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# DEAL LITIGATION RUN AMOK: DIAGNOSIS AND PRESCRIPTIONS

*Currently, almost all major corporate M & A deals are challenged by shareholder class action suits. The authors argue that the cause is not corporate malfeasance, but entrepreneurial plaintiffs' lawyers responding to the financial incentives created by the law governing the award of attorney's fees. They suggest eight reforms to tamp down this litigation, from forum selection bylaws to bond requirements. They conclude that companies have the ability to engage in self-help to effectively stem the tide and that the courts need to take action to completely address the problem.*

By Marc Wolinsky and Ben Schireson *

The statistics are daunting. In 2007, 53% of the M&A deals over $500 million were challenged by shareholder suits. By 2012, the percentage had grown to 96%.[1] So the current reality is that every deal – regardless of whether it is a strategic deal, a private equity deal, the result of a single-bidder negotiation, or a full-blown public auction – is subjected to shareholder litigation. And, increasingly, the litigation is being brought in several forums across various states by law firms competing to lead the charge. The result has been awkward and, at times unseemly, jockeying between courts over control of shareholder litigation brought by multiple law firms representing separate plaintiffs in multiple courts.[2]

One can imagine two possible explanations for this phenomenon. The first is that there has been an outbreak of lawlessness in American boardrooms, and the plaintiff's bar has come to the rescue. The second is that the system is broken, that shareholder suits are being filed regardless of the merits, and that shareholder plaintiffs are imposing a dead weight on society and an

[1] Robert Daines and Olga Koumrian, *Shareholder Litigation Involving Mergers and Acquisitions*, Cornerstone Research, February 2013 Update at 2.

[2] *See In re Topps Co. S'holders Litig.,* 924 A.2d 951, 953 (Del. Ch. 2007) (then-Vice Chancellor Strine refused to stay Delaware action in favor of New York action emphasizing that "the interests of the stockholders in the fair and consistent enforcement of their rights under the law governing the corporation" trump any individual plaintiff's "desire . . . to litigate in a forum other than the state of incorporation.").

* *MARC WOLINSKY is a litigation partner, and BEN SCHIRESON is an associate at Wachtell, Lipton, Rosen & Katz in New York City. Their e-mail addresses are mwolinsky@wlrk.com and bdschireson@wlrk.com. The views expressed in the article are their own.*

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unwarranted burden on corporate America and the courts.

## THE EXPLOSION IN DEAL LITIGATION IS ATTRIBUTABLE TO ONE THING: FEES

The first explanation is, of course, fanciful. By any measure, corporate boards as a whole are more independent, more conscientious, and more mindful of their obligations than they were 10 years ago. The reality is that the system is broken. And the single most important reason why the system is broken is that the financial incentives for shareholder suits are out of whack. The plaintiff's bar, filled with able and entrepreneurial lawyers, is responding to the financial incentives that make it profitable for them to bring litigation in virtually every case. They are responding to the incentives created by exploiting a set of rules, typically judge-made rules, that make it profitable to challenge virtually every deal.

What are the main sources of the problem? There are at least three.

1. The plaintiff's law firms do not have clients in any real sense of the word. In years past, the shareholder plaintiffs used to be individual shareholders, derisively and often accurately referred to as "frequent filers."[3] The trend now is for suits to be filed by public pension funds. At this point, the large, well-capitalized plaintiffs' firms have "portfolio monitoring agreements" under which the funds tell the firms what securities they hold, and retain them to monitor the companies. When a merger is announced, the firms check to see if any of their clients hold the selling corporation's securities, and, if they do, file complaints alleging that the deal is the result of a bad process and was struck at an unfairly low price. In short, the litigation too frequently is lawyer-driven, not client-driven.

