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Another Day, Another Forum: Strategies For Litigating Stockholder Class Actions and Derivative Suits in Multiple Forums

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Introduction

Parallel litigation in multiple forums has become a systemic and growing problem in stockholder class actions and derivative suits.[1] Following the announcement of a public company merger or a major corporate setback, representative stockholder plaintiffs, suing directly or derivatively, file multiple actions asserting the same claims for breach of fiduciary duty against corporate officers and directors. Companies and their officers and directors quickly become embroiled in a game of tug-of-war over which forum will take the lead.

The Delaware Court of Chancery is often in the fray. Delaware courts have embraced a policy that disputes involving internal corporate affairs should be decided in the state of incorporation. Delaware courts strongly advocate this policy as promoting the best interests of companies and stockholders in doctrinal predictability and judicial efficiency. Given that nearly one million companies and more than 60% of the Fortune 500 are incorporated in Delaware,[2] it is not surprising that Delaware courts have been influential in shaping developments in multi-forum stockholder litigation. Chancellor Strine and Vice Chancellor Parsons of the Court of Chancery each recently co-authored important articles regarding the unique features and challenges of this type of multi-forum litigation.[3]

This article surveys one aspect of the multi-forum litigation problem—that is, defense strategies to channel litigation into one forum for a merits determination. The primary strategies are motions to stay or to dismiss parallel cases based on considerations of filing priority, *forum non conveniens*, comity, "one forum" efficiency, and enforcement of forum selection provisions in corporate charters or bylaws. As the law now stands, none of the strategies yields reliably predictable results. Corporate defendants inevitably face a risk of defending duplicative simultaneous or serial cases.

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Multi-Forum Stockholder Litigation

A recent article co-authored by Chancellor Strine, *Putting Stockholders First, Not the First-Filed Complaint*, analyzes the doctrinal origins of multi-forum stockholder litigation.[4] The article attributes the phenomenon to several major developments in the law: (1) judicial extension of the reach of personal jurisdiction and the application of the internal affairs doctrine beyond geographical state boundaries,[5] (2) development of class actions and derivative suits as frequently used forms of action,[6] and (3) federal legislation forcing class action litigation into federal courts where barriers to a plaintiff's success are relatively high, while leaving litigation involving internal corporate affairs in the hands of state courts.[7]

As a result of these developments, lawyers representing stockholders have strategic options about where to file suits challenging the fiduciary actions of corporate directors and officers, including the state of incorporation, the corporate headquarters state, and sometimes federal court. Plaintiffs' law firms compete for control of the litigation by filing separate actions, often staking out positions in different state and federal courts. Plaintiffs and their attorneys need to control claims in order to secure a judicially sanctioned lead plaintiff role, and ultimately seek recovery of attorney's fees. In light of judicial conventions that support deference to the court with the "first-filed" case, plaintiffs are incentivized to file suit quickly. Delaware courts have lambasted these "fast filer" dynamics as leading to insufficient investigation and prosecution of claims and inadequate representation of stockholders.[8]

Although these fast-filer dynamics are not new, multi-forum litigation has emerged recently as a hot topic mainly because of the steep increase in "merger objection" class actions filed after the announcement of a proposed sale of a public company. These actions tend to be lawyer-driven and formulaic: a stockholder with relatively modest holdings asserts claims for breach of fiduciary duty by the selling company's board of directors, alleging a flawed sale process, inadequate price, and deficient disclosures, and threatens to seek a preliminary injunction to hold up the transaction. A recent study indicates that in 2012, almost all acquisitions valued at over $500 million were challenged in litigation, up from about 50% of similarly sized transactions in 2007. In 2012, an average of nearly five lawsuits were filed per deal, with the first filing averaging about 14 days after announcement of the proposed transaction.[9] In approximately 65% of the transactions involving sale of a Delaware company, lawsuits were filed in both Delaware and another jurisdiction.[10]

Relatedly, derivative litigation in multiple forums is attracting heightened interest because of developments in Delaware law regarding the potential for serial suits. A recent decision by the Delaware Supreme Court permits a stockholder to inspect corporate books and records under section 220 of the Delaware Code in order to file a better derivative complaint after dismissal without prejudice for failure to plead demand futility.[11] Of potentially greater concern, a 2012 decision by the Delaware Court of Chancery declined to give preclusive effect to dismissal of a derivative suit with prejudice by a federal court in California.[12] The Delaware Supreme Court reversed, making clear that full faith and credit requires Delaware courts to give a judgment the same preclusive effect that it would have in the rendering jurisdiction. This decision did not resolve, however, the preclusive effect under Delaware law when a derivative suit is dismissed, with prejudice, for failure to satisfy the Rule 23.1 demand requirement.[13]

In responding to multi-forum litigation, corporate defendants naturally seek to defend against the claims in a single forum, preferably the forum likely to yield the best defense result.[14] But regardless of whether the best forum for defense is Delaware, to the extent that Delaware courts enforce a policy of asserting jurisdiction in intra-corporate disputes, this policy encourages defendants to promote Delaware as the lead court, and to petition other courts to stand down. Otherwise, defendants may be forced to defend in multiple forums.

