The Trial Lawyers' New Merger Tax

CORPORATE MERGERS AND THE
MEGA MILLION-DOLLAR LITIGATION
TOLL ON OUR ECONOMY

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INTRODUCTION

Securities class action lawsuits have long been plagued by abusive practices. But the trial lawyers' latest litigation tactic—across-the-board unjustified legal attacks on mergers and acquisitions—reaches a new low.

Here's how it works: Just about every merger or acquisition that involves a public company and is valued over $100 million—91% of all such transactions in 2010 and 2011—becomes the subject of multiple lawsuits within weeks of its announcement. Because the parties to the merger want to close their deal and begin to reap the economic benefits of the combination, the vast majority of these lawsuits settle quickly—within three months—and typically provide little or no benefit for shareholders. But the settlements do award large attorneys' fees to the lawyers who filed the lawsuits.

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Because this litigation is filed in multiple courts throughout the country—state and federal—judges today cannot stop the abuse. Action by Congress and state legislatures is needed now to prevent trial lawyers from obstructing economically beneficial transactions and diverting hundreds of millions of dollars away from productive uses, injuring the very shareholders they claim to represent.

This paper analyzes the remarkable M&A litigation explosion.

DISCUSSION

Mergers and acquisitions provide critically important economic benefits—to the individual companies involved and to the economy as a whole:

- Lower costs, and therefore lower prices, through economies of scale and other efficiencies such as synergies in the production or distribution of complementary products;
- Access to new or better technologies;
- Placing superior management in charge of inefficiently used resources;
- Transfer of technical and marketing expertise; and
- Access to greater capital resources.[1]

Given today's global markets, these benefits are more important than ever to enable America's companies to compete and win against businesses from around the world—and provide the jobs that Americans so urgently need.[2]

If a public official proposed a multi-million dollar across-the-board tax on M&A transactions, opposition would be immediate and widespread. Imposing such a toll would prevent many economically beneficial mergers from taking place, because a government tax of tens of millions of dollars would transform them into money-losing transactions. And even when a deal could go forward, a significant share of the benefit—the capital available for reinvestment or the savings that could be reflected in lower costs and therefore greater sales—would be eliminated.

But that is exactly what is happening today. The trial bar is using the securities litigation system to impose its own private tax on merger transactions. Pay the tax—which comes in the form of a "litigation settlement"—and the transaction is allowed to go forward. Refuse to pay and companies face delay, uncertainty, and possible disruption of their deal. Not surprisingly, everyone pays, to the tune of hundreds of millions of dollars. Trial lawyers turn out to be very effective tax collectors, especially when they are collecting millions of dollars for their own accounts.

That means that any company contemplating a merger or acquisition must include in its assessment of the deal's economics the "litigation tax" that will be demanded by trial lawyers. That additional cost may transform what would have been an economically sensible pro-consumer deal into a non-starter—depriving shareholders, workers, and the economy as a whole of the benefits that the deal would have produced. For deals that go forward, the "tax" diverts hundreds of millions of dollars away from shareholders and workers and into the pockets of trial lawyers, an unfair and unjust result that hurts the competitiveness of our entire economy. The remainder of this paper outlines the problems associated with abusive merger and acquisition litigation and proposes several potential reforms that could begin to rein in abusive and unjustified lawsuits.

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The M&A Litigation Epidemic

The explosion of federal and state lawsuits challenging mergers and acquisitions is stark and shocking. An independent analysis of transactions valued at more than $100 million involving public companies in 2010 and 2011 found:

> ***[a]lmost every acquisition . . . elicited multiple lawsuits***, which were filed shortly after the deal's announcement and often settled before the deal's closing. Only a small fraction of these lawsuits resulted in payments to shareholders . . . .[3]

The numbers are staggering: ***91% of all deals in 2010 and 2011 valued at more than $100 million*** were targeted with an average of 5.1 lawsuits each.[4] Only ***39%*** of such deals were subject to lawsuits in 2005.[5] Lawsuit frequency has thus ***more than doubled*** in just five years.