2. There is no consequence to losing for the clients. In the world where real clients hire lawyers with their own money to bring suits, there is a cost to being wrong. If the client loses, the client is out the fees. While the incentives against bringing meritless litigation are not as strong in the United States as they are in jurisdictions that follow the "English rule" of loser pays, there is nonetheless a real incentive to not file meritless suits. But the "clients" of the plaintiff's bar have no incentive to decide whether or not to file suit because they are not paying the freight – legal fees. And when a suit is filed, they have no incentive to monitor what their lawyers are doing and whether their lawyers are prosecuting the case efficiently. They are not paying. And there is little or no personal involvement: shareholder plaintiffs in deal litigation are rarely even deposed, and even more rarely called to upon to testify at trial.

3. The pay-offs for the plaintiff's lawyers are skewed in favor of litigation. In shareholder litigation that has real merit, the payoffs can be huge. Without getting into the merits of the case, take *Southern Peru*.[4] In that case, the Court of Chancery awarded $304 million in attorneys' fees. On appeal, defendants argued that the fee represented more than $35,000 per hour worked. The Delaware Supreme Court upheld the award.[5]

A good argument can be made that society is better off when there are financial incentives for entrepreneurial lawyers to take cases like *Southern Peru* on what is effectively a contingency fee basis. The pay-off of that size is often justified by the claim that for every successful suit with a big payday, there are other suits that wind up paying nothing. That, of course, is a justification for the lodestar system, which often

[3] *See In re Revlon, Inc. S'holders Litig*., 990 A.2d 940, 943 n.1 (Del. Ch. 2010) (Laster, V.C.) ("I characterize certain law firms as frequent filers based on my personal experience, which happily accords with an empirical analysis of the plaintiffs' firms who file most frequently in the Court of Chancery.") (citing Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation; Acquisition-Oriented Class Actions*, 57 Vand. L.Rev. 133, 186-87 (2004)).

[4] *In re Southern Peru Copper Corp. Shareholder Derivative Litigation*, C.A. No. 961-CS (Del. Ch. Oct. 14, 2011, revised Dec. 20, 2011).

[5] *Americas Mining Corp.* v. *Theriault*, No. 29, 2012 at *86 (Del. Aug. 27, 2012) (affirming fee award in *Southern Peru*).

provides the successful plaintiff's lawyer with a multiple to make up for the cases that don't pay.[6]

But is that assumption valid now? Does the plaintiff's bar need the incentive of a big payday to make up for the losers? Plaintiffs settled 64% of consolidated lawsuits related to deals announced in 2012 where an outcome could be determined.[7] Similarly, plaintiffs settled a majority of shareholder suits over deals announced in 2011 (58% settled), 2010 (62% settled), and 2009 (61% settled), where an outcome could be determined.[8] So the reality is that plaintiff's lawyers are being awarded very nice fees in cases they settle based on the number of hours they devote to the case and rates that they quote (but that no shareholder client ever really pays), and huge fees in the occasional case that does not settle and actually goes to successful verdict. The financial incentives are all aligned to reward plaintiff's lawyers to bring litigation. The only downside to the plaintiff's lawyer is the cost of filing a suit that does not pay, or does not pay as much as another suit.

The Delaware courts are becoming more receptive to the issue and have recently denied applications for expedited proceedings. A recent denial of a motion to expedite proceedings challenging a deal noted that approximately 90% or more of all mergers involving at least $100 million are now challenged in litigation.[9] In another recent case where 19 Delaware class actions had been filed challenging a proposed buyout, Chancellor Strine denied an expedition motion, finding no "plausible, conceivable basis" to find "a colorable possibility that you could deem the choices made by this board to be unreasonable" given the various safeguards it employed.[10] Or as Vice Chancellor Glasscock put it in another recent case in which he denied expedited treatment and then dismissed the complaint: "To paraphrase Lucas Jackson, sometimes nothin' can be a real cool hand, in cards, perhaps even in life, but not in legal pleadings. Cool Hand Luke (Warner Brothers 1967)."[11]

By denying motions for expedited treatment, the courts deprive plaintiff's lawyers of the single most valuable tool in extracting a settlement: the threat of a ruling that will delay the deal close. By screening suits at the outset, the Delaware courts have tilted the playing field back to some equilibrium. But there is room for much, much more.

