DELAWARE CORPORATE LITIGATION AND THE FRAGMENTATION OF THE PLAINTIFFS' BAR†

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Since 2000, a growing proportion of lawsuits against directors of public companies incorporated in Delaware have been filed outside Delaware. There has also been a large increase in the likelihood of litigation challenging M&A transactions involving Delaware targets, and the likelihood that suits involving the same transaction will be filed both in Delaware and elsewhere. In this Article we explore one potential cause for these trends—intensified competition between plaintiffs' law firms. We trace the development of the plaintiffs' bar from the 1970s to the present and identify three changes that plausibly contributed to the out-of-Delaware trend and a higher litigation rate: (1) stronger competition among plaintiffs' lawyers specializing in securities litigation also affected the corporate law side of the plaintiffs' bar; (2) changes in how the Delaware courts selected lead counsel encouraged non-Delaware filing by firms who were unlikely to win lead counsel status in Delaware; (3) potential obstacles

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associated with launching a suit in a jurisdiction other than Delaware become less of a concern to the plaintiffs' bar.

This Article draws upon data and insights developed more fully in a related policy-oriented paper: "Delaware's Balancing Act", Indiana Law Review *(forthcoming 2012), and a related empirical paper ("Is Delaware Losing its Cases",* Journal of Empirical Legal Studies *(forthcoming 2012)).*

I. INTRODUCTION

Until recently, the received wisdom was that most corporate law cases involving Delaware public companies were filed in Delaware courts. However, we have shown in related work that since 2000 a growing proportion of these lawsuits have been filed and litigated elsewhere.[1] Our research also shows the litigation rate for both large merger and acquisition ("M&A") transactions and leveraged buyouts ("LBOs") involving Delaware targets has grown dramatically over the same period.[2]

We have offered elsewhere conjectures as to why the "out-of-Delaware" trend we document has occurred and have tested a number of these empirically.[3] In this Article we explore a possible additional cause that we adverted to only briefly in our related work, namely changes to the environment in which the plaintiff law firms which bring the cases operate.[4] Our departure point is an explanation offered by Chancellor Strine of the Delaware Court of Chancery for increased filings outside Delaware, namely that there has been "a fragmentation in the plaintiffs' bar . . . that has caused there to be more of a melee."[5] We show here that changes to the plaintiffs' bar indeed likely form an important part of the explanation for both the "out of Delaware" trend and the rise in litigation rates.

Why might changes to the plaintiffs' bar be expected to affect the venue for and frequency of corporate litigation involving public companies? The possibility we focus on primarily here is that intensified competition prompted plaintiffs' lawyers to file lawsuits involving Delaware public companies outside Delaware so as to gain an advantage in

[1] John Armour, Bernard Black & Brian Cheffins, *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. (forthcoming 2012), *available at* http://ssrn.com/abstract=1578404 [hereinafter *ABC Losing Cases*]; John Armour, Bernard Black & Brian Cheffins, *Delaware's Balancing Act*, INDIANA L. REV. (forthcoming, 2012), *available at* http://ssrn.com/abstract=1677400 [hereinafter *ABC Balancing Act*].

[2] *ABC Losing Cases* (2012), *supra* note 1.

[3] *ABC Losing Cases* (2012), *supra* note 1; *ABC Balancing Act* (2012), *supra* note 1.

[4] *ABC Balancing Act* (2012), *supra* note 1, Part III.G.

[5] Ted Mirvis, *Anywhere But Chancery: Ted Mirvis Sounds an Alarm and Suggests Some Solutions*, M&A J., May 2007, at 17–18.

pursuit of the coveted role of lead counsel in corporate litigation. We demonstrate this by describing how the plaintiffs' bar specializing in corporate litigation and in the related, often overlapping area of securities litigation has developed over time.

The historical exercise we engage in here is a venture into largely unexplored territory. Legal academics generally know little about the sociology of the plaintiffs' bar.[6] Moreover, much of the limited research has focused on firms specializing in areas other than corporate and securities law.[7] A series of articles in the mid-1980s did provide insights into the incentives of plaintiffs' law firms in corporate and securities litigation.[8] The rise and fall of

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[6] *See* Bill Henderson, *Where Did High-End Plaintiffs' Lawyers Go to Law School?*, EMPIRICAL LEGAL STUDIES, http://www.elsblog.org/the_empirical_legal_studi/2006/12/where_did_highe.html (last visited May 2, 2012) (explaining that law students and law professors know very little about the plaintiffs' bar, perhaps in part due to the small size of the firms that tend to specialize in this area and the fact that they rarely recruit students through on-campus interviews, in addition to the fact that legal educators are top-heavy with corporate law practice). *See also* Sara Parikh, *How the Spider Catches the Fly: Referral Networks in the Plaintiffs' Personal Injury Bar*, 51 N.Y.L. SCH. L. REV. 243, 244 (2006) (noting that "the plaintiffs' bar received scant attention among legal profession scholars" until the past decade or so).

[7] *See, e.g.*, Parikh (2006), *supra* note 6 (personal injury bar); THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY (Univ. of Cal. Press 2002) (civil rights and personal injury); LESTER BRICKMAN, LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA (Cambridge Univ. Press 2011) (tort liability); David Hyman, Bernard Black & Charles Silver, *Waiting for the Big One: The Economics of Plaintiff-Side Personal Injury Practice* (Northwestern Law & Econ. Research Paper No. 09-17, 2011), *available at* http://ssrn.com/abstract=1441487.

[8] John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 1, 44 (1985); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 706 (1986); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 907–08 (1987); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs'*

Milberg Weiss, a securities class action powerhouse that faced partner disagreements and scandal in the mid-2000s, has been analyzed in some detail.[9] Otherwise, little has been written about plaintiffs' law firms who bring shareholder suits.

We provide evidence that competition among plaintiffs' lawyers specializing in shareholder litigation has intensified over the past fifteen or twenty years, in ways that likely contributed to both the out-of-Delaware trend in litigation venue and the rising incidence of shareholder suits challenging large M&A and other corporate transactions. We identify three factors as being of particular importance. First, in contrast to defense side work, plaintiff law firm dynamics encourage spin-offs and break-ups among top tier plaintiffs' law firms. This has produced over the past 10 to 15 years a proliferation of experienced, well-resourced lawyers and firms able to litigate thoroughly major shareholder suits, and to bring these suits in multiple venues. Second, after adoption of the Private Securities Litigation Reform Act ("PSLRA") in 1995, it became hard for smaller plaintiff firms', lacking major institutional shareholders as clients, to compete for the lead counsel role in securities suits. Some of the smaller firms, having historically focused on securities litigation, began moving increasingly into corporate litigation. Third, for a variety of reasons, obstacles to plaintiffs' firms bringing litigating outside their "home turf" have declined. While Delaware has long made it straightforward for a law firm based outside

Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. CHI. L. REV. 1 (1987).

9 *See, e.g.*, JOSEPH C. GOULDEN, THE MONEY LAWYERS 245-326 (St. Martin's Press 2006); PATRICK DILLON & CARL M. CANNON, CIRCLE OF GREED: THE SPECTACULAR RISE AND FALL OF THE LAWYER WHO BROUGHT CORPORATE AMERICA TO ITS KNEES (Broadway Books 2010); James P. McDonald, *Milberg's Monopoly: Restoring Honesty and Competition to the Plaintiffs' Bar*, 58 DUKE L.J. 507 (2008). Here and below, we generally refer to law firms using only the first two names in the firm name, and do not take into account all changes to firm names occurring over time. We often use the current firm name, except where this would be misleading (e.g. with Milberg Weiss).

Delaware to launch a lawsuit in Delaware courts, it became easier for plaintiffs' law firms to bring corporate law suits *outside* Delaware.

While competition among the plaintiffs' firms who bring corporate lawsuits has intensified, and while this trend plausibly contributed to the "out-of-Delaware," frequent filing, and multi-forum litigation trends in corporate litigation, we refrain from making anything more than tentative claims concerning causation. There are a number of plausible explanations why it has became increasingly common for corporate lawsuits against directors of Delaware public companies to be brought outside Delaware. Moreover, the out-of-Delaware trend would, even without changes to the plaintiffs' bar, foster at least some multi-jurisdictional filings.