Higher-value deals attract even more lawsuits. An amazing ***95% of all proposed acquisitions valued at $500 million or more triggered lawsuits challenging the deal***. By comparison, ***only 53% of such deals in 2007*** were subjected to a lawsuit.[6]

Finally, this lawsuit explosion affects transactions of all sizes. An independent study found that the number of suits challenging proposed mergers and acquisitions ***quadrupled from 2005 to 2010, and increased six-fold when compared with 2011***.[7]

Lawsuits have skyrocketed "not only in terms of the number of cases, but also [are] significantly higher as a percentage of the total number of deals."[8]

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The increase therefore cannot be explained by growth in M&A activity. To the contrary, lawsuit growth ***exceeds*** the expansion of M&A activity.

Certainly no one can reasonably claim that there is credible evidence of fraud or other violations with respect to more than 90% of the large M&A transactions in the United States. ***If the allegations were real, there would be intense law enforcement focus on such a hotbed of fraud—by the Securities and Exchange Commission, the Department of Justice, and State Attorneys General. That has not happened.***

The only plausible explanation for this lawsuit epidemic is abuse of the litigation system by trial lawyers.

No Proof of Wrongdoing

The flimsy factual underpinnings of the overwhelming majority of these lawsuits is confirmed by the absence of judicial findings of wrongdoing. Cases that are not dismissed are quickly settled—because businesses will pay to settle even meritless claims in order to eliminate uncertainty regarding the proposed transaction.

Again, the numbers are remarkable. For lawsuits filed in 2010-2011 and resolved by March 2012:

M&A Lawsuits 2010-2011*

- 91% of all deals were targeted with an average of 5.1 lawsuits each
- 67% were settled
- 28% were voluntarily dismissed by the plaintiffs;
- 4% were dismissed on the merits; and
- none had gone to trial.

*For companies valued at over $100 million.
(Cornerstone Research, Robert M. Daines & Olga Koumrian, *Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions – March 2012 Update*)

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- ***4%*** were dismissed on the merits; and
- ***none*** had gone to trial.[9]

Indeed, more than half of all merger lawsuits settled in 2010 and 2011 were resolved within two months of the filing date. ***Only 15% of lawsuits lasted longer than 100 days before settlement***.[10]

The speed with which the cases settle is not surprising. As one independent study explained, a "positive factor for plaintiffs is the urgency with which the companies involved wish to close the transaction and, if a large deal, the incremental costs of settling the litigation are not significant relative to the overall transaction. Accordingly, ***many of the cases are settled out of court shortly after they are brought***."[11] Professor Jennifer Johnson of Lewis & Clark Law School explained, "'If [the companies] want their deal to go through, they don't have time to win.'"[12]

These settlements do not serve shareholder interests. As one court has explained, "[a]bsent the rational sifting out of non-meritorious cases, stockholders suffer as the costs of litigation exact an undue toll on the procession of transactions valuable to stockholders and cause a harmful diminution in wealth-generating risk-taking by directors."[13] Therefore, "stockholders want to have unmeritorious cases dismissed without rewarding plaintiffs' lawyers for the simple fact that they filed a lawsuit."[14]

Lawyers Get Millions and Shareholders Foot the Bill

Who benefits from this litigation? And who loses? The answer is clear—trial lawyers benefit, and shareholders pay.

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The lack of benefit to the shareholders, in whose name these cases are brought, is truly extraordinary. ***84% of settlements in 2011 were "disclosure only" settlements***, resulting in the insertion of some additional language in merger documents ***and no monetary award to shareholders***.[15]

Another 11% of settlements involved changes in immaterial and irrelevant deal terms, ***again with no monetary award to shareholders***.[16] For example, some settlements simply delay the shareholder vote. Similarly, a change in the "breakup fee" for a deal that, at the time of the litigation settlement, is virtually certain to be finalized provides absolutely no benefit to shareholders. As a Delaware court has explained, trial lawyers "have perfected this technique"—what the court termed "minor tweaks to the transaction"—"as a basis for settling cases challenging third-party deals"; "[l]owering the termination fee and supplemental disclosures provide a particularly convenient way to settle litigation over a deal that already has been exposed to the market for some time, by which point it is relatively clear to the parties that an interloper is unlikely to appear."[17] Only 10 of 202 settlements—five percent—produced any payment at all to shareholders.[18]

That is a very significant change from the results ten years earlier, when shareholder suits were filed much less frequently. 52% of lawsuits filed in 1999 and 2000 produced additional cash awards for shareholders, while only 10% were limited to additional disclosures.[19] Shareholders are obtaining significantly worse results in today's lawsuits.