## SUGGESTED PRESCRIPTIONS FOR A BETTER SYSTEM

### *1. Adopt forum selection bylaws*

All too often when a deal is announced, plaintiff's lawyers file litigation in multiple forums in order to jockey for a lead position. One result is that defendants, who generally want the case to be heard in Delaware, will agree to expedited discovery in Delaware in order to push the case into that forum. A classic example of a cure for a problem that just creates one more problem, i.e., expedited litigation in Delaware in order to avoid litigating the case in multiple forums.

There is a real cure for this available now: forum selection bylaws. The bylaw provides that all litigation brought by a shareholder to enforce its rights as a shareholder under state law must be brought in the company's state of incorporation, most typically Delaware.

The Court of Chancery recently held that directors of Delaware corporations may validly adopt forum selection bylaws.[12] In that decision, Chancellor Strine held that just as the boards of Delaware corporations may adopt a so-called poison pill to address potential takeover threats, boards have the "statutory authority to adopt a bylaw to protect against what they claim is a threat to their corporations and stockholders, the potential for duplicative law suits in multiple jurisdictions over single events."[13] And earlier this

[6] *Goodrich* v. *E.F. Hutton Group, Inc*., 681 A.2d at 1046 (Del. 1996) (noting that the "lodestar calculation can then be adjusted, through application of a "multiplier" or fee enhancer, to account for additional factors, *e.g*., the contingent nature of the case") (*citing Lindy Bros. Builders, Inc. of Phila*. v. *American Radiator & Standard Sanitary Corp*., 540 F.2d 102, 112 (3d Cir.1976); *Swedish Hospital Corp.* v. *Shalala*, 1 F.3d 1261, 1265 (D.C. Cir.1993)); *Americas Mining Corp.* v. *Theriault*, No. 29, 2012 at *88 (noting same).

[7] Robert Daines and Olga Koumrian, *Shareholder Litigation Involving Mergers and Acquisitions*, Cornerstone Research, February 2013 Update at 5.

[8] *See id.*

[9] *Stourbridge Investments, LLC* v. *Bersoff*, C.A. No. 7300-VCL (Del. Ch. Mar. 13, 2012) (Transcript).

[10] *In re Dell Shareholder Litigation*, C.A. No. 8329-CS (Del. Ch. June 19, 2013) (Transcript).

[11] *In re Bioclinica, Inc. Shareholder Litigation*, C.A. No. 8272-VCG, 2 n.3 (Del. Ch. Oct. 16, 2013).

[12] *Boilermakers Local 154 Ret. Fund* v. *Chevron Corp*., C.A. No. 7220-CS (Del. Ch. June 25, 2013).

[13] *Id.* at *29.

month the plaintiffs who unsuccessfully challenged the legality of forum selection bylaws dropped their appeal to the Delaware Supreme Court. The result is that Chancellor Strine's decision is, for now, the final and authoritative word.

A forum selection bylaw will not only provide certainty in merger litigation and permit these suits to be litigated in a forum with extensive experience and expertise in applying the law of the state of incorporation, it will eliminate the incentive for the defense bar to agree to expedited discovery in Delaware in order to push the case to that forum. While a number of the other prescriptions in this article require further action by the courts or legislature, forum selection bylaws provide a remedy that can be adopted by a board immediately to combat potentially abusive deal litigation. Given the significant benefits of exclusive forum provisions, companies should engage in self-help and adopt a forum selection bylaw to address the risk of duplicative shareholder litigation and ensure disputes involving the internal affairs of a corporation will be resolved in the state of incorporation.