An additional contribution of this Article is its tracing of the development of the plaintiffs' bar from the 1970s, when shareholder class actions under corporate and securities law first became important, to the present. In so doing, we address in part a curious gap in the academic literature on U.S. corporate law, namely limited analysis of the role the plaintiffs' bar plays in shaping the regulation and governance of public companies. The legal environment in the United States is uniquely hospitable to shareholder litigation involving public companies.[10] Plaintiffs' lawyers largely determine which lawsuits are brought and where.[11] The plaintiffs' bar therefore is an integral element of the legal ecosystem within which public companies function. Thus, the dearth of academic research on their role in bringing corporate lawsuits is a serious gap in our understanding of the regulation of public firms.

In the remainder of this Article, we explore the extent to which changes in the structure of the plaintiffs' bar may

[10] Brian R. Cheffins & Bernard S. Black, *Outside Director Liability Across Countries*, 84 TEX. L. REV. 1394, 1393–94 (2006); John Armour, Brian R. Cheffins, Bernard S. Black & Richard Nolan, *Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States*, 6 J. EMP. LEG. STUD. 701, 709–10 (2009).

[11] *ABC Balancing Act* (2012), *supra* note 1, Part II.A.

have influenced both venue choice and litigation rates. Part II summarizes our empirical research on the out-of-Delaware trend. Part III describes the growth of shareholder litigation under both corporate and securities law prior to 2000. Part IV discusses accompanying changes to the industrial organization of plaintiffs' law firms specializing in corporate and securities lawsuits. Part V then examines how that industrial organization, and opportunities to bring corporate suits outside Delaware, changed after 2000, and considers the impact of those changes on corporate litigation rates and where suits are filed. We focus exclusively on litigation involving public companies. We focus principally on litigation involving Delaware companies, although many of the changes in the plaintiffs' bar we document have implications for the frequency and venue of corporate lawsuits against non-Delaware companies.

II. TRENDS IN DELAWARE CORPORATE LITIGATION

We begin by briefly reviewing here the evidence, developed in our related research,[12] that corporate lawsuits involving Delaware companies are increasingly being brought outside Delaware and that litigation rates have increased for Delaware companies, at least for suits challenging M&A transactions. Readers who are familiar with this research can skip this part.

A. Our Data

In our empirical research, we rely on four different data sources which, taken together, support the emergence since 1995 of a strong "out-of-Delaware" trend in corporate lawsuits involving Delaware companies, coupled with trends toward greater overall frequency of litigation challenging mergers and other major corporate transactions, and greater frequency of suits in two or more jurisdictions. Table 1 summarizes our data sources, which cover large M&A

[12] *ABC Losing Cases* (2012), *supra* note 1.

transactions, LBO transactions, suits leading to reported decisions, and options backdating cases.

TABLE 1: SUMMARY OF DATASETS

Dataset	Starting Point	Search strategy	Time period	Sample
Large M&A Transactions	25 largest completed M&A transactions per year with US public target announced during each year	SEC filings—looking for incidence and details of lawsuits. Deal information from SDC Platinum.	1994-2010	Shareholder suits under corporate law were filed against the target and/or its board with 135 of the 282 (48%) Delaware companies in dataset.
Leveraged Buyout Transactions	Completed LBOs of US public companies announced during each year		1995-2010	Shareholder suits under corporate law were filed against the target and/or its board with 176 of the 339 (52%) Delaware companies in dataset.

Dataset	Starting Point	Search strategy	Time period	Sample
Judicial opinions	Cases where directors of public companies were sued under corporate law that gave rise to a publicly available judicial opinion	Lexis, Westlaw, Delaware Chancery Court websites	1995-2009	704 cases over 15 years, of which 540 (77%) involved Delaware companies.
Option Backdating suits	Companies where derivative suits were filed involving stock option backdating	Case lists compiled by a proxy advisory service, a D&O insurance expert, and plaintiff law firms	2002-2009, with 90% filed in 2006-2007.	127 Delaware companies.

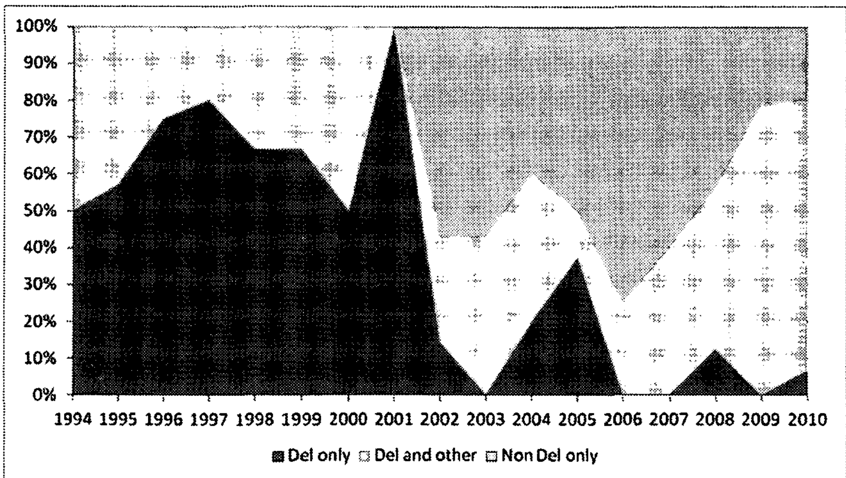
Source: *ABC Losing Cases* (2012), *supra* note 1.

B. Delaware Courts' Declining Share of Lawsuits Involving Delaware Companies

Each of our datasets provides distinct but complementary evidence of an out-of-Delaware trend. With large M&A transactions involving Delaware targets, between 1994 and 2001, 68% of the suits that were brought were filed in Delaware. From 2002 to 2010, this average dropped to 34%. With LBO lawsuits, while 73% of those involving Delaware companies were filed in Delaware between 1995 and 2001, from 2002 to 2010 the equivalent figure was 43%. For both datasets, the shift was primarily to other state courts rather than federal courts.

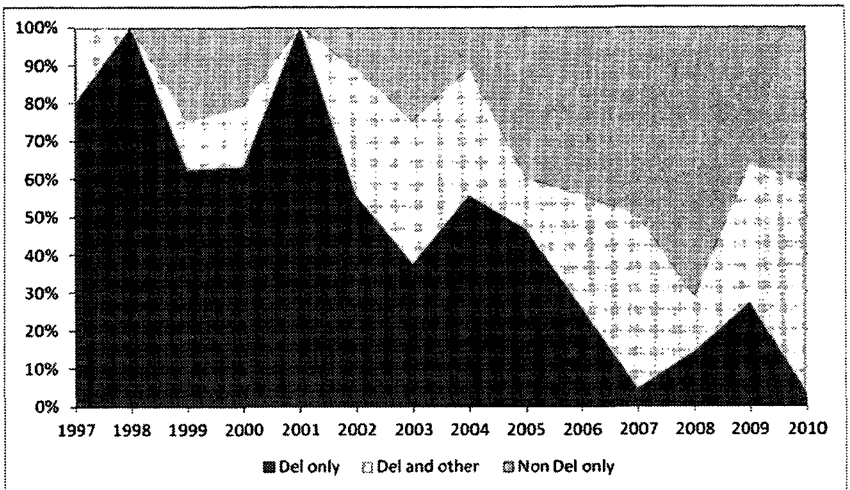
A parallel trend was that litigation became increasingly multijurisdictional, often at Delaware's expense. Figure 1 shows, for litigated large M&A transactions, the proportion where litigation took place (i) exclusively in Delaware; (ii) in Delaware and one or more other forum; and (iii) exclusively outside Delaware. The proportion where litigation was exclusively in Delaware dropped dramatically between 1994 and 2010 while instances where lawsuits were filed exclusively outside Delaware went from unknown to common. Figure 2 presents equivalent data for LBO transactions, where the trend was similar.

FIGURE 1: LITIGATION PATTERNS FOR LARGE M&A TRANSACTIONS INVOLVING DELAWARE TARGETS WHICH GENERATED LAWSUITS, 1994–2010



Source: *ABC Losing Cases* (2012), supra note 1, fig. 5.