But trial lawyers are doing very well indeed. Cornerstone Research analyzed the fee awards in 88 recent merger settlements, and found that ***the average fee award was $1.2 million***.[20] Another study found that the average fee for cases resolved in 2009-2011 was ***$1.3 million***.[21]

And lawyers get large fees even when they fail to generate any additional compensation for their clients. A Bloomberg study of settlements in 2010 found that "lawyers won $32.4 million for themselves in the 40 cases that generated no money for clients"—the median fee was $512,500 and $4 million was awarded in one case.[22]

More recently, a challenge to an acquisition by a Coca-Cola bottling company yielded a fee award of ***$7.5 million***, while shareholders received no monetary award. The only changes to the deal were a reduced termination fee and additional disclosures of information. ***In three other cases where shareholders received no money, each set of plaintiffs' attorneys reaped between $2.5 and $6.5 million in fees.***[23] And these are not multi-year cases. ***Trial lawyers are reaping million-dollar fees in cases that generally are resolved within 100 days***.[24]

No wonder that Professor John Coffee of Columbia Law School has stated that "'[t]he greatest benefit is for the plaintiffs' attorneys' in [this] litigation."[25]

Of course, ***the very shareholders that receive no benefit from the litigation are left to foot the bill for the trial lawyers' fees***. "'If you can get $500,000 for increased disclosures and not one nickel for shareholders, who's paying that?' [Professor Jennifer] Johnson said. 'It's coming out of shareholders' pockets' because the companies pay the lawyers' bills."[26]

Trial Bar Feeding Frenzy

The lucrative fees available in M&A cases have generated a frenzy of activity among trial lawyers that further confirms the abusive nature of these lawsuits.

First, there is an embarrassing, and extremely aggressive, race to the courthouse. ***More than two-thirds of these suits are filed within two weeks of the announcement of the proposed deal***.[27]

In a group of Delaware state court lawsuits analyzed by Bloomberg, the median time for filing was eight days after announcement of the deal. But "[t]wo hours and 27 minutes after a Dec. 27" announcement of a transaction, a law firm "posted a notice that it was investigating whether directors sought the best price. . . . Within a week, 11 more firms posted similar notices. Lawsuits followed."[28]

Here's how the system works: "Often within hours of a deal being announced, numerous law firms are announcing investigations into whether the board of directors has performed adequate procedures to secure the best deal for the shareholders. Lawsuits quickly follow, often in a number of different state and federal courts."[29]

Why do trial lawyers engage in what one court labeled an "unseemly filing Olympiad"?[30] Because, as a Delaware court has explained, "[m]any jurisdictions are perceived to follow a 'first-filed' rule that gives control [of the litigation] to the first stockholder plaintiff and associated law firm to file a representative action."[31] Faster filing means higher fees.

But the speed with which the suits are filed confirms their illegitimacy. "The limited time between the deal being announced and litigation being filed prompted many commentators in this area to question the legitimacy of the lawsuit and the plaintiff's ability to conduct sufficient inquiries to have good cause to believe that the board had breached its fiduciary duty to its shareholders."[32]

"'The quicker the suit, the less thoughtful the suit,' said Charles M. Elson, director of the University of Delaware's John L. Weinberg Center for Corporate Governance. 'You're striking on the mere announcement of the merger,' with little information about its fairness."[33]

Second, trial lawyers rush to file duplicative suits in order to stake their claim to a portion of the almost-certain award of attorneys' fees. On average, ***each transaction is subject to five lawsuits***.[34] But ***many deals attract more than 15 suits***.[35]

Duplicative lawsuits is another area in which this type of litigation is transformed compared to the norm just a few years ago. In 2007, an average of 2.8 suits was filed for each deal of $500 million or more. By 2010, that number had grown to 5.4 suits per deal, and 6.2 suits per deal in 2011.[36]

These multiple lawsuits provide no benefit to shareholders. In fact, they increase the harm by raising the price of settlement: all of the trial lawyers filing suit must be satisfied—in other words, all must receive an acceptable share of the fee award—in order for the merging companies to resolve all of the litigation and complete their transaction. Because those fees are ultimately borne by the company, and therefore the shareholders, this abusive behavior compounds the financial toll that the litigation imposes on innocent shareholders.