### 2. Make Iqbal and Twombly the law in Delaware

In *Bell Atlantic Corp.* v. *Twombly,*[14] the U.S. Supreme Court abrogated prior precedent holding a complaint should not be dismissed under Rule 12(b)(6) unless it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[15] The *Twombly* decision held that the "'no set of facts' language has been questioned, criticized, and explained away long enough," and introduced a new "plausibility" standard.[16] In *Ashcroft* v. *Iqbal,*[17] the Supreme Court applied the "plausibility" standard, stating that "[its] decision in *Twombly* expounded the pleading standard for 'all civil actions.'"[18] In discussing the principles underlying the *Twombly* decision, the Court stated that Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."[19]

The Delaware Supreme Court has not yet addressed how the "plausibility" pleading standard adopted by the Supreme Court in *Iqbal* and *Twombly* will impact the Delaware "reasonable conceivability" standard. While the "reasonable conceivability" test has been endorsed recently by the Delaware Supreme Court, the Court declined to assess *Iqbal* and *Twombly*'s impact on the less stringent Delaware standard because the issue had not been fully litigated.[20] The Delaware Supreme Court should assess the impact of the federal standard in *Twombly*/*Iqbal* on the "reasonable conceivability" standard as soon as possible, and authorize Delaware courts to weigh plausibility at the pleading stage. If the Court of Chancery is not empowered to tamp down the wave of deal litigation at the pleading stage, it will continue to result in unwieldy litigation with little benefit to shareholders.

### 3. PSLRA-style reforms

The legislative history of the Private Securities Litigation Reform Act of 1995 (PSLRA) details strikingly similar problems prior to reforms by Congress to curb abuses in securities suits. In justifying the need for action, Congress cited the following:

- the proliferation of lawsuits based solely on significant changes in stock price "without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action";
- plaintiffs targeting "deep pocket defendants," including insured individuals, "without regard to their actual culpability;
- abusing the discovery process to impose burdensome costs forcing defendants to settle because of economic reasons; and
- lawyers manipulating the clients that they supposedly represent."[21]

[14] 550 U.S. 544 (2007).

[15] *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

[16] *Twombly,* 550 U.S. at. 555.

[17] 556 U.S. 662 (2009).

[18] *Id*. at 684.

[19] *Id.* at 678-679.

[20] *Central Mortgage Company* v. *Morgan Stanley Mortgage Capital Holdings LLC*, 27 A.3d 531, 537 (Del. 2011) (noting that the court has "not had occasion yet to address the impact, if any, that the United States Supreme Court's holdings in *Twombly* and *Iqbal* should have" on the Delaware "conceivability" standard and declining to do so in a case where the issue had not been "fully and fairly litigated"); *Cambium* v. *Trilantic Capital Partners*, 36 A.3d 348 (Del. Jan. 20, 2012) (Order) (emphasizing that the standard to be applied on a motion to dismiss is reasonable conceivability).

[21] H.R. Conf. Rep. 104-369, P.L. 104-67, PSLRA of 1995.

Comparable concerns exist for plaintiff-driven deal litigation. Accordingly, reform should begin by utilizing the well-devised schemes that have been effective in curbing abuses in the securities class action suits at the federal level.

First, under the PSLRA, the court chooses the most adequate lead plaintiff and lead counsel at the start of the case, not through a motion for class certification.[22] Specifically, the PSLRA provides that if more than one action asserting substantially similar claims on behalf of the class is filed, and any party seeks to consolidate the actions, the court should not appoint a lead plaintiff until the motion to consolidate is rendered. After that time, the PSLRA provides that "as soon as practicable" the court should appoint a lead plaintiff. This avoids the problem of duplicative litigation proceeding in multiple forums.

Second, a major concern in the PSLRA was "[p]rofessional plaintiffs" holding a "nominal number of shares in a wide array of public companies" allowing lawyers quickly to file "abusive securities class action lawsuits."[23] The PSLRA employs a special procedure for selecting an "empowered" lead plaintiff (presumptively one with sizable claims), who, in turn, has the right to select and retain class counsel, subject to judicial approval.[24]

These principles should apply equally to deal litigation and require that plaintiffs have a significant stake in the action. Recent opinions by Chancellor Strine have amplified this concern by requiring lead plaintiffs to agree to retain all or most of their shares for the duration of litigation.[25] Instituting these requirements by statute would weed out litigious plaintiffs with nominal shares in favor of stakeholders with significant financial interest in the case.