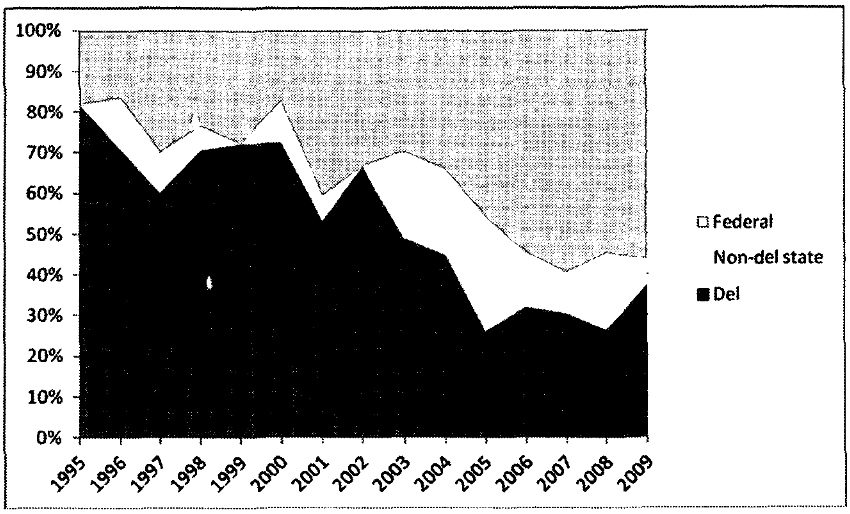
FIGURE 2: LITIGATION PATTERNS FOR LBO TRANSACTIONS INVOLVING DELAWARE COMPANIES WHICH GENERATED LAWSUITS, 1995–2010



Source: *ABC Losing Cases* (2012), supra note 1, fig. 9.

With cases involving Delaware public companies that generated publicly available opinions, the fraction of decisions issued by Delaware judges fell steadily, from 75% in 1995 to an average of 30% over 2005-2009 (Fig. 3). The gap was filled primarily by opinions issued by federal courts rather other state courts.

FIGURE 3: PROPORTION OF CORPORATE LAW DECISIONS INVOLVING DELAWARE COMPANIES BY LOCATION, 1995–2009



Source: *ABC Losing Cases* (2012), supra note 1, fig. 9.

Finally, with options backdating derivative suits, all of which were filed in the mid-2000s, with the 127 Delaware public companies affected, 101 of them involved suits solely outside Delaware. Of the 26 Delaware companies where derivative lawsuits were launched in Delaware, with only 4 (3%) did the suits occur *exclusively* in Delaware. The upshot is that while the Delaware courts have been termed "the Mother Court[s] of corporate law,"[13] the dominance they enjoyed in the 1990s has diminished substantially.

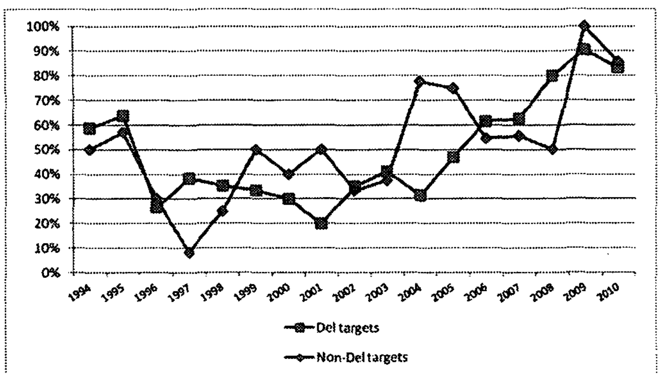
C. Rising Litigation Rates

In addition to the declining proportion of shareholder litigation involving Delaware companies occurring in

[13] Kamen v. Kemper Fin. Servs., 908 F. 2d 1338, 1343 (7th Cir. 1990), *rev'd on other grounds*, 500 U.S. 90 (1991), *quoted in* Jerue v. Millett, 66 P.3d 736, 745, n.26; Stephen A. Radin, *The New Stage of Corporate Governance Litigation: Section 220 Demands – Reprise*, 28 CARDOZO L. REV. 1287, 1288 (2006).

Delaware, we found a second, perhaps related trend—the likelihood that major M&A transactions and LBOs would attract a suit increased dramatically over our study period. Over our full 1994–2010 period, 48% of the large M&A transactions in our dataset attracted suits. In only two years prior to 2005, however, did this figure exceed 50% (1994 and 1995).[14] The proportion of litigated deals involving Delaware companies rose dramatically from 2005 onwards. Non-Delaware targets experienced a similar trend. Figure 4 shows these trends graphically.

FIGURE 4: PERCENTAGE OF THE 25 LARGEST M&A TRANSACTIONS THAT GENERATED CORPORATE LITIGATION, 1994–2010



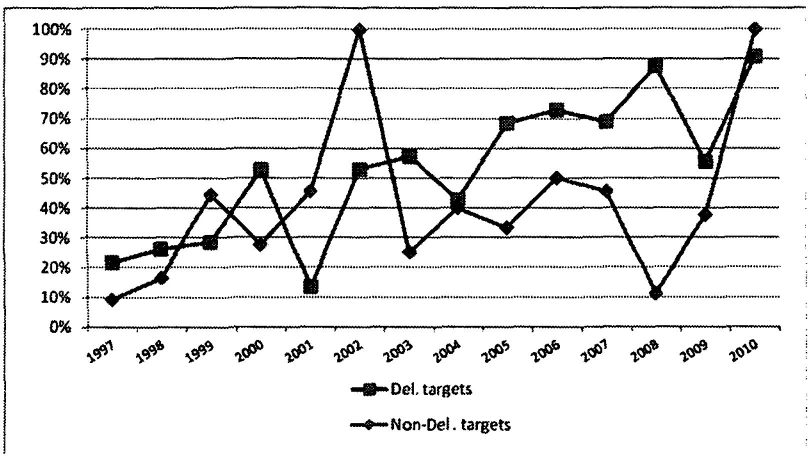
Source: *ABC Losing Cases* (2012), fig. 4.

Our LBO data reveal a similar pattern. The proportion of buyouts involving a Delaware company that generated shareholder-initiated litigation never exceeded 60% until

[14] Krishnan, Masulis, Thomas, and Thompson report a lower litigation rate than our results reveal, indicating that only 12% of M&A transactions involving public companies carried out in 1999 and 2000 generated shareholder litigation. C.N.V. Krishnan, Ronald W. Masulis, Randall S. Thomas & Robert B. Thompson, *Litigation in Mergers and Acquisitions* 12 (Vanderbilt Law & Econ. Research Paper No. 10-37, 2011), *available at* http://ssrn.com/abstract=1722227. They report in addition, however, that the litigation rate was higher with larger acquisitions, with the rate being 27% for takeover offers of a $1 billion or more. *Id.* at 23. This corresponds quite closely with our results for 1998 and 1999.

2005 but from 2005 on, this percentage was roughly 70% or higher in each year except 2009. Litigation rates also generally increased for non-Delaware targets. Figure 5 shows these trends graphically. Other studies confirm the high litigation rate in the last few years.[15]

FIGURE 5: PERCENTAGE OF LEVERAGED BUYOUTS THAT GENERATED CORPORATE LITIGATION, 1997–2010



Source: *ABC Losing Cases* (2012), fig. 8.

[15] *See, e.g.*, CORNERSTONE RESEARCH, RECENT DEVELOPMENTS IN SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS 2 (2012), *available at* http://www.cornerstone.com/files/News/d7e418ea-eb2c-4a17-8eae-de2510d9d1ba/Presentation/NewsAttachment/8b664075-ebfb-4cce-aa76-8a050befad03/Cornerstone_Research_Shareholder_MandA_Litigation.pdf (With M&A transactions with a value of $500 million or more, 95% resulted in shareholder litigation in 2010 and 96% in 2011.); Matthew D. Cain & Steven M. Davidoff, Takeover Litigation in 2011 2 (2012) (unpublished manuscript), *available at* http://ssrn.com/abstract=1998482 (percent of M&A transactions with value of $100 million or more attracting suits was 85% in 2010 and 94% in 2011).

D. Comparing Delaware Companies with Non-Delaware Companies

Figures 4 and 5 show broadly similar rising litigation rates for both Delaware companies and companies incorporated elsewhere, for both large M&A transactions and LBOs. This graphical depiction is supported by regression analysis, presented in our companion empirical paper.[16] This suggests that whatever causal mechanisms explain the upward trend in litigation involving Delaware targets are not specific to Delaware.