Third, trial lawyers spread these duplicative multiple lawsuits among different courts, a tactic designed solely to increase each trial lawyer's settlement leverage by requiring a settlement of his or her separate action in order to permit the transaction to proceed.

Multi-jurisdiction filings afflict 47% of transactions that are subjected to litigation—up from 9% in 2005.[37] Another study of acquisitions valued at $500 million or more found suits filed in more than one jurisdiction with respect to ***73% of the deals*** producing lawsuits in 2011.[38] Moreover, "increasingly, plaintiffs' attorneys are choosing to file cases outside of the defendant's state of incorporation."[39]

The proposed $600 million acquisition of Dynegy by Blackstone attracted more than 25 lawsuits in both Texas and Delaware.[40] When Express Scripts and Kinder Morgan each proposed to acquire companies, the two deals were challenged in ***more than 20 separate suits in multiple jurisdictions***.[41]

These suits force defendants to litigate in numerous jurisdictions that are incapable of coordinating with each other, particularly state courts in different states. That dramatically increases the cost of defense, and increases settlement pressure regardless of the merits of the underlying claim—"[d]efense counsel may have to appear at various hearings in multiple forums, respond to duplicative requests for discovery, and brief and argue duplicative motions."[42] Also, "litigation in multiple forums wastes judicial resources as judges in two or more jurisdictions must review the same pleadings and documents and are sometimes asked to decide the exact same motions. When a case invariably settles, the settling judges must arbitrate fee disputes among any non-co-operating plaintiffs' counsel. Judges in non-settling forums may spend additional resources assuring the out of state settlement is not collusive."[43]

A committee of the Association of the Bar of the City of New York, composed of lawyers who represent both plaintiffs and defendants, concluded that "publicly listed companies are often forced to spend resources trying to coordinate and manage duplicative or overlapping securities litigations (with the brunt being borne by current shareholders), while judicial resources are unnecessarily consumed."[44] Delaware state judges also have recognized this problem repeatedly.[45]

Delaware, as the most common state of incorporation, is a frequent location for merger suits. However, ***as Delaware courts have begun to crack down on abusive filings and excessive attorneys' fees, plaintiffs' lawyers have begun filing in other states more frequently***.[46] An empirical analysis by Professors Cain and Davidoff found that this is no mere coincidence: "when attorneys face a choice in where to bring litigation, they respond to lower prior fee awards and settlement rates in one particular state by moving to other state jurisdictions to file. In other words, attorneys are highly responsive to the incentives provided by differential fee awards and settlements . . . across multiple jurisdictions."[47]

Another study identified four factors that likely contributed to the out-of-Delaware trend:

> (i) statements by Delaware judges expressing doubts, sometimes strong ones, about the plaintiffs' bar and the suits they bring; (ii) Delaware judges cutting plaintiffs' lawyers fee requests; (iii) Delaware courts retreating from the "first to file" custom in choosing lead counsel; and (iv) plaintiffs' lawyers beginning to file tagalong derivate suits, usually outside Delaware because expedited discovery is easier to obtain elsewhere.[48]

These findings confirm the abusive nature of this tactic.

In short, this litigation has all of the characteristics of suits that are designed to extort settlements and attorneys' fee payments without regard to the merits: complaints filed quickly with little investigation, multiple cases in multiple courts, and very few determinations on the merits. And shareholders are left on the hook for the resulting millions of dollars of increased costs.

Circumventing Congress's Securities Litigation Reforms

This dramatic pattern of improper and abusive M&A litigation should come as no surprise. Securities lawsuits have long been misused by trial lawyers to profit at the expense of innocent shareholders. That is why Congress in the 1990s enacted the Private Securities Litigation Reform Act ("PSLRA") and the Securities Litigation Uniform Standards Act.[49] This new abusive litigation bears the very same hallmarks of abuse as the lawsuits that were prevalent the last time Congress acted.