Delaware courts themselves have an interest in controlling intra-corporate litigation involving Delaware companies.[15] The Court of Chancery describes itself as "the nation's preeminent forum for the determination of disputes involving the internal affairs" of corporations[16] and one-fifth of Delaware's state budget is funded by corporate franchise taxes.[17] In a leading case, the Court of Chancery stated its basis for asserting priority in deciding representative litigation involving intra-corporate disputes:

> For investors in Delaware corporations, it is important that the responsibilities of directors be articulated in a consistent and predictable way . . . . [R]andom litigation results are not good for investors . . . . It is a very delicate corporate law exercise to determine whether to enjoin a premium-paying merger affecting thousands of stockholders at the instance of stockholders holding a small fraction of the company's shares. In that respect, it is no insult to the courts of other states . . . to say that the Delaware courts are better positioned to provide a reliable answer about Delaware corporate law in emerging areas like the ones presented by this dispute.[18]

As then-Chancellor Chandler explained, "Delaware has an ongoing interest in applying our law to director conduct in the context of current market conditions—conditions which change rapidly and pose new challenges for officers and directors of Delaware corporations."[19]

Strategies for Channeling Control to One Forum

Against this backdrop of competing interests, a primary objective of defendants is to channel claims into one forum via motions to stay or to dismiss superfluous actions. The United States Supreme Court established that every court has the power to stay proceedings "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."[20] The decision to stay a case, however, is a matter of judicial discretion. And discretion can yield unpredictable results.

Courts employ an array of rationales in deciding a request to stay a case in favor of another forum. Those rationales are based on comity and judicial efficiency, and include the first-filed rule and *forum non conveniens* analysis. Recent innovations include a "one forum" motion and, when applicable, a motion to enforce a forum selection provision in corporate articles or bylaws. These rationales and their strengths and weaknesses are discussed below.

The First-Filed Rule

In exercising discretion to stay or dismiss a suit in light of parallel litigation, courts in several leading jurisdictions rely heavily on the first-filed rule. The first-filed rule is based on the idea that the court in which claims were filed first has jurisdictional priority. As initially conceived, the first-filed rule operated to prevent defendants from defeating a plaintiff's choice of forum by filing a second suit in another forum.[21] Also, the rule initially applied only to actions in the same state, and not to suits pending in multiple jurisdictions.[22]

Through judicial evolution, courts now invoke the first-filed rule when considering the priority between actions in different jurisdictions.[23] As a principle for abating duplicative lawsuits, the first-filed rule avoids wasteful duplication of time, effort, and expense, inconsistent and conflicting rulings, and an "unseemly" race to judgment in competing forums.[24] The first-filed rule is easy to forecast, creating a bright line rule for dealing with parallel, duplicative litigation filed by representative plaintiffs.

In Texas and New York (jurisdictions in which a relatively high volume of merger objection suits are filed),[25] courts customarily apply a first-filed rule in managing parallel litigation. In Texas, "it is the custom for the court in which the later action is instituted to stay proceedings therein until the prior action is determined, or at least for a reasonable time."[26] This custom "has practically grown into a general rule . . .

Thus, the prudent course is to request a stay of the later action and allow the court in which the prior action is pending to reach a final determination of the issues."[27] Similarly, in New York, courts apply a first-filed rule to "'avoid duplication of judicial effort, avoid vexatious litigation in multiple forums, achieve comprehensive disposition of litigation among parties over related issues, and eliminate the risk of inconsistent adjudication.'"[28]

In Delaware, on the other hand, the Court of Chancery does not follow a first-filed rule. A later-filed action in Delaware "will not be stayed as a matter of right" and discretion to stay such an action "should be exercised freely."[29] Delaware courts have embraced a concept that that when multiple suits are filed within a relatively short period of time, the suits should be regarded as simultaneously filed, and any rule of filing priority should be set aside in favor of other considerations in choosing the best forum and the most adequate plaintiff to control the litigation.[30] In Delaware's point of view, insignificant differences in filing time should be disregarded in order to discourage "hastily drafted and barely researched complaints"[31] that do not benefit the company or its stockholders.