What about the out of Delaware trend discussed in Section II.B? Is this trend Delaware-specific or has the proportion of litigation outside the state of incorporation increased similarly for firms incorporated elsewhere? Our regression analysis indicates that the migration of litigation away from the state of incorporation is stronger for Delaware than for non-Delaware firms.[17] This suggests that the out-of-Delaware trend reflects, to a substantial extent, factors that are unique to Delaware companies, or at least impact them more intensely.

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[16] For M&A transactions, we found a statistically significant upward time trend for all target companies, regardless of state of incorporation. For LBOs, we found a statistically significant upward time trend for all companies incorporated outside their home state, whether the incorporation state was Delaware or elsewhere.

[17] In investigating this question, one must distinguish between non-Delaware firms incorporated in their home (headquarters) state and those incorporated away from home ("away incorporators"). Delaware companies almost always fall into the latter category. Home-state incorporators typically present plaintiffs with only two possible litigation fora—home state courts and federal courts in the home state—whereas away incorporators present three: home state, incorporation state, and federal court in the home state. Thus, the appropriate comparison is between Delaware firms and other away incorporators. We find a statistically significant increase over time in the probability that litigation will bypass the state of incorporation for Delaware targets, but not for other away incorporators.

III. CORPORATE AND SECURITIES LITIGATION, PRE-2000

A. Shareholder Lawsuits Under Corporate Law During the 1970s

The rising rate of corporate litigation involving Delaware companies described in Part II fits with general trends going back at least half-a-century. It is widely believed that the U.S. experienced a "litigation explosion" during the second half of the 20th century.[18] One can also see such a pattern for corporate and securities litigation involving public companies, which emerges beginning in the 1970s and 1980s.

Shareholder suits under corporate law were by no means unknown during the middle decades of the 20th century. Many public companies were incorporated in Delaware, so as one might expect, many of the suits were against Delaware companies.[19] A 1961 *Wall Street Journal* article referred to "A number of Manhattan-based lawyers (who) specialize in stockholder suits . . . counting on their occasional victories to bring them substantial fee awards by the courts" and discussed a lawyer based in Wilmington, Delaware saying he represented "firms in about 20 stockholder actions a year, double the number five years ago."[20] Still, through the 1970s,

[18] Lawrence M. Friedman, *The Litigation Revolution*, *in* THE CAMBRIDGE HISTORY OF LAW IN AMERICA: VOLUME III – THE TWENTIETH CENTURY AND AFTER (1920–) 175, 176–77 (Michael Grossberg & Christopher L. Tomlins eds., Cambridge Univ. Press 2008).

[19] We know of no work, prior to our own, summarized in Part II, that assesses for the 1950s and 1960s the relative likelihood of corporate lawsuits for Delaware companies versus other public companies.

[20] Harlan Byrne, *Companies in Court: Stockholders File More Suits, Sparking Debate Among Lawyers*, WALL ST. J., Apr. 27, 1961, at 1. *See also* Wayne E. Green, *Executives in Court: More Company Officers are Sued for Negligence in Running Their Firms*, WALL ST. J., June 29, 1966, at 1 ("[S]tockholder suits against executives are making frequent headlines.").

shareholder suits under corporate law remained something of a backwater.[21]

William Lerach, a leading securities lawyer from the 1980s through to the mid-2000s, said derisively of plaintiffs' lawyers who litigated in Delaware during this era that they "pestered and pecked and settled their cases cheaply and made their living."[22] Roberta Romano similarly said in a widely cited 1991 study of shareholder suits under corporate law in the 1970s that "shareholder lawsuits (were) rare."[23] She searched securities filings to track down shareholder suits under corporate law affecting a random sample of 535 publicly-traded companies, a majority of which were traded over-the-counter or on NASDAQ rather than the New York Stock Exchange. The litigation frequency per corporation for her sample was one lawsuit every 82 years.[24]

Shareholder-litigation was more somewhat more common when larger companies were involved. Thomas Jones, in a 1980 study, searched securities filings by 190 publicly traded companies sampled from 1975 *Fortune* lists of large firms to find derivative suits, shareholder class actions and individual shareholder lawsuits filed between 1971 and 1978.[25] Among these 190 companies, 58 (31%) faced shareholder litigation over the eight year period; thus the directors of a typical corporation in the sample faced roughly a 1-in-18 annual risk of a shareholder lawsuit. Jones nevertheless observed, "[t]he burden of shareholder lawsuits on corporate executives does not appear to be overwhelming."[26]

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[21] Peter Elkind, *The King of Pain is Hurting*, FORTUNE, Sept. 4, 2000, at 190.

[22] DILLON & CANNON (2010), *supra* note 9, at 70.

[23] Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55, 59 (1991).

[24] *Id.* at 60.

[25] Thomas J. Jones, *An Empirical Examination of the Incidence of Shareholder Derivative and Class Action Lawsuits, 1971-1978*, 60 B.U. L. REV. 306 (1980).

[26] *Id.* at 313.

Romano found that Delaware courts and federal courts were both popular venues for lawsuits involving Delaware corporations, but it was rare for lawsuits to be brought in a state court other than Delaware's.[27] Yet there was scarcely a litigation frenzy in Delaware.[28] A 1984 *Wall Street Journal* article on the Delaware Court of Chancery observed that the court was "militantly informal, and small."[29] As we will see in sub-section C this would change in the 1980s as hostile takeovers became more frequent and LBOs became a major M&A phenomenon.

B. Securities Class Actions

While shareholder litigation under Delaware corporate law remained something of a backwater in the 1970s, matters were changing dramatically for suits under federal securities law. Various post-World War II legal changes set the stage for a dramatic rise in securities class actions in the 1970s.[30] During the mid-1940s, federal courts began permitting private suits to be brought for violations of Rule 10b-5, the general anti-fraud provision in Section 10(b) of the Securities Exchange Act of 1934.[31] The Supreme Court ruled in 1964 in *J.I. Case Co v. Borak* that investors could sue for damages and for injunctive relief for false and misleading statements in proxy materials issued to shareholders in

[27] *See* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 41 (1993) (reporting based on the same dataset as the one relied upon in Romano (1991), *supra* note 23, that of thirty-five lawsuits that involved Delaware corporations that were not filed exclusively in federal court, twenty-nine were filed in the Delaware Court of Chancery).

[28] Mary Williams, *Delaware's Sedate Chancery Court Is a Major Corporate Battleground*, WALL ST. J., May 10, 1984, at 33.

[29] Williams (1984), *supra* note 28.

[30] For an overview, see Michael A. Perino, *The Milberg Weiss Prosecution: No Harm, No Foul?*, 11–13 (St. John's Legal Studies Research Paper No. 08-0135, May 2008), *available at* http://ssrn.com/abstract =1133995.

[31] Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946); 17 C.F.R. § 240.10b-5 (2012).

contravention of section 14(a) of the Exchange Act.[32] In 1968, *Escott v. BarChris Construction Corp.* suggested that the federal courts would hold underwriters and directors to a high standard in meeting their "due diligence" defense in suits involving public offerings under section 11 of the Securities Act of 1933.[33] Finally, growing lower court acceptance in the 1970s of what became known as the "fraud-on-the-market" theory indicated shareholders could bring lawsuits alleging misdisclosure under Rule 10b-5 even if they had not seen or relied upon misstatements allegedly made, thus making it much easier for plaintiffs to launch 10b-5 class actions.[34]

This expansion in substantive causes of action was complemented by procedural innovations. In 1966, amendments to Rule 23 of the Federal Rules of Civil Procedure eased the way for claims for securities fraud to be framed as class actions. The most important change was that an aggrieved investor, who previously had to opt in to be part of a class, now had to opt out if the investor did not want to participate.[35] Henceforth, not only could plaintiffs' lawyers aggregate readily myriad small claims into a class action covering almost all shareholders, but defendants had a convenient way to cap their exposure by settling the class action.[36]

The potential for lucrative settlements of securities class actions became evident when Milberg Weiss negotiated in 1973 a $2 million settlement at the end of a lengthy trial in a

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[32] J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

[33] 283 F. Supp. 643 (S.D.N.Y. 1968).