The earlier "abusive practices" involved "the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer."[50] That is just like today's "routine filing of lawsuits" whenever a significant merger or acquisition is announced.

The 1990s litigation was marked by the same race to the courthouse we see today: "the suits are filed just hours after the news of a stock price decline, with no evidence of wrongdoing."[51] "The leading plaintiffs' law firm reported that 69 percent of the cases it filed over a three year period were filed within 10 days of the event or disclosure that gave rise to the allegations of fraud."[52]

And the lawsuits targeted by Congress's reforms virtually all were resolved through settlement, with plaintiffs receiving little benefit and investors "ultimately . . . paying the costs associated with the lawsuits."[53] "Strike suits are money makers for the lawyers, but such claims destroy jobs and hurt the economy. Instead of spending money on research and development or hiring more employees or reducing the cost of their products, companies spend that money on strike suit insurance and legal fees. And, the problem is rapidly getting worse."[54]

Professor Johnson observes that today's M&A litigation has "replaced traditional stock drop cases as the lawsuit of choice for plaintiffs' securities lawyers."[55] In other words, when Congress blocked abusive stock drop cases, trial lawyers started filing abusive M&A cases. Moreover, as Professor Johnson explains, "from the perspective of plaintiffs' counsel:"

> [The M&A cases] are even better than the stock drop cases. Like the traditional pre-PSLRA securities cases, they are filed quickly, usually within days of the announcement of an acquisition deal. Unlike the prior cases, they also settle quite quickly, often within two or three months. Also, in the M&A class actions, defendants have the added incentive to settle as soon as possible, not only to avoid litigation but also to complete the transaction at hand.[56]

Indeed, as a result of the M&A litigation explosion, "the number of securities class action filings in state court outnumber[s] federal filings."[57]

This explosion of state court class actions is possible only because the federal Securities Litigation Uniform Standards Act ("SLUSA"), enacted in 1998 to stop a similar trial lawyer rush to state courts, contains a "carve-out" permitting securities class actions in state court "based upon the statutory or common law of the State in which the issuer is incorporated" that involve sales of stock by the issuer or statements by the issuer concerning the exercise of stockholders' voting rights or tender, exchange, or appraisal rights—issues that typically arise in connection with a merger or acquisition.[58] "Taking advantage of the SLUSA 'Delaware Carve Out,' plaintiffs counsel are filing merger objection class actions in multiple forums, usually alleging a violation of state fiduciary duty law or related violations under state securities statutes."[59]

Entrepreneurial trial lawyers have thus found a way to circumvent Congress's reform of federal class actions and embark on a whole new category of abusive securities litigation.

Reform is Urgently Needed

This torrent of abusive litigation presents a challenging problem—the cases are filed in both federal and state courts and include claims based on federal as well as state law. And, because the lawsuits challenging mergers and acquisitions are only one of the categories of claims brought under these federal and state laws, reforms modifying the substantive legal standards would affect a wider class of litigation. Finally, there can be meritorious M&A lawsuits; but the objective data leave no doubt that the system today is rife with abusive claims.

A principal source of the trial lawyers' settlement leverage, and therefore a principal enabler of abusive lawsuits, is the burden imposed on companies that must defend themselves in multiple state and federal courts around the country. That factor increases settlement pressure exponentially, because defense costs are higher and an adverse decision in just one of many courts could upset the deal.

One obvious step to begin to reduce the abuse, therefore, is to prevent plaintiffs' lawyers from exploiting this circumstance by eliminating forum shopping and forum multiplication. "[T]he only effective way to reduce the costs associated with duplicative deal litigation," according to the committee of the Association of the Bar of the City of New York made up of both plaintiff and defense lawyers, "is to have clear and unambiguous provisions concerning where deal litigation may properly be brought and/or a mechanism for coordinating litigation when competing cases are filed in multiple jurisdictions."[60]