Delaware's policy has led to more forum conflicts in intra-corporate disputes.[32] In effect, if a second action is filed in Delaware, corporate defendants are strategically compelled to prevail upon the court in the first-filed jurisdiction to stay the case in order to permit Delaware courts to decide issues of Delaware corporate law—which sometimes can be an uphill battle.

In the context of derivative suits, Delaware courts have expressed additional reasons for giving little weight to case filing priority: fast filing undermines Delaware policy to encourage stockholders to make use of pre-suit "books and records" discovery under section 220 of the Delaware General Corporation Law before filing derivative litigation.[33] In *King v. VeriFone Holdings, Inc.*,[34] the Delaware Supreme Court held that a stockholder may pursue books and records discovery to attempt to file a stronger complaint after the stockholder's derivative suit has been dismissed without prejudice for failure to plead demand futility. Although the Court rebuked the plaintiff for filing a derivative action without inspecting corporate books and records first, the Court nonetheless allowed the plaintiff to take another bite at the apple, thus opening the door to serial derivative cases that "litigate repeatedly the issue of demand futility."[35]

Judicial Comity

Judicial comity provides grounds to support judicial discretion to respect the policy of Delaware courts to take priority in deciding cases involving the internal affairs of Delaware companies, even if the first case is filed outside Delaware. Judicial comity is the respect that courts of one jurisdiction show to another by giving effect to the other's laws and judicial decisions,[36] and is a cornerstone of the discretionary power to stay proceedings in deference to proceedings in another jurisdiction.

In California, for example, another jurisdiction in which merger cases are often filed,[37] courts recognize that their discretionary power to stay proceedings includes considerations of comity, and have stayed first filed cases in deference to parallel Delaware litigation. Courts have discretion to stay proceedings to avoid "unseemly conflicts with the courts of other jurisdictions," and may consider "whether the rights of the parties can best be determined by the court of the other jurisdiction *because of the nature of the subject matter*[.]"[39]

Forum Non Conveniens

The doctrine of *forum non conveniens* provides another rationale on which courts may stay litigation that has been, or could be, filed in a more appropriate forum. As described in the Second Restatement of Conflict of Laws, *forum non conveniens* is the concept that a "state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available

to the plaintiff."[40] This rationale, however, has limited utility in intra-corporate disputes. The doctrine is grounded in geographical convenience which has little relevance in identifying the forum most appropriate for deciding a stockholder class action or derivative suit based on intra-corporate fiduciary duty claims.[41]

A traditional *forum non conveniens* analysis involves balancing public factors, such as the competing interests of the jurisdictions in the litigation and the "avoidance of overburdening local courts with congested calendars," with the private interests of the parties which "make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive."[42] The private factors include issues such as access to proof, the availability of compulsory process, and the enforceability of a judgment.

For corporate defendants, it can be difficult to prevail on a motion to stay based on a *forum non conveniens* analysis when the company is headquartered in the forum state because it is easy for plaintiffs to marshal a long list of forum contacts. Although physical location is generally unimportant in a fiduciary duty case, it can be hard to convince a court to prioritize a list of convenience factors in a way that makes sense for the case. For this reason, *Putting Stockholders First* proposes an amendment to the Second Restatement of Conflict of Laws to establish a *presumption* in intra-corporate actions so that choice of law (*i.e.*, law of the state of incorporation) has primary significance in resolving forum conflicts.[43]

The Federal Colorado River Doctrine

Federal courts frequently are among the multi-forum filings in stockholder litigation, both in merger class actions and in derivative suits. Members of the plaintiff's bar have acknowledged the "familiar pattern" in merger class actions where "tag along" actions are filed in federal court asserting the same claims filed in state court, but adding a federal securities claim for proxy violations in order to obtain federal jurisdiction.[44] Similarly, plaintiffs often file derivative suits in both state and federal court after announcement of negative corporate events. Plaintiffs allege state law mismanagement claims against the directors and officers for causing alleged corporate losses and add securities claims in federal court.[45]

In managing multiple federal court filings, the Judicial Panel on Multidistrict Litigation (JPML) is empowered to transfer actions "to any district for coordinated or consolidated pretrial proceedings," on the motion of a party or on the JPML's own initiative.[46] But when parallel cases are filed in state and federal courts, federal courts must rely on their inherent power to stay proceedings "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."[47]

In determining whether to exercise discretion to stay a federal action in favor of parallel state proceedings, federal courts look to the *Colorado River Doctrine*, which is a set of factors including consideration of filing priority and other factors similar to a *forum non conveniens* analysis.[48] The *Colorado River Doctrine* factors include convenience of the federal forum, avoiding piecemeal litigation, the order in which jurisdiction was obtained by the concurrent forums, whether federal law or state law provides the rule of decision on the merits; whether the state proceedings are adequate to protect the federal litigant's rights; and whether exercising jurisdiction would promote forum shopping.[49]

Even assuming that defendants convince a federal court to stay the action on state law claims in light of these factors, some federal jurisdictions decline as a matter of policy to stay federal claims over which they have exclusive jurisdiction—including federal securities claims on which plaintiffs typically rely in merger and derivative cases.[50] When a federal court is in the multi-forum mix, the defendants' best option may be to attempt to coordinate the proceedings if a complete stay of the federal case is not achievable.