[34] DILLON & CANNON (2010), *supra* note 9, at 59; Note, *The Fraud-on-the-Market Theory*, 95 HARV. L. REV. 1143, 1148–52 (1982).

[35] DEBORAH R. HENSLER, NICHOLAS M. PACE, BONITA DOMBEY-MOORE, BETH GIDDENS, JENNIFER GROSS & ERIK K MOLLER, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 13–15 (2000).

[36] Perino (2008), *supra* note 30, at 12; Paul G. Mahoney, *The Development of Securities Law in the United States*, 47 J. ACCT. RES. 325, 333 (2009).

case involving Dolly Madison Industries.[37] This was a huge amount at the time, but just as important was who paid, namely Touche Ross, Dolly Madison's accountants. The settlement indicated that liability under Rule 10b-5 could extend to third party advisers with deep pockets, a point that had not been previously established.

The available data confirm the rise to prominence of securities litigation. Paul Mahoney reports that whereas only ten Rule 10b-5 class actions resulted in a reported case prior to 1962, there were seven such cases in 1966, sixteen in 1967 and nearly forty by 1970.[38] According to data compiled by the Administrative Office of the United States Courts, in 1961 171 private actions involving federal securities laws (including lawsuits involving commodities and exchanges) were filed, which constituted 0.4% of all federal civil filings. By 1975 over 2,200 federal securities lawsuits were filed, which was 2.7% of all federal civil filings (see Figure 6). The number of distinct companies who faced securities class action lawsuits was much smaller, but likely numbered in the hundreds.[39]

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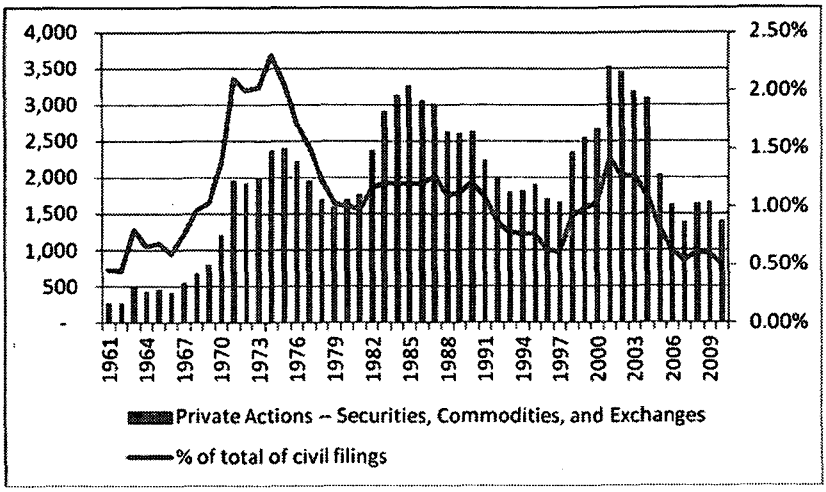
[37] DILLON & CANNON (2010), *supra* note 9, at 59–60; GOULDEN (2006), *supra* note 9, at 261–62.

[38] Mahoney (2009), *supra* note 36, at 334 fig. 1.

[39] As Michael Perino, who collected this data for 1961 to 2006, points out, these figures overstate the litigation rate because issuers frequently face multiple complaints. Also, the available data combine securities lawsuits with suits involving commodities and exchanges. Inconsistent record-keeping from jurisdiction to jurisdiction prior to the mid-1990s further compromises reliability: Julie Stoiber, *A New Era for Plaintiffs' Attorneys*, PHILA. INQUIRER, Dec. 10, 1995, at E1. Nevertheless, the data should provide a reasonable sense of time trends in securities litigation: Perino (2008), *supra* note 30, at 12 n.13. The earliest available data we have found that corrects for these problems, by being limited to securities class actions and counting the number of *companies sued*, rather than the number of *lawsuits filed*, goes back to 1991. Over 1991–95, the number of annual class action suits, counted on this basis, ranged from 167 to 244. *See* Todd Foster, Ronald I. Miller & Stephanie Plancich, *Recent Trends in Shareholder Class Action Litigation: Filings Plummet, Settlements Soar*, NERA ECON. CONSULTING (Jan. 2007), http://www.nera.com/extImage/BRO_Recent_Trends_SEC1288_FINAL_0307.pdf.

FIGURE 6: PRIVATE SECURITIES ACTIONS IN FEDERAL COURTS, 1961–2010



Source: Data from Administrative Office of the United States Courts.

The explosive growth in securities litigation stalled in the mid-1970s and the litigation rate even fell in the late 1970s and early 1980s.[40] This may have been partially attributable to a more restrictive judicial approach to these suits.. Beginning in the mid-1970s, the courts halted and partially reversed an earlier trend of being liberal in finding implied private rights of action for provisions, such as Exchange Act section 10(b), which did not expressly include these rights.[41] Nevertheless, federal securities litigation surged again in the

[40] In addition to the data in Figure 6, see Barbara Ann Banoff & Benjamin S. Duvall, *The Class Action as a Mechanism for Enforcing the Federal Securities Laws: An Empirical Study of the Burdens Imposed*, 31 WAYNE L. REV. 1, 45–46 (1984).

[41] Jayne W. Barnard, *The Supreme Court and the Shareholder Litigant:* Basic, Inc. v. Levinson *in Context*, 16 PEPP. L. REV. 985 (1989). The Supreme Court's decision in *Santa Fe Industries v. Green*, 430 U.S. 462 (1977), is widely regarded as a significant turning point.

mid- and late-1980s, with annual filing rates regularly over 2,500.[42]

One spur for suits was a surge in the number of initial public offerings, particularly by high technology companies.[43] Lawsuits became commonplace whenever a public offering was followed by a marked dip in share prices.[44] Hi-tech companies were particularly susceptible because their share prices often fluctuated markedly due to technology changes.[45]

The trends involved had a strong geographic orientation. During the 1970s securities litigation was concentrated in the Southern District of New York, where the New York Stock Exchange is located.[46] California was not yet a common forum for these suits.[47] In contrast, the 1980s wave of securities litigation centered around Silicon Valley, with many suits filed in the Northern District of California.[48]

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[42] *See supra* at p. 447 fig. 6; *see also Securities Fraud Litigation: Both Sides Agree it is a Never-Ending Battle*, CORP. LEGAL TIMES, Sept. 1992, at 1 (quoting remarks by William Lerach indicating that the number of securities class actions rose steadily from 1982 to 1991).

[43] Roberta Romano, *What Went Wrong With Directors' and Officers' Liability Insurance?*, 14 DEL. J. CORP. L. 1, 14 (1989).

[44] W. John Moore, *Litigators Replace Capitalists as Kings of Silicon Valley*, LEGAL TIMES, July 2, 1984, at 1.

[45] Ross Kerber, *Shareholder Suits Prompt Reform Push*, WASH. POST, Aug. 8, 1993, at H1; Damon Darlin, *A Nice, Clean California Industry*, FORBES, Aug. 26, 1996, at 46 (indicating that between 1989 and 1994 securities class actions were launched against fifty-three of California's top 100 high-tech companies).

[46] Banoff & Duvall (1984), *supra* note 40, at 37 (estimating that one-third of private securities cases were brought in the Southern District of New York).

[47] Elkind (2000), *supra* note 21.

[48] Nanette L. Stasko, *Competitive Bidding in the Courthouse: In Re Oracle Securities Litigation*, 59 BROOK. L. REV. 1667, 1670–71 (1994); *Securities Fraud Litigation* (1992), *supra* note 42 (indicating that between 1988 and 1991, 30% of federal securities class actions were filed in California, tops in the country); Milt Policzer, *They've Cornered the Market*, NAT'L L.J., Apr. 27, 1992, at 1 (citing a study by the Law and Economics Consulting Group reporting that 28% of securities fraud class actions were filed in the federal district courts of Los Angeles, San Francisco and San Diego).