### 4. Reverse the first-filed presumption

Traditionally, courts have looked to see which plaintiff filed the first suit in deciding which one should have primacy. The perverse result of this is that the lawyer who has spent the least amount of time investigating the merits of a claim is rewarded for shooting first and aiming later. Moreover, as Chancellor Strine has noted, the first-filed doctrine does not "adequately capture the importance of the choice of law – that of the state of incorporation – made by investors in the corporation."[26]

Chancellor Strine's prescription is to give primacy to the suit filed in the corporation's state of incorporation. That is a start, but just a start. Why not create a rebuttable presumption that the plaintiff in the first-filed suit will not be given the lead spot, i.e., a presumption that the first firm to file did so because it was motivated by a desire to be first, not best.

### 5. Eliminate presumption that litigation caused a benefit

The current state of the law in Delaware allows plaintiffs to benefit from a presumption that any change in the deal following the filing of litigation was caused by the filing and permits the plaintiffs' lawyers to claim a fee based on this presumed benefit.[27] For example, even if another bidder steps in and the target's stock price rises, plaintiffs' lawyers can lean on a presumption that the filing of litigation caused this rise in the stock price. This provides yet another unwarranted incentive for plaintiffs to file an insubstantial complaint and then passively await any number of unrelated market events to intercede. There is no need for any such presumption. If the plaintiff's lawyer wants to claim that his or her suit created a benefit, he or she should bear the burden of proving it.

### 6. Fee shifting

Nothing is more sacrosanct in American jurisprudence than the notion that each side bears its own costs. The English rule, loser pays, is viewed as almost anti-American because it supposedly insulates big bad companies from having to defend potentially meritorious claims from the little guy. That model simply makes no sense in the world of deal litigation. Why should a plaintiff be able to get a share of the benefit it created for the class in cases where a benefit is created, but be immunized from bearing the cost the shareholder imposed on the company and every other

[22] 15 U.S.C. § 77z-1(a)(3)(B).

[23] H.R. Conf. Rep. 104-369, *supra* note 21 at 33.

[24] *In re Cendant Corp. Litigation*, 264 F.3d 201, 273–78 (3d Cir. 2001).

[25] *In re Dell Shareholder Litigation*, C.A. No. 8329-CS (Del. Ch. Mar. 18, 2013); *In re NYSE Euronext Shareholders Litigation*, C.A. No. 8136-CS (Del. Ch. Mar. 13, 2013).

[26] Leo E. Strine, Jr., Lawrence A. Hamermesh, & Matthew C. Jennejohn, *Putting Stockholders First, Not the First-Filed Complaint*, Discussion Paper No. 740, Harvard Law School.

[27] *See, e.g.*, *Alaska Electrical Pension Fund* v. *Brown*, No. 240, 2009 (Del. Jan. 14, 2010) ("Although the presumption of causation is demanding, it is rebuttable.").

one of its shareholders when litigation is purely frivolous?

The reality is that the American rule permits well-financed plaintiffs' firms to impose the cost of defending frivolous suits onto the other shareholders (by forcing the company to bear defense costs). The prescription is obvious. Eliminate the American rule in deal litigation, and impose a real downside on plaintiffs who are supposedly championing the interests of all shareholders. This is a system that has worked in other countries and is fully applicable here, given the lack of any cost to the plaintiffs of bringing frivolous litigation.[28]

### *7. No tangible benefit, no fee*

A California court recently held that plaintiffs cannot receive a fee for changes in the deal where the plaintiff failed to make a pre-suit demand.[29] The California court further held that the attorney fee claim failed because the shareholder did not show that the additional language in the proxy statement had an "actual and concrete" impact on the acquisition vote.[30]

Texas has a similar rule, which requires that where any portion of benefits recovered for a class are in the form of coupons or any other noncash benefit, then the attorneys' fees awarded must be in the same proportion of cash and noncash as was the actual recovery for the class. A recent Texas appellate court applied this rule to deny a fee application where the class received injunctive relief only and no cash, reasoning in that scenario that the law firms are entitled to no fees at all.[31] What these decisions all have in common is one thing: no tangible benefit, no fee.