The One-Forum Motion

Defendants have deployed a variant of the traditional stay motion in recent merger cases. Under this variant, defendants file "one forum" motions in all relevant jurisdictions requesting that the courts confer and permit the litigation to proceed in a single jurisdiction, while staying or dismissing litigation in the alternate jurisdictions.[51] This approach is designed to avoid offending non-Delaware judges by suggesting that defendants prefer to litigate in Delaware.[52] In practice, however, a "one forum" motion risks the possibility of litigation in a potentially less desirable forum,[53] or may result in coordinated simultaneous proceedings rather than narrowing the field to a single forum.[54]

Former Chancellor Chandler supported use of one-forum motions,[55] but current members of the Court of Chancery have commented that they lack "utility," provide a "pretext for courts who want to cling to cases for the wrong reasons,"[56] and encourage defendants to "really punt[] on the question" about which forum should decide the merits of the case.[57]

Forum Selection Provisions in Corporate Charters and Bylaws

In *In re Revlon, Inc. Shareholders Litigation*,[58] Vice Chancellor Laster suggested another innovative solution to the problem of multi-forum stockholder litigation: adoption of forum selection clauses in corporate charters. A recent empirical study shows that after *Revlon* was issued on March 15, 2010, the number of publicly traded companies with intra-corporate forum selection clauses in charters and bylaws had leaped from 16 to 133 in fifteen months, and to more than 300 by early 2013.[59] This approach borrows from choice of venue provisions commonly found in corporate contracts.[60]

Judicial enforcement of corporate forum selection clauses, however, had a rocky start. In *Galaviz v. Berg*, a federal court in California refused to enforce a forum selection bylaw, citing the fact that the board of directors adopted the bylaw after the alleged breach of duty occurred.[61] Hoping to increase the chances of judicial enforcement, many companies have opted to seek stockholder approval of forum selection provisions in corporate charters. But while inclusion of a forum selection provision in a charter is easy for pre-IPO companies, this route is harder for companies that are already trading and may face stockholder opposition.[62]

After the *Galaviz* decision, plaintiffs' firms filed a dozen class action complaints in the Delaware Court of Chancery challenging actions by boards of directors to adopt forum selection bylaws without stockholder approval. Most of the defendant companies withdrew their forum selection bylaws or proposals. But two companies stayed for the fight.[63] On June 25, 2013, Chancellor Strine issued a groundbreaking decision upholding the contractual and statutory validity of these companies' forum selection bylaws under Delaware General Corporate Law: "Where, as here, the certificate of incorporation has conferred on the board the power to adopt bylaws, and the board has adopted a bylaw consistent with [Delaware law], the stockholders have assented to that new bylaw being contractually binding."[64] This important decision likely will lead to increased adoption of forum selection bylaws in Delaware corporations.[65]

Conclusion

Multi-forum litigation in the context of class actions and derivative suits involving internal corporate affairs presents an intractable problem with no fully predictable and reliable solution. The interests of stockholders and companies represented by plaintiffs in these actions are not served by the filing of multiple suits, while corporate defendants and courts are burdened by the costs and inefficiencies of duplication and potentially conflicting rulings. Courts and practitioners must continue to work to find and enforce fair and reliable solutions.

Endnotes

[1] *See* Cornerstone Research, *Shareholder Litigation Involving Mergers and Acquisitions* (March 2012 Update and February 2013 Update), *available at*: http://www.cornerstone.com/recent-developments-in-shareholder-litigation-involving-mergers-and-acquisitions ["*Cornerstone*"].

[2] Del. Div. of Corps. Ann. Rep. 1 (2011), http://corp.delaware.gove/2011CorpAR.pdf. Fewer than than 5% of these corporations have their principal place of business in Delaware. Randy J. Holland, *Delaware's Business Courts: Litigation Leadership*, 34 J. CORP. L. 771, 772 (2008-2009).