When essentially identical cases are filed in multiple federal courts, there is a well-established procedure for consolidating the cases in one court.[61] ***But no procedure exists to consolidate identical cases filed in the courts of different States and in federal courts as well***. And the facts demonstrate that state courts are not utilizing doctrines of deference or *forum non conveniens* to centralize this litigation effectively[62]—and it is unclear whether such a change in jurisprudence could be adopted, although it is certain that such a process would take many years to work itself through the courts of dozens of States.[63]

There are a number of possible legislative approaches. At the federal level:

- Congress could enact a statute requiring all merger-related securities litigation to be brought in the state of incorporation of the defendant company. That proposal was put forward by the Committee on Securities Litigation of the Association of the Bar of the City of New York.[64]
- Congress could amend the SLUSA "carve out" provision, and the parallel provision of the Class Action Fairness Act, to require that class actions brought under the "carve outs" (and shareholder derivative actions with similar effect) may be filed only in the courts of the defendant company's state of incorporation.
- To address the multiplication of federal class actions, Congress could enact legislation providing that any lawsuits relating to mergers or acquisitions that are filed in federal court should be transferred immediately to a federal court in the state of incorporation of the company being acquired (if there is more than one federal court in that State, the appropriate district should be the one containing the state capital).

It is possible to envision legislative reform at the state level, but it would require enactment by a significant number of states, and therefore might take many years to reduce the burden on shareholders:[65]

- States could enact laws providing that lawsuits brought against a company and/or its officers and directors challenging a transaction on grounds of fairness or breach of fiduciary duty must be brought in the state of incorporation, in order to ensure fairness and the efficient and expeditious resolution of such claims. Although there is legal precedent permitting a State to require that particular categories of lawsuits be brought only in its own courts, Congress should expressly authorize enactment of such state laws in order to eliminate any doubt about the States' power in this regard.

One thing is clear. Action is needed now to eliminate the abusive litigation that is hurting shareholders, and forcing corporations to spend millions of dollars on a litigation tax rather than on building their businesses, creating new jobs, and expanding our economy. Although these reforms will not entirely eliminate the problem of abuse, they will stop the multiplication of litigation and forum shopping, and—by beginning to even the odds—enable companies to fight back against unjustified claims. That will make it much more difficult for trial lawyers to collect their litigation tax.

ENDNOTES

[1] Herbert Hovenkamp, *Federal Antitrust Policy* 544-46 (4th ed. 1994); Lawrence A. Sullivan, *Antitrust* 614-15 (1977).

[2] Antitrust laws protect the economy against mergers and acquisitions that would reduce competition and therefore injure consumers and other market participants.

[3] Cornerstone Research, Robert M. Daines & Olga Koumrian, *Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions – March 2012 Update*, at 1 (hereinafter "*Recent Developments in M&A Litigation*").

These lawsuits fall into three basic categories: federal securities class actions under Section 10(b) of the Securities Exchange Act and/or Section 11 of the Securities Act alleging that the company has made materially false misrepresentations regarding the proposed transaction or has failed to disclose material information; shareholder class actions under state law alleging that a company's management and board of directors have breached their fiduciary duty to shareholders in agreeing to the terms of the transaction or failing to disclose information necessary to enable shareholders to cast an informed vote with respect to the transaction; and derivative actions under state law alleging breaches of fiduciary duty such as conflicts of interest. Federal class actions may be brought only in federal court, but the state law claims may be brought in either federal or state court.

[4] *Recent Developments in M&A Litigation*, at 3.

[5] Matthew D. Cain & Steven M. Davidoff, *A Great Game: The Dynamics of State Competition and Litigation* (Apr. 2012), at 13, *available at* http://ssrn.com/abstract=1984758. Cain and Davidoff found that 84% of 2009 and 2010 transactions were subject to litigation. *Id*.

[6] *Recent Developments in M&A Litigation*, at 2.

[7] Jennifer J. Johnson, *Securities Class Actions in State Court* (June 2011), at 36, *available at* http://ssrn.com/abstract=1856695 (hereinafter "*Securities Class Actions in State Court*").

[8] PricewaterhouseCoopers, *The ever-changing landscape of litigation comes full circle: 2011 Securities litigation study* (Apr. 2012), at 7 (hereinafter "*2011 Securities Litigation Study*").

[9] *Recent Developments in M&A Litigation*, at 9.

[10] *Id*. at 10.

