Mark Roe has argued, the federal government is one of the most prominent sources of Delaware's competition. *See* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003) (exploring the role of the federal government in corporate law).

159. *See* Thomas & Thompson, *A Theory of Representative Shareholder Litigation*, *supra* note 9, at 1799–1800 (explaining that one benefit of litigation on multiple fronts is that it allows states other than Delaware to assert their interests in corporate cases).

160. *Id.* at 1757.

increased, Delaware has seen an increase in the use of strategic tactics in the contest to split fees. These activities include the strategic filing of a Delaware complaint, contested consolidations, and requests for expedited proceedings.<sup>161</sup> All of these practices, which may also be occurring in other states, can increase the costs on both the plaintiff and defense sides of these cases and also increase the administrative burden on the courts.<sup>162</sup>

It may be that the costs imposed by concurrent, multi-jurisdictional litigation are necessary to gain any of the prospective benefits associated with competition among states for cases.<sup>163</sup> But it may be possible to preserve the potential benefits of competition while casting aside some of the strategic behavior that does not contribute to these benefits. A system that allows plaintiffs to choose where to file and also permits a relatively quick consolidation of all cases across jurisdictions would preserve competition while limiting the costly tactics that this Article documents. At a minimum, the incidence and magnitude of strategic behavior should be part of the discussion of how to address this issue.

Finally, it is worth wondering whether the changes wrought by the rise of multi-jurisdictional litigation may prompt changes to the way Delaware administers cases. The Chancery has long preferred plaintiffs' counsel to operate through consensus and agreement. As competition between groups of plaintiffs's attorneys becomes more pitched and takes place on multiple fronts, it may be more difficult for consensus to emerge. To the degree that Delaware's rules facilitate strategic behavior in this new world, there may be some pressure to alter rules in a way that reduces the burden that this strategic behavior places on parties and courts.

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161. The focus here is on how the costs associated with strategic behavior impact the debates on multi-jurisdictional competition. There are other costs associated with multi-jurisdictional competition that are not the focus of this empirical study. Perhaps the most prominent of these costs is the possibility that multi-jurisdictional litigation facilitates the practice of collusive reverse auctions between defense counsel and some plaintiffs' counsel. *See* discussion *supra* note 66.

162. The overall effects of these strategic costs are not entirely clear. It is difficult to say, for example, what the desirable amount of contested consolidations is. Nevertheless, if proceedings are purely about dividing attorneys' fees and produce no effect on substantive outcomes, it is difficult to see how such proceedings would be beneficial.

163. The difficulty of measuring the quality of cases being filed, and their ultimate effect on corporate governance, complicates any attempt to assess any proposed solutions to the rise in multi-jurisdictional litigation. While there may be a temptation to infer that the very high percentage of acquisitions that result in litigation means that some of these cases are of low quality, no one has yet provided quantitative evidence to that effect. Moreover, as explained earlier, the overall number of deals that have resulted in litigation has not varied substantially in recent years, which may indicate that case selection is not a dire problem. *See supra* notes 28–31 and accompanying text. *See also* Thomas & Thompson, *A Theory of Representative Shareholder Suits*, *supra* note 9, at 1788–89 (counseling caution about inferring lawsuit quality from the types of settlements that parties reach).