[3] *See* Leo E. Strine, Jr., Lawrence A. Hamermesh & Matthew C. Jennejohn, *Putting Stockholders First, Not the First-Filed Complaint*, Harvard, JOHN M. OLIN CENTER FOR LAW, ECONOMICS AND BUSINESS, Discussion Paper No. 740, at 43 n.118, 49-50 (Jan. 2013), *available at* http://ssrn.com/abstract-2200499 ["*Putting Stockholders First*"]; Donald F. Parsons, Jr. and Jason S. Tyler, *Docket Dividends: Growth in Shareholder Litigation Leads to Refinements in Chancery Procedures*, forthcoming 70 WASH. & LEE L. REV. 473, 476 n.11 (2013) ["*Docket Dividends*"].

[4] *Putting Stockholders First*, *supra* note 3, at 26-50.

[5] *Id*. at 43-45.

[6] *Id*. at 38-41, 49-50, explaining that after the Federal Rules of Civil Procedure codified the class action structure, plaintiffs developed the model in mass tort, civil rights, and corporate litigation.

[7] *Id*. at 11-13. In response to perceived burdens and abuses in class action litigation, Congress enacted the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.), the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. §§ 77p(b), 78bb(f)(1) (2006), and the Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1453, 1711-1715 (2006).

[8] *Putting Stockholders First*, *supra* note 3, at 17-25.

[9] *Cornerstone*, *supra* note 1, March 2012 Update at 2-4; February 2013 Update at 1-3.

[10] Most cases settle for additional disclosures for which plaintiff's counsel receives an attorney's fee. *Id*. February 2013 Update at 6.

[11] *King v. VeriFone Holdings, Inc.*, 12 A.3d 1140 (Del. 2011).

[12] *La. Mun. Police Employees' Ret. Sys. v. Pyott*, 46 A.3d 313 (2012), rev'd, No. 380, 2012, 2013 Del. LEXIS 179 (Apr. 4, 2013).

[13] *Pyott v. La. Mun. Police Emp. Ret. Sys.*, No. 380, 2012, 2013 Del. LEXIS 179 (Apr. 4, 2013).

[14] Edward B. Micheletti and Janness E. Parker, *Multi-Jurisdictional Litigation: Who Caused this Problem, and Can It Be Fixed?*, 37 DEL. J. CORP. L. 1 (2012). Delaware's "extensive body of precedent developed by expert judges" may be seen by corporate defendants as a more stable environment in which to litigate corporate affairs. John Armour *et al.*, *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1347-53 (2012).

[15] *See Dias v. Purches*, C.A. No. 7199-VCG, 2012 Del. Ch. LEXIS 42, at *7, 10 (Del. Ch. Mar. 5, 2012) (denying motion to stay Delaware action, where a first-filed action pending in different state would also continue); *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 958 (Del. Ch. 2007) (same).

[16] *See* Delaware State Courts: Delaware Court of Chancery, http://courts.delaware.gov/Chancery (stating that the Delaware Court of Chancery is "widely recognized as the nation's preeminent forum for the determination of disputes involving the internal affairs of the thousands upon thousands of Delaware corporations and other business entities through which a vast amount of the world's commercial affairs is conducted. Its unique competence in and exposure to the issues of business law are unmatched.").

[17] Jeffrey D. Hern, *Delaware Courts' Delicate Response to the Corporate Governance Scandals of 2001 and 2002: Heightening Judicial Scrutiny on Directors of Corporations*, 41 WILLAMETTE L. REV. 207, 228 (2005). Chancellor Strine once noted that Delaware could be perceived 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).

[18] *Topps*, 924 A.2d at 961-63.

[19] *In re Citigroup Inc. S'holders Deriv. Litig.*, 964 A.2d 106, 118 (Del. Ch. 2009).

[20] *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).

[21] *Putting Stockholders First*, *supra* note 3, at 60-61.

[22] *Id*.; *see also Advanced Bionics Corp. v. Medtronic, Inc.*, 29 Cal. 4th 697, 707 (2002) ("The first-filed rule was never meant to apply where the two courts involved are not courts of the same sovereignty." (internal quotations omitted)).

[23] *Putting Stockholders First*, *supra* note 3, at 62.

[24] *See Simmons v. Superior Court*, 96 Cal. App. 2d 119, 123-125 (1950).

[25] *Cornerstone*, *supra* note 1, March 2012 Update at 8.

[26] *In re State Farm Mut. Auto. Ins. Co.*, 192 S.W.3d 897, 901 (Tex. App. 2006) (citing *Mills v. Howard*, 228 S.W.2d 906, 907 (Tex. App. 1950)); *see also In re AutoNation, Inc.*, 228 S.W.3d 663, 670 (Tex. 2007) ("When a matter is first filed in another state, the general rule is that Texas courts stay the later-filed proceeding pending adjudication of the first suit."); *VE Corp. v. Ernst & Young*, 860 S.W.2d 83, 84 (Tex. 1993) (where identical suits are pending in different states, "the principle of comity generally requires" deference to the first-filed action).