[11] *2011 Securities Litigation Study*, at 8 (emphasis added).

[12] Ann Woolner, Phil Milford, Rodney Yap, *When Merger Suits Enrich Only Lawyers*, Bloomberg News (Feb. 16, 2012), *available at*, http://www.bloomberg.com/news/2012-02-16/lawyers-cash-in-while-investor-clients-get-nothing-in-merger-lawsuit-deals.html (hereinafter "*When Merger Suits Enrich Only Lawyers*").

[13] *In re Topps Co. Shareholder Litigation*, 924 A.2d 951, 961 n.38 (Del. Ch. Ct. 2007).

[14] *Id*. at 961.

[15] Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2011* (Feb. 2012), at 4, *available at* http://ssrn.com/abstract=1998482 (hereinafter "*Takeover Litigation in 2011*"). Cornerstone finds a virtually identical 83%. *Recent Developments in M&A Litigation*, at 11.

[16] *Takeover Litigation in 2011*, at 3-4. Cornerstone finds 13%. *Recent Developments in M&A Litigation*, at 11.

[17] *In re Revlon, Inc. Shareholders Litigation*, 990 A.2d 940, 947 (Del. Ch. 2010).

[18] *Recent Developments in M&A Litigation*, at 11.

[19] Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 Vanderbilt L. Rev. 133 (2004).

[20] *Recent Developments in M&A Litigation*, at 12.

[21] *Takeover Litigation in 2011*, at 3.

[22] *When Merger Suits Enrich Only Lawyers*, *supra*.

[23] *Recent Developments in M&A Litigation*, at 13.

[24] *See* page 4, *supra*.

[25] *When Merger Suits Enrich Only Lawyers*, *supra*. One recent article states, "Put in blunt terms, most transaction-related litigation is more about getting access to fee distributions than it is about improving shareholder value or protecting the rights of shareholders." Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. Davis L. Rev. 137, 151 (2011) (hereinafter "*Shareholder Suits*").

[26] *When Merger Suits Enrich Only Lawyers*, *supra*.

[27] *Recent Developments in M&A Litigation*, at 5.

[28] *When Merger Suits Enrich Only Lawyers, supra*.

[29] *2011 Securities Litigation Study*, at 9.

[30] *In re Topps Co. Shareholder Litigation*, 924 A.2d at 957.

[31] *Louisiana Municipal Police Employees' Retirement System v. Pyott*, 46 A.3d 313, 337 (Del. Ch. 2012).

[32] *2011 Securities Litigation Study*, at 9.

[33] *When Merger Suits Enrich Only Lawyers, supra*.

[34] *Recent Developments in M&A Litigation*, at 3.

[35] *Id.*; *see also 2011 Securities Litigation Study*, at 9.

[36] *Recent Developments in M&A Litigation*, at 2.

[37] *Great Game: The Dynamics of State Competition and Litigation*, at 13.

[38] *Recent Developments in M&A Litigation*, at 7.

[39] *Securities Class Actions in State Court*, at 37.

[40] *Shareholder Suits*, at 147.

[41] *Recent Developments in M&A Litigation*, at 3.

[42] *Securities Class Actions in State Court*, at 47.

[43] *Id.* at 46-47.

[44] Committee on Securities Litigation of the Association of the Bar of the City of New York, *Coordinating Related Securities Litigation: A Position Paper* (2008), at 2, *available at*, http://www.nycbar.org/pdf/report/Securities_Litigation_%20A.pdf (hereinafter "*Coordinating Related Securities Litigation: A Position Paper*").

[45] *See, e.g., In re Allion Healthcare Inc. Shareholders Litig.*, 2011 WL 1135016, at *4 (Del. Ch. Mar. 29, 2011) (observing that "the fallout" of multi-jurisdictional litigation "has become increasingly problematic in recent years" and noting that lawyers and judges "have yet to come up with a workable solution"); *In re Compellent Techs., Inc. Shareholders Litig.*, C.A. No. 6085-VCL, slip op. at 26 (Del. Ch. Jan. 13, 2011) (stating that multi-forum issues are "a problem in virtually every deal").

[46] *A Great Game: The Dynamics of State Competition and Litigation, supra*.