What does that mean in practice? Take a real life example. In *Del Monte*, Vice Chancellor Laster sided with plaintiffs and ordered a delay of the shareholder vote on a proposed buyout of the company, overturned a termination fee based on alleged conflicts in the deal process, and explicitly held open the possibility of a damages remedy against the leading bidder.[32] The plaintiffs' lawyers were awarded $2.75 million in interim fees on the basis of the court's award of the interim relief.[33] But what happened in the end? With all the "remedial" steps ordered by the court, no competing bidder emerged, no higher offer was made. So why should the plaintiff get a fee for convincing the court to award a remedy that, in the end, did not benefit the shareholders?

### *8. Capacity to post a bond should be made an element of a request for expedited treatment*

The common law has a rule designed to make sure that expedited litigation does not wind up hurting the defendant. In a case involving a claim for a preliminary injunction, the plaintiff must post a bond in an amount set by the court to compensate the defendant for any losses it suffers from the entry of an injunction that, it later turns out, was unwarranted.

Unfortunately, that rule has lost its force in deal litigation. A few Delaware cases have suggested that posting of a sizable bond should be warranted where plaintiffs are risking shareholder money.[34] But only nominal bonds are typically required for disclosure injunctions and bonds are often small even for substantive injunctions.[35]

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[28] Werner Pfennigstorf, The European Experience with Attorney Fee Shifting, 47 Law & Contemporary Problems 37, 44–47 (1984); Thomas D. Rowe, Jr., Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions, 13 Duke J. Comp. & Int'l L. 125, 128 (2003).

[29] *Pipefitters Local No. 636 Defined Benefit Plan* v. *Oakley, Inc.*, 2010 Cal. App. Lexis 33 (Cal. App. 4th, Jan. 13, 2010); *see also Abouab* v. *City and County of San Francisco*, 141 Cal. App. 4th 643 (2006).

[30] *Oakley* at *7.

[31] *In re Kazman* v. *Frontier Oil Corp.*, No. 14-12-000320-CV, 2013 WL 1244376 (Tex. Ct. App. Mar. 28, 2013).

[32] *In re Del Monte Foods Co. S'holders Litig.,* C.A. No. 6027-VCL (Del. Ch. Feb. 14, 2011).

[33] Robert Daines and Olga Koumrian, *Shareholder Litigation Involving Mergers and Acquisitions*, Cornerstone Research, February 2013 Update at 7.

[34] *In re Netsmart Techs., Inc. S'holders Litig*., 924 A.2d 171, 208 (Del. Ch. 2007) ("It would be hubristic for me to take a risk of that kind for the Netsmart stockholders, and the plaintiffs have not volunteered to back up their demand with a full bond."); *Koehler* v. *NetSpend Holdings Inc.*, 2013 WL 2181518 (Del. Ch. May 21, 2013) (citing same).

[35] *See, e.g., David P. Simonetti Rollover IRA* v. *Margolis,* 2008 WL 5048692, at *14 n. 68 (Del.Ch. June 27, 2008) (stating that a $65 million bond in a disclosure injunction would be "unprecedented"); *Solar Cells, Inc.* v. *True N. P'rs, LLC*, 2002 WL 749163, at *8 (Del.Ch. Apr. 25, 2002) (requiring bond of $2,500 for merger injunction); *Hayes* v. *Activision Blizzard, Inc.*, C.A. No. 8885-VCL (Del. Ch. Sept. 18, 2013) (Transcript) (imposing a bond of $150,000 where defendants sought $1 billion bond for a preliminary injunction of the sale of $8.2

This bad law should not only be abandoned in favor of the traditional rule, the traditional rule should be enforced rigorously. A plaintiff moving for expedited treatment of its case not only should be required to show at the outset that there is a "a sufficient possibility of threatened irreparable injury" and a "colorable claim."[36] Given the significant costs to shareholders if plaintiffs are wrong and the limited risks to plaintiffs of bringing frivolous litigation, plaintiffs should also be required to demonstrate in their motion for expedited treatment that they are capable of posting a real bond to compensate the company and their fellow shareholders if they are wrong.