As can be seen from the data in Figure 6 on total filings under securities law, the securities litigation surge during the 1980s was reversed to some degree in the early 1990s. However, the number of securities suits which were *class actions* continued to grow.[49] A plausible explanation is that in 1988 in *Basic, Inc. v. Levinson* the U.S. Supreme Court affirmed the fraud-on-the market doctrine,[50] a ruling that led the *Wall Street Journal* to say "[t]his case opens the way to huge class actions."[51]

The surge in securities litigation surge prompted a backlash from the defendants, including accounting firms, high-tech companies, and venture capital firms who provided capital for the high-tech ventures.[52] This backlash led to the Private Securities Litigation Reform Act of 1995.[53] The PSLRA altered securities litigation in three ways relevant to our story: (1) it tightened rules governing pleading and discovery to make it more difficult for a suit to survive a motion to dismiss; (2) in the common situation where two or more suits were filed arising from the same facts, which were later consolidated into a single suit, it made institutional shareholders the preferred lead plaintiffs for the consolidated

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[49] Kerber (1993), *supra* note 45; *see also* Michael Selz, *Lawsuits Often Follow When Small Firms Go Public*, WALL ST. J., Jan. 13, 1992, at B2 (citing data from Class Action Reports, a Washington newsletter, indicating that more securities class actions were filed in 1990 and 1991 than in the previous five years).

[50] Basic, Inc. v. Levinson, 485 U.S. 224 (1988).

[51] *Disclosing the Court's Confusion*, WALL ST. J., Mar. 9, 1988, 26; *see also* GOULDEN, *supra* note 9, at 268 (quoting the president of the Securities Industry Association, who said that the case provided "a lever to coerce a settlement by translating an amorphous fraud allegation into an astronomical damage claim").

[52] Kerber (1993), *supra* note 45; GOULDEN (2006), *supra* note 9, at 286; Kathleen Day, *When Shareholders Sue*, WASH. POST, Jan. 31, 1994, at 1.

[53] Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

suit; and (3) it limited the ways in which plaintiffs' lawyers could seek suitable named plaintiffs.[54]

Numerous plaintiffs' lawyers initially side-stepped the PSLRA by bringing securities class actions in state court.[55] Congress reacted to these state class actions by enacting the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), which gave defendants the right to remove a state law securities class action lawsuit to federal court, where it would be judged under the PSLRA.[56] State law securities class actions quickly disappeared,[57] and the number of federal class action suits returned to near its pre-PSLRA level.[58]

C. Corporate Lawsuits in the 1980s: A Merger-Driven Surge

Corporate litigation surged in the 1980s, though for a different reason than securities litigation. For example, Romano reports that while the frequency of shareholder lawsuits for her sample companies was one suit every 82 years during the 1970s, this rate more than doubled to one lawsuit every 34 years in the 1980s.[59] This litigation surge was attributable primarily to lawsuits involving mergers and acquisitions, which Romano found increased fivefold after

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[54] GOULDEN (2006), *supra* note 9, at 287; Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1493–94 (2006).

[55] Peter Bassett & Kelly C. Wilcove, *Post Reform Act Developments in Derivative, Financial Advisor, and State Court Securities Litigation*, 1199/PLI CORP. 545, 550–51 (2000); Jordan A. Costa, *Removal of Securities Act of 1933 Claims After SLUSA: What Congress Changed and What It Left Alone*, 78 ST. JOHN'S L. REV. 1193, 1202–03 (2004).

[56] Pub. L. No. 105-353; 112 Stat. 3227 (codified in scattered sections of of 15 U.S.C.).

[57] Costa (2004), *supra* note 55, at 1205; David Priebe, *Piling On: The Reemergence of the Parallel Derivative Lawsuit as the Federal Securities Class Action Window Closes*, 1136 PLI/CORP. 333, 335, 339 (1999).

[58] Choi & Thompson (2006), *supra* note 54, at 1496.

[59] Romano (1991), *supra* note 23, at 60.

1980, amidst a decade of hectic deal-making.[60] There was a surge in hostile takeover bids in the 1980s, and this trend, together with the emergence of leveraged buyouts fostered litigation.[61] Both the defenses deployed by targets against hostile bids, and management participation in LBOs, gave rise to plausible claims that the defendants had acted in a self-interested manner. The *Washington Post* captured the trend in a 1988 article on shareholder lawsuits, saying "[a]s corporate takeovers and management buyouts have boomed over the last several years, the whole system of filing, litigating and settling class action lawsuits on behalf of public shareholders has become at times a cynical and profitable game played by and for lawyers . . . ."[62]

Delaware was the center of the surge in M&A lawsuits. The register of the Delaware Court of Chancery reportedly was "bustling" as "automatic" complaints became more common in takeover deals, in the sense that lawsuits were often filed as soon as deals were announced.[63] As Chancellor William Allen remarked in a 1989 settlement ruling arising from an acquisition case, "[e]very time there is an announced offer, there is an industry of class action lawyers who will file a suit, even when a board is fully independent and fully functioning to meet its obligations."[64] At the same time, our data on litigation rates, discussed in Section II.D, indicates that many deals did not attract suits. Even among the largest 25 deals in each year, fewer than half attracted litigation through the early 2000s; the proportion of smaller deals that attracted suits presumably was even lower. Only

[60] *Id.*; Romano (1989), *supra* note 43, at 13–14.

[61] On the changes in takeover tactics in the 1980s, see John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers? The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1755–56 (2007); Brian R. Cheffins, *Introduction*, *in* 1 THE HISTORY OF MODERN U.S. CORPORATE GOVERNANCE, at ix, xxii (2011).

[62] Steve Coll & David A. Vise, *Shareholder Lawsuits: Profitable New Path for Attorneys*, WASH. POST, July 24, 1988, at H1.

[63] Anthony Borden, *The Shareholder Suit Charade*, AM. LAW., Dec. 1989, at 67.

[64] Borden (1989), *supra* note 63, at 68.

very recently has nearly every sizeable deal attracted a challenge. Moreover, during the 1980s only a small minority of the M&A suits filed in Delaware courts actually resulted in serious litigation. Reportedly, there were by the end of the decade hundreds of neglected, if technically open, cases.[65]

Shareholder litigation involving Delaware public companies continued to have a strong M&A orientation thereafter. In two related studies, Thompson and Thomas examined all complaints filed in the Delaware Court of Chancery in 1999 and 2000.[66] They found 294 companies who faced a suit claiming breach of fiduciary duty was alleged (often, one set of facts attracted more than one suit, but the suits were normally consolidated). Of these, 213 (73%) were M&A-related class actions, and six additional cases were M&A-related derivative suits.[67]

While Delaware courts were a popular venue for shareholder litigation involving Delaware companies, not all plaintiffs' lawyers were enamored with Delaware. William Lerach, then based in Milberg Weiss's San Diego office, was probably the first plaintiffs' lawyer who chose with regularity to sue under Delaware corporate law in state court outside Delaware.[68] This began as far back as 1984, when Lerach filed a lawsuit targeting directors of Walt Disney Company in Los Angeles Superior Court.[69] This was not merely a matter of convenience for the San Diego-based attorney. Instead, in a 1990 Practising Law Institute paper, Lerach denounced Delaware's "decades-long history of

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[65] *Id.*

[66] Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133 (2004); Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747 (2004).

[67] Thompson & Thomas, *Class Actions* (2004), *supra* note 66, at 168–69; Thompson & Thomas, *Derivative Lawsuits* (2004), *supra* note 66, at 1772–73.

[68] Lerach's entrepreneurship in this regard was recognized by Vice Chancellor Laster. *See In re* Compellent Techs., Inc. S'holder Litig., C.A. No. 6084-VCL, 2011 WL 6382523, at *19 (Del. Ch. Jan. 13, 2011).

[69] DILLON & CANNON, *supra* note 9, at 80–81.

accommodating complaining corporate interests" and praised the California courts for having "repeatedly recognized the importance of shareholder lawsuits to help control and remedy corporate fiduciary misconduct."[70]

Lerach's aversion to Delaware was pragmatic rather than dogmatic. He remained perfectly prepared to file in Delaware when he saw an advantage from doing so. For instance, in the run up to a 1990 settlement in California state court where Milberg Weiss was lead counsel in a derivative suit involving Carolco Pictures that generated $6.5 million in attorneys' fees, Milberg Weiss only filed a number of cases in California on behalf of various plaintiffs, and filed in Delaware as well. Defense counsel observed that the "plaintiff and its law firms have filed actions, dismissed actions, and re-filed actions in search of a friendly forum."[71]

IV. THE PLAINTIFFS' BAR, PRE-2000

A. The Structure of Plaintiffs' Law Firms

In the United States the legal profession grew dramatically in size during the closing decades of the 20th century.[72] Compensation for the provision of legal services rose from $695 million in 1960, or 0.23% of compensation of all employees, to $10.5 billion in 1980 (0.63% of all

[70] William S. Lerach, *Securities Class Actions and Derivative Litigation Involving Public Companies: One Plaintiff's Perspective*, PRAC. L. INST., LITIG., Oct. 1990, at 65, 201, 218.