[47] *Id.* at 4. "[T]his pattern of moving litigation away from the state of incorporation reflects an intentional strategy by plaintiffs' counsel to engage in forum shopping. By filing claims based on Delaware law in foreign jurisdictions, litigants avoid recent attempts by the Delaware courts to raise pleading standards and actively police plaintiffs' attorneys' fees" while continuing to rely on Delaware substantive law. *Shareholder Suits* at 141 (internal footnotes omitted); *see also id.* at 143 & 146 ("the multiforum litigation stategy" is "a natural response to the competitive pressures of the plaintiffs' bar"; "[b]y controlling foreign litigation, plaintiffs' counsel place themselves in a position to assert leadership positions in settlement discussions").

[48] J. Armour, B. Black & B. Cheffins, *Delaware's Balancing Act*, 87 Indiana Law J. 1345, 1380 (2012).

[49] Enactment of the 1990s reforms was followed by criminal prosecutions of leading members of the plaintiffs' securities bar, who admitted to criminal violations in the course of their litigation activities—including crimes that injured the classes they represented. William Lerach and Melvyn Weiss and six of their colleagues pleaded guilty to criminal charges in connection with the Milberg Weiss firm's securities class action practice.

[50] H.R. Conf. Rep. 104-369, at 31 (1995).

[51] H.R. Rep. No. 104-50 pt. 1, at 16 (1995).

[52] *Id.* (footnote omitted).

[53] S. Rep. 104-98, at 9 (1995).

[54] H.R. Rep. 104-50 Pt. 1, at 20 (1995).

[55] *Securities Class Actions in State Court*, at 51.

[56] *Id.* at 51-52 (footnotes omitted).

[57] *Id.* at 26.

[58] 15 U.S.C. § 78bb(f)(3)(A); *see also* 15 U.S.C. § 77p(d)(1)(A)-(B). The Class Action Fairness Act ("CAFA") contains a similar exclusion. *See* 28 U.S.C. § 1332(d)(9).

[59] *Securities Class Actions in State Court*, at 57.

[60] *Coordinating Related Securities Litigation: A Position Paper*, at 2.

[61] *See* 28 U.S.C. §1407 (authorizing Judicial Panel on Multidistrict Litigation to consolidate cases).

[62] Professor Johnson explains: "At present, there is no formal mechanism to coordinate suits among state courts. While state judges can consider *forum non conveniens* motions and

motions to stay in favor of parallel proceedings in other courts, these motions are not always successful. Similarly, there is no formal coordination between federal and state courts. Only under extraordinary circumstances can a federal court interfere with parallel state proceedings." *Securities Class Actions in State Court*, at 45 (footnotes omitted).

[63] Other state-level judicial reforms suffer from the same flaw. As discussed above, there is considerable evidence that the Delaware courts' skepticism about quick filings and large attorneys' fee claims led trial lawyers to begin to file cases in other state courts. Recent news reports about Texas courts' adoption of a restrictive approach to fee awards may similarly divert cases to other states. *See* Nate Raymond, *Alison Frankel's On The Case: Don't Mess with Texas (if you're a lawyer for plaintiffs in an M&A case)* (Oct 9, 2012), *available at* http://newsandinsight.thomsonreuters.com/Legal/News/ViewNews.aspx?id=58630.

[64] *Coordinating Related Securities Litigation: A Position Paper*, at 9-10.

[65] Trial lawyers have already demonstrated that they will work aggressively to defeat any effort to maintain their ability to bring multiple lawsuits in multiple jurisdictions. After the Delaware Chancery Court suggested that companies could include a provision in corporate organizational documents designating an exclusive forum for these disputes (*In re Revlon, Inc. Shareholders Litigation*, 990 A.2d at 960 & n.8), and a number of companies adopted bylaws embodying that approach, trial lawyers brought suit against a dozen of those companies to invalidate the clauses. Most of the companies simply withdrew the provisions to avoid the litigation expense. Frank Aquila & Anna Kripitz, *Forum Selection Provisions in Delaware*, Corporate Counsel (Aug. 27, 2012), *available at* http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202568858-164&ForumSelection_Provisions_in_Delaware.

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