[27] *State Farm*, 192 S.W.3d at 901.

[28] *Regions Bank v. Wieder & Mastroianni*, P.C., 170 F. Supp. 2d 436, 439 (S.D.N.Y. 2001) (quoting *Marshak v. Reed*, No. 01 Civ. 7151, 2001 U.S. App. LEXIS 13146, at *2 (2d Cir. June 8, 2001)).

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

[30] *E.g., Dias v. Purches*, C.A. No. 7199-VCG, 2012 Del. Ch. LEXIS 42, at *4 & n.5 (Del. Ch. Mar. 5, 2012).

[31] *See Biondi v. Scrushy*, 820 A.2d 1148, 1158-59 (Del. Ch. 2003) (rejecting the first-filed preference in shareholder class actions because the "potential divergence in the best interests of the plaintiffs' attorneys and the plaintiffs they are purporting to represent . . . may be exacerbated, by a legal rule that places determinative weight on which complaint was filed first"); *In re Topps S'holders Litig.*, 924 A.2d 951, 957 (Del. Ch. 2007) ("[T]he fact that a particular plaintiff filed the first complaint in a wave of hastily-crafted class action complaints attacking a just-announced transaction has no rational force in determining where a motion to enjoin that transaction should be heard.").

[32] *Docket Dividends*, *supra* note 3, at 508 & n.151 (describing the conflict between Delaware and New York courts in the *Topps* merger litigation). *See Topps*, 924 A.2d at 953. A New York appellate court recently mandated a temporary stay in deference to a second filed merger litigation in Delaware, which is considered a victory for the Delaware Court of Chancery. *Matter of NYSE Euronext Shareholders/ICE Litig.*, No. 654496/2012, 2013 N.Y. Misc. LEXIS 812 (N.Y. Sup. Ct. Mar. 1, 2013), rev'd No. 654496/12 (N.Y. App. Div. Mar. 15, 2013).

[33] *See, e.g., La. Mun. Police Employees' Ret. Sys. v. Pyott*, 46 A.3d 313, 338 (Del. Ch. 2012) (noting that a "corporation must underwrite the costs" of defending "hastily filed complaints [that] have little chance of surviving a Rule 23.1 motion . . . either directly through indemnification and advancement or indirectly through insurance"), rev'd, No. 380, 2012, 2013 Del. LEXIS 179 (Apr. 4, 2013); *see also King v. VeriFone Holdings, Inc.*, 994 A.2d 354, 364 n.34 (Del. Ch. 2010), *rev'd on other grounds* 12 A.3d 1140 (Del. 2011).

[34] 12 A.3d 1140 (Del. 2011); *see Docket Dividends, supra* note 3, at 517-19.

[35] *King*, 12 A.3d at 1150. The court considered potential consequences for derivative plaintiffs who engage in a "race to the bottom" including (i) the denial of lead plaintiff position in a consolidated action, (ii) dismissal of the complaint without leave to amend, and (iii) "grant leave to amend one time, conditioned on the plaintiff paying the defendants' attorneys' fees incurred on the initial motion to dismiss." *Id.* at 1151-52.

A 2012 decision by Vice Chancellor Laster nearly opened that door wider by declining to give preclusive effect to the judgment of a federal court in California that dismissed a derivative action with prejudice for failure to plead demand futility, and by allowing a different stockholder plaintiff to proceed in Delaware on the same demand futility argument. La. Mun. Police Employees' Ret. Sys. v. Pyott, 46 A.3d 313, 323-38 (Del. Ch. 2012). The Delaware Supreme Court reversed, however, holding that stockholder derivative plaintiffs are in privity with one another for purposes of collateral estoppel, and that the Court of Chancery erred in applying a presumption that "fast filer" plaintiffs who do not use books and record pre-suit discovery are inadequate. Pyott v. La. Mun. Police Emp. Ret. Sys., No. 380, 2012, 2013 Del. LEXIS 179 (Apr. 4, 2013).

[36] *See Advanced Bionics v. Medtronic, Inc.*, 29 Cal. 4th 697, 706-07 (citing comity as grounds for refusing to enjoin the parties from participating in a second-filed Minnesota action in favor of a parallel, first-filed California action).

[37] *Cornerstone, supra* note 1, March 2012 Update at 8 (showing California as second only to Delaware in the number of cases filed following announcement of mergers).