[71] Milt Policzer, *They've Cornered the Market*, NAT'L L.J., Apr. 27, 1992, at 1 (quoting Dean J. Kitchens and Wesley G. Howell of Los Angeles-based corporate firm Gibson, Dunn).

[72] Robert W. Gordon, *The American Legal Profession, 1870-2000, in* CAMBRIDGE HISTORY (2008), *supra* note 18, at 73, 113, 116; MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 39–40 (1991); ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 274, 291–93 (1993).

compensation) and $46.1 billion in 2000 (1.39%).[73] This growth was accompanied by a shift toward practice in much larger firms, described by Marc Galanter as "mega-law" and "mega-lawyering".[74] The number of law firms with fifty or more lawyers increased from five in 1949 and thirty-eight as of 1960 to at least 287 by 1990.[75] Similarly, while as of 1978 there were 15 firms with more than 200 lawyers, the equivalent figure was 105 in 1987 and 196 in 2005.[76] Law firms expanded to accommodate client preferences for integrated legal services and to cope with rising demand for transactional legal services, driven in large part by an increase in the number, size and scale of corporate mergers.[77]

Client demand for integrated legal services meant that attorneys specializing in civil litigation on the defense side were part of the mega-firm trend. The human capital of a top-flight litigator tends to be personal, often portable to a different firm, and hard to lend to associates in a way that supports firm growth.[78] Matters were different in law firms representing large corporate clients. If a transaction attracted litigation, litigators in the firms which had handled the transaction could work on the litigation, in cooperation with the firm's transactional lawyers. Transactional lawyers could also refer other client matters to their litigation

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[73] Derived from Table 6.2B, 6.2C and 6.2D, *available at* http://www.bea.gov/national/nipaweb/SelectTable.asp (last visited May 2, 2012).

[74] Marc Galanter, *Mega-Law and Mega-Lawyering in the Contemporary United States*, *in* THE SOCIOLOGY OF THE PROFESSIONALS: LAWYERS, DOCTORS AND OTHERS 152, 153 (Robert Dingwall & Philip Lewis eds., 1983).

[75] Gordon (2008), *supra* note 72, at 115; Brent Irby, *Moving Toward Interstate Advocacy: Ethical Concerns Facing Multistate Practitioners*, 22 J. LEGAL PROF. 289, 290–91 (1998).

[76] Gordon (2008), *supra* note 72, at 115; Diane Wagner, *The New Elite Plaintiffs' Bar*, A.B.A. J., Feb. 1, 1986, at 44.

[77] Randall S. Thomas, Stewart J. Schwab & Robert G. Hansen, *Megafirms*, 80 N.C. L. REV. 115, 134, 136–44 (2001).

[78] GALANTER & PALAY (1991), *supra* note 72, at 109–10; Coffee (1986), *supra* note 8, at 707.

partners. Conversely, a litigator in a mega-firm could refer his corporate clients to the firm's transactional lawyers.

Reflecting these complementarities in operation, litigation became an increasingly important part of the mega-firm business model. During the 1960s, 1970s, and 1980s corporate clients became increasingly willing to litigate as part of business strategy.[79] Thus, while in the 1950s, elite "corporate" law firms often treated litigation as a sideline and even a second-class activity, by the 1980s it was a key aspect of mega-firm practice.[80]

Matters were different with on the plaintiff side. Named plaintiffs in shareholder litigation were typically individuals or public pension funds, who had little demand for transactional legal services, as well as less need for referrals to litigators with other specialties. Thus, plaintiffs' law firms had less of the "firm specific" capital that induces loyalty among members of a typical corporate-oriented "mega-firm."[81] The result was that plaintiffs' litigation firms were likely to be smaller and less stable than the law firms representing corporations or their directors

The historical evidence bears out these conjectures. Plaintiff law firms were largely immune to the "mega-lawyering" trend. As Jack Coffee observed in a 1985 law review article on shareholder litigation, "[T]he empirical reality is clear: most plaintiffs' attorneys are either solo practitioners or are associated with relatively small firms."[82] This general proposition also largely held true for plaintiffs' firms which brought corporate and securities suits. As of 1985, Milberg Weiss, the largest plaintiff's firm specializing

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[79] GALANTER & PALAY (1991), *supra* note 72, at 43–44, 51; LINCOLN CAPLAN, SKADDEN: POWER, MONEY, AND THE RISE OF A LEGAL EMPIRE 139–40 (1993); Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and its Values*, 59 BROOK. L. REV. 931, 939–45 (1993).

[80] GALANTER & PALAY (1991), *supra* note 72, at 32–33, 51.

[81] Coffee (1986), *supra* note 8.

[82] Coffee (1985), *supra* note 8, at 22; *see also id.* at 20 ("Almost invariably, plaintiffs' firms are significantly smaller than firms that specialize in defense work.").

in securities class actions, had thirty-seven lawyers, while the 500th largest law firm in the United States had fifty-four.[83]

Plaintiffs' firms remained largely immune to the mega-firm trend in the 1990s. According to a 1996 list of the 1000 largest law firms engaged in business litigation, Milberg Weiss, still the largest corporate and securities specialist firm, ranked 322nd.[84] Of the twenty-six law firms that filed ten or more shareholder lawsuit complaints in the Delaware Court of Chancery in 1999 and 2000,[85] only twelve were listed in the 2001 version of the Martindale-Hubbell Law Directory, widely recognized as providing the most definitive directory of U.S. law firms (Table 2). Of these only one, Milberg Weiss, had more than fifty lawyers, and none had more than 100.

TABLE 2: LAW FIRMS BRINGING 10 OR MORE SHAREHOLDER LAWSUITS IN DELAWARE, 1999–2000, LISTED IN MARTINDALE-HUBBELL

Rank	Law Firm	Complaints Filed	Number of Lawyers	Head Office
1	Goodkind Labaton	86	47	New York
3	Wechsler, Harwood	69	11	New York
4	Abbey, Gardy	67	14	New York
5	Bernstein, Liebhard	67	8	New York
8	Milberg, Weiss	46	68	New York
10	Wolf Popper	41	20	New York

[83] Coffee (1986), *supra* note 8, at 786.

[84] *The U.S. Business Litigation 1,000 Largest Law Firms*, CORP. LEGAL TIMES, Sept. 1996, at 14.

[85] As listed by Thompson & Thomas, *Class Actions* (2004), *supra* note 66, at 186–87.

Rank	Law Firm	Complaints Filed	Number of Lawyers	Head Office
11	Wolf, Haldenstein	40	45	New York
16	Kirby, McInerney	21	16	New York
17	Chimicles & Tikellis	16	14	Haverford PA
20	Beatie & Osborn	11	7	New York
21	Berger & Montague	11	49	Philadelphia
24	Garwin, Bronzaft	10	12	New York

Source: Thompson & Thomas (2004a), *supra* note 66; Martindale-Hubbell Law Directory (2001). Rank is based on number of corporate lawsuits filed in Delaware Chancery Court.

Matters were much the same with the law firms that brought the largest number of securities class actions. The Securities Class Action Services 50 ("SCAS 50"), available from 2003 on, ranks annually the top fifty plaintiffs' law firms by the total dollar amount of securities class-action settlements in which each law firm served as lead or co-lead counsel.[86] Of the top ten law firms in the initial 2003 SCAS 50, only one had more than 100 lawyers – Milberg Weiss – and only one other had more than fifty (Table 3).[87]

[86] These annual lists were provided to us by Institutional Shareholder Services ("ISS"), which compiled them.

[87] Lawyer counts are from Martindale-Hubbell. Press reports indicated that Milberg Weiss may have had more lawyers than Martindale-Hubbell indicated. *See* Jonathan D. Glater, *Firm Famed for Holders' Suits May Split*, N.Y. TIMES, June 11, 2003, at C1 (saying the firm had 220 lawyers).