## WILL ANY OF THIS WORK, OR WILL IT JUST DRIVE LITIGATION TO OTHER FORUMS?

All of these prescriptions are appropriate remedies and are fully justified, but the question remains as to whether they will work. If Delaware continues to take the lead in tamping down on frivolous deal litigation, in the absence of a forum selection bylaw, plaintiffs will be sorely tempted to file "ABC" – "Anywhere But Chancery."[37] The critical first step in fighting "ABC" complaints is for companies to engage in self-help and adopt forum selection bylaws. Other state courts should be obligated to enforce forum selection bylaws under the internal affairs doctrine, which requires courts in other states to follow the law of the corporation's state of incorporation in deciding issues involving the shareholders rights vis-à-vis the corporation.[38]

In the absence of a forum selection bylaw, the adoption of the fee-focused prescriptions of this article will work only if the attorneys' fee provisions of Delaware law are considered substantive, and the Delaware courts say so. While, as a general matter, the procedural law of the local court will apply,[39] a recognized exception to this rule applies when the procedural law of the foreign state is inseparably interwoven with substantive rights.[40] There is no reason why this exception should not apply in the context of attorneys fee awards: the rules governing whether and when a shareholder should be able to collect fees from the corporation directly affect the substantive relationship between one shareholder and others, as well as the shareholder's relationship with the company.

The PSLRA-based reforms, notably, early selection of the class representative and class certification, are more problematic. For them to have teeth, courts in other states will need to respect decisions by the Delaware courts, and recognize Delaware's paramount interest in regulating the internal affairs of Delaware corporations. In one notable interstate tussle that took place before the forum selection bylaw was upheld, Chancellor Strine certified a class in the NYSE Euronext litigation, but the New York Supreme Court continued to press on and was scheduled to hear class certification motion to certify an identical class. An appellate court stepped in and stayed the New York action on an interlocutory appeal.[41] The result was certainly correct. But now that the forum selection bylaw has been upheld, companies can avoid these problems by adopting the bylaw. ■

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billion in stock) *rev'd on other grounds*, *Activision Blizzard, Inc.* v. *Hayes*, C.A. No. 497-2013 (Del. Oct. 10, 2013).

[36] *Giammargo* v. *Snapple Beverage Corp*., 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994).

[37] *See* "Anywhere But Chancery: Ted Mirvis sounds an alarm and suggests some solutions," The M&A Journal, May 2007 (quoting Ted Mirvis of Wachtell, Lipton, Rosen and Katz).

[38] *Edgar* v. *MITE Corp*., 457 U.S. 624, 645 (1982) ("The internal affairs doctrine is a conflict-of-laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs — matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders — because otherwise a corporation could be faced with conflicting demands." (citation omitted)); *CTS Corp*. v. *Dynamics Corp*., 481 U.S. 69, 90 (1987) ("[A] corporation — except in the rarest situations — is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation."). In one early case, a federal judge refused to

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enforce a forum selection bylaw. *See Galaviz* v. *Berg*, 763 F. Supp.2d 1170, 1174-75 (N.D. Cal. 2011). But since then the Court of Chancery has made clear that that directors of Delaware corporations may adopt forum selection bylaws. *See Boilermakers Local 154 Ret. Fund* v. *Chevron Corp*., C.A. No. 7220-CS (Del. Ch. June 25, 2013).

[39] *See, e.g.*, *Monsanto Co.* v. *Aetna Cas. & Sur. Co*., 1990 WL 9496, at *1 (Del. Super. Jan. 19, 1990).

[40] *MPEG LA, L.L.C.* v. *Dell Global B.V.*, C.A. No. 7016-VCP (Del. Ch. March 6, 2013) (citing *Monsanto* at *1).

[41] *NYSE Euronext Shareholder/ICE Litigation*, New York Supreme Court, No. 654496/2012.