[38] *See, e.g., In re Quest Software S'holders Litig.*, Case No. 30-2012-0052957, Orange County (Cal. Sup. Ct. March 12, 2012) (order staying the first-filed case in favor of later filed Delaware suit); *Kardosh v. Occam Networks, Inc.*, Cast No. 1371748, Santa Barbara (Cal. Sup. Ct. Nov. 19, 2010) (same); *Staehr v. Duffield*, 2003 WL 25485513 (Cal. Super. Ct. June 18, 2003) (same); Cal. Code Civ. Proc. § 410.30(a) (a court "shall" stay an action when it finds "that in the interest of substantial justice an action should be heard in a forum outside of this state"); *Simmons v. Superior Court*, 96 Cal. App. 2d 119, 130 (1950) (where a case calls for the construction of the laws of a foreign jurisdiction, and an action between the same parties involving the same subject matter is pending in that jurisdiction, California "courts should await the decision in such action").

[39] *Farmland Irrigation Co. v. Dopplmaier*, 48 Cal. 2d 208, 215 (1957)(emphasis added). "It would be unreasonable and illogical to have an individual involved in simultaneous litigation in two separate forums, over the same issue" which "could result in conflicting rulings." *Bancomer, S.A. v. Superior Court*, 44 Cal. App. 4th 1450, 1462 (1996). Where a case calls for the construction of the laws of anther jurisdiction, and an action between the same parties involving the same subject matter is pending in that jurisdiction, California "courts should await the decision in such action." *Simmons v. Superior Court*, 96 Cal. App. 2d 119, 130

(1950); Cal. Code Civ. Proc. § 410.30(a) (a court "shall" stay an action when it finds "that in the interest of substantial justice an action should be heard in a forum outside of this state").

[40] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (1971); *see also Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 428-29 (2007) ("Dismissal for forum non conveniens reflects a court's assessment of a range of considerations, most notably the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality." (Emphasis added; internal citations omitted)).

[41] *See Putting Stockholders First, supra* note 3, at 55, 56; *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 962-63 (Del. Ch. 2007) (the location of a company's headquarters might be important in "contract, employment, worker safety, environmental, and tort claims" but "has no rational relation" to choice of forum in a case "about the responsibilities of directors of a Delaware corporation to the corporation and its stockholders under Delaware law").

[42] *Gulf Oil v. Gilbert*, 330 U.S. 501, 508 (1947), superseded by statute on other grounds, 28 U.S.C. §1404(a), as recognized in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 722 (1996).

[43] *Putting Stockholders First, supra* note 3, at 92-93.

[44] *Docket Dividends, supra* note 3, at 507 (quoting Mark Lebovitch, Jerry Silk & Jeremy Friedman, *Improving Multi-Jurisdictional, Merger Related Litigation*, AM. B. ASS'N, COM. & BUS LITIG. COMM., at 1 (Feb. 14, 2011), *available at* http://www.blbglaw.com/news/_publications/data/00132/_res/id=sa_File1/Lebovitch_Silk_Friedman_reprint.pdf.

[45] This was the scenario in *La. Mun. Police Employees' Ret. Sys. v. Pyott*, 46 A.3d 313 (2012), *rev'd*, No. 380, 2012, 2013 Del. LEXIS 179 (Apr. 4, 2013), for example, where duplicative federal and state derivative suits were filed following the company's announcement of a large government settlement.

[46] 28 U.S.C. § 1407(a); (c). The *transfer* is temporary, as all cases that are not resolved through pretrial proceedings must be remanded back to the transferor district for trial. *Id*. § 1407(a).

[47] *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).

[48] *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *See McCreary v. Celera Corp.*, 2011 U.S. Dist. LEXIS 41639, at *7 (N.D. Cal. Apr. 13, 2011).

[49] *Colorado River*, 424 U.S. at 817.

[50] *Id*. at 813 (federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them"). Some federal courts stay parallel federal securities claims; some do not. *E.g., Celera*, 2011 U.S. Dist. LEXIS 41639, at *7 (staying federal claims under *Colorado River*); *In re Novell, Inc. S'holder Litig.*, No. 10- 12076-RWZ, 2012 U.S. Dist. LEXIS 16765, at *30-31 (D. Mass. Feb. 10, 2012) (same). *Cf. Giles v. ICG, Inc.*, 789 F. Supp. 2d 706, 713 (S.D.W.Va. 2011) (staying merger class action under *Colorado River* except for Exchange Act claim).

[51] *See* Motion to Proceed in One Jurisdiction, *In re Wyeth S'holders Litig.*, C.A. No. 4329-VCN (Del. Ch. Mar. 25, 2009). See Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and its Application to Multijurisdictional Litigation*, 106 NW. U. L. REV. 1753, 1804 n.270 (2012). This has also been dubbed a "self-help" approach. *See* Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 158 (2011).