TABLE 3: TOP 10 LAW FIRMS IN SCAS 50, 2003

Law Firm	Total Settlements ($ million)	Number of Lawyers
Milberg Weiss	2,112	109
Bernstein Litowitz	950	8
Grant & Eisenhofer	611	25
Goodkind Labaton	551	45
Barrack, Rodos	390	Not listed in M-H
Entwistle & Cappucci	311	30
Chitwood & Harley	303	16
Berger & Montague	272	61
Wolf Haldenstein	219	M-H information incomplete.[88]
Wolf Popper	209	19

Sources: Institutional Shareholder Services, Securities Class Action Services 50 (2003); *Martindale-Hubbell Law Directory* (2004) (M-H).

B. Securities Class Actions: The Dominance of Milberg Weiss

As the 20th century drew to a close, the plaintiffs' bar specializing in corporate and securities lawsuits, not only lacked mega-firms, it included relatively few key players. With securities class actions, Milberg Weiss' dominance was striking. As the *New York Times* observed in 2004, the firm "towered like no other over the combative business of suing corporations."[89] Melvyn Weiss said that the 1973 settlement his firm reached with Dolly Madison and its accountants

[88] In the 2004 edition of Martindale-Hubbell, only two lawyers are listed. 6 MARTINDALE-HUBBELL LAW DIRECTORY 836B (2004) (Illinois). Yet the firm had offices in four cities and had forty-five lawyers listed in the 2001 edition. 15 MARTINDALE-HUBBELL LAW DIRECTORY 1555B–1558B (2001) (New York).

[89] Timothy O'Brien, *Behind the Breakup of the Kings of Tort*, N.Y. TIMES, July 11, 2004, at BUS1.

"established our reputation for financial fraud – we were *the* firm thereafter."[90] By the early 1980s, Weiss was recognized as the nation's leading securities class action lawyer.[91] A 1988 article on Weiss' partner William Lerach christened Lerach a "[o]ne-Man Bull Market in Shareholder Suits" and *Newsweek* labeled Lerach "[t]he Lawyer CEOs Love to Hate" in 1996.[92] Between 1990 and 1995 Milberg Weiss had a 28% "market share" of the total amount of all securities class action settlements, computed by the size of the settlements for which the firm acted lead counsel. This was well ahead of the second-placed firm, Wolf Haldenstein, at 11%.[93]

The enactment of the PSLRA in 1995 posed a seemingly serious threat to Milberg Weiss' dominance. According to one Silicon Valley lawyer, the PSLRA was "a bill of attainder against Bill Lerach."[94] The PSLRA indeed targeted practices commonly associated with Milberg Weiss, as it prohibited some types of fees payable for referring a lawsuit to a law firm, barred shareholders from buying stock specifically so they could sue and forbade members of a class from receiving payments disproportionate to their share of the recovery.[95]

Ironically, though, Milberg Weiss' market dominance increased post-PSLRA. For many smaller plaintiff-side firms the PSLRA's class action roadblocks seemed insuperable. Milberg Weiss, on the other hand, was able to use its size and ample capital to conduct the extensive investigation needed to meet the new detailed pleading standards.[96]

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[90] GOULDEN (2006), *supra* note 9, at 262 (emphasis in original).

[91] Tamar Lewin, *Class Actions Pay for Some Lawyers*, N.Y. TIMES, Dec. 5, 1983, at D1.

[92] Lyle Crowley & Karen Dillon, *One-Man Bull Market in Shareholder Suits*, AM. LAW., Mar. 1988, at 28; GOULDEN (2006), *supra* note 9, at 250 (quoting the Newsweek article).

[93] Choi & Thompson (2006), *supra* note 54, at 1515.

[94] Elkind (2000), *supra* note 21, at 204. Defense lawyers also reputedly called the legislation "[t]he Let's Get Bill Lerach Act of 1995." GOULDEN (2006), *supra* note 9, at 284.

[95] DILLON & CANNON (2010), *supra* note 9, at 228.

[96] *Id.* at 268–69; Renee Deger, *State of Alert*, RECORDER (San Francisco), Aug. 9, 2001, at 1 ("With institutional investors increasingly

Moreover, the PSLRA provision presumptively allocating the lead counsel role on the basis of the economic significance of potential lead plaintiffs' stakes in a company turned out to favor Milberg Weiss, which had the track record and resources needed to develop relationships with public pension plans willing to act as lead plaintiffs. Many smaller firms had less success in attracting institutions as clients. The proportion of named plaintiffs in securities suits brought by Milberg Weiss who were institutional investors increased from 5% pre-PSLRA to 50% by 2001.[97]

Milberg Weiss pressed their comparative advantage, with considerable immediate success. An executive at a insurance directors' and officers' insurance company said of the firm in 2002 "[t]hey've been very aggressive in cornering the market."[98] While pre-PSLRA Milberg Weiss accounted for 30% of securities class actions filed in federal court this figure was 60% in 1997, 73% in 2000 and almost 60% in 2002.[99] Milberg Weiss' market dominance was not as extensive when measured by settlement dollars, but its market share remained at 27% between 1996 and 2001, essentially the same proportion as during the first half of the 1990s.[100] Milberg Weiss was far ahead of the runner-up, New York-based Bernstein Litowitz, at 9%. Bernstein Litowitz, moreover, often was co-lead counsel with Milberg Weiss,

turning to fewer firms to represent them in class actions, smaller firms are being left in the cold.").

[97] DILLON & CANNON (2010), *supra* note 9, at 271–72, 366; McDonald (2008), *supra* note 9, at 532.

[98] Edward Iwata, *Law Firms Tussle over Enron Case*, USA TODAY, Feb. 12, 2002, at B1.

[99] DILLON & CANNON (2010), *supra* note 9, at 269; McDonald (2008), *supra* note 9, at 532; GOULDEN (2006), *supra* note 9, at 248, 296.

[100] Choi & Thompson (2006), *supra* note 54, at 1515. Settlements lag filings, often by several years on average. This was especially true after the PSLRA was adopted, and plaintiffs and defendants skirmished over what the new law required, so Milberg's share of settlements during this period is not directly comparable to its share of filings.

especially in cases brought in the Southern District of New York, home turf to both firms.[101]

While Milberg Weiss adjusted well to the challenges posed by the enactment of the PSLRA there was a sense that competitors could also adjust, and Milberg Weiss' dominance could not last. In 1999 Bernstein Litowitz challenged Milberg Weiss directly on the West Coast, recruiting a former managing partner of Milberg Weiss' San Diego office to open a San Francisco office.[102] In 2001, Max Berger, managing partner of Bernstein Litowitz, observed that one outcome of the PSLRA's reforms was that "[n]o one firm will dominate the field any longer."[103] The head of litigation at Skadden Arps, a major Wall Street law firm, observed similarly in 2001, "Milberg had practically a monopoly. Now there's an oligopoly."[104] Nevertheless, as of 2003, the first year the SCAS 50 was compiled, the total dollar amount of settlements for which Milberg Weiss was had lead or co-lead counsel was $2.1 billion, the total of the next three highest ranked firms combined (Table 3) and nearly 38% of the total accumulated by all firms in the top ten.

C. The Delaware Plaintiffs' Bar

As the 20th century drew to a close, the plaintiffs' bar which brought most of the corporate lawsuits in Delaware was, if anything, even more cliquish than the cohort of lawyers specializing in securities class actions. This was due in large part to a gate-keeping function performed by Delaware lawyers, based in Wilmington. Delaware counsel were able to play this role because of state rules governing the practice of law. Attorneys who are not licensed in a

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[101] DILLON & CANNON (2010), *supra* note 9, at 359 (referring to the two firms as "friendly competitors").

[102] *Id.* at 383 (discussing the recruitment of Alan Schulman).

[103] Michael McDonald, *Reform in Securities Suits Shakes Law Firm's Security*, CRAIN'S N.Y. BUS., Feb. 12, 2001, at 18.

[104] *Id.*

particular state generally cannot practice law in that state.[105] Preparing papers incident to actions and court appearances is considered to be practicing law, even without an actual court appearance.[106] However, under Delaware Court of Chancery and Supreme Court rules an out-of-state firm can appear in a case before a Delaware court if they are admitted *pro hac vice*,[107] that is, for a particular case "for this turn."[108] Such an admission can only be