[52] Micheletti and Parker, *supra* note 14, at 18 (citing Transcript of Oral Argument at 87, *Continuum Capital v. Nolan*, C.A. No. 5687-VCL, 2011 Del. Ch. LEXIS 69 (Del. Ch. Feb. 3, 2011) ("[I]t is never an easy task to say to a judge, 'We don't want to be in your courtroom.' There is always concern about collateral consequences of that.")).

[53] *See, e.g., In re optionsXpress Holdings, Inc. S'holder Litig.*, C.A. No. 6314-VCL (Del. Ch. Apr. 28, 2011) (staying Delaware action in favor of Illinois action following a one-forum motion, even though the case involved Delaware law); *New Jersey Carpenters Annuity Fund v. Smith Int'l, Inc.*, No. 5292-VCL (Del. Ch. Aug. 24, 2011) (staying Delaware action in favor of Texas action following a one-forum motion, even though the case involved Delaware law).

[54] For example, in stockholder litigations filed in Delaware and New York, both jurisdictions have declined to stand down. *See In re Topps Co. S'holders Litig.*, 924 A.2d 951, 953 (Del. Ch. 2007) (same); *In re The Topps Co. S'holders Litig.*, 859 N.Y.S.2d 907, 907 (N.Y. Sup. Ct. June 8, 2007); *In re NYSE Euronext S'holders/ICE Litig.*, No. 654496/2012, 2013 N.Y. Misc. LEXIS 812, at *7 (N.Y. Sup. Ct. Mar. 1, 2013) (litigation in Delaware and New York will continue in parallel), *rev'd* No. 654496/12 (N.Y. App. Div. Mar. 15, 2013).

[55] *In re Allion Healthcare Inc. S'holders Litig.*, No. 5022-CC, 2011 Del. Ch. LEXIS 48, at *12 n.12 (Del. Ch. Mar. 29, 2011) (Chancellor Chandler "personal[ly] preferred . . . for defense counsel to file motions in both (or however many) jurisdictions where plaintiffs have filed suit, explicitly asking the judges in each jurisdiction to confer with one another and agree upon where the case should go forward").

[56] *Putting Stockholders First, supra* note 3, at 79 n.217.

[57] *See* Micheletti and Parker, *supra* note 14, at 18 (citing Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 24, *In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL (Del. Ch. Jan. 13, 2011) ("[T]he defendants have rationally taken this all-we-care-about-is-one-forum position which really punts on the question. And that simply pushes off the

time at which somebody has to make a decision and really leaves it to the courts to try to act among themselves."); Quinn, *supra* note 51, at 158-59.

[58] 990 A.2d 940 (Del. Ch. 2010).

[59] Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses*: *An Empirical Analysis*, Stanford Law School and The Rock Center for Corp. Governance, at 6 & n.14, available at. http://ssm.com/abstract+2042758. Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis ("Brouhaha")*, 68 Bus. Law. 325, 326 (2013); *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, C.A. Nos. 7220-CS, 7238-CS, slip op. (Del. Ch. June 25, 2013) ("*Chevron*") (citing *Brouhaha*).

[60] FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 12 (1991); *Ellingwood v. Wolf's Head Oil Ref. Co.*, 38 A.2d 743, 747 (Del. 1944) ("In interpreting the meaning of charter provisions the same method is applied as that which is followed in interpreting written contracts generally.").

[61] *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1171 (N.D. Cal. 2011)). In *Chevron*, Chancellor Strine criticized *Galaviz*, noting that the court's decision "rests on a failure to appreciate the contractual framework established by the [Delaware General Corporation Law] for Delaware corporations and their stockholders." *Chevron*, slip op., at *34.

[62] A federal court in the Southern District of New York declined to enforce a forum selection charter amendment that had been approved by stockholders because the amendment was filed in Delaware –and thus only became effective—four days after the IPO in which defendants allegedly breached their duties and plaintiffs bought their stock. *In re Facebook, Inc. IPO Sec. and Deriv. Litig.*, 2013 WL 525158 (S.D. N.Y. Feb. 13, 2013). The opinion suggests, however, that had the amendment been filed prior to the IPO, it would have been operative in the case.

[63] Grundfest, *supra* note 59, at 11-14, 40-42.

[64] *Chevron*, slip.op., at *37.

[65] The *Chevron* plaintiffs appealed Chancellor Strine's decision to the Delaware Supreme Court. *See Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, No. 433, 2013 C (Del.). Before the court issued an opinion, however, plaintiffs voluntarily withdrew their appeal. *See id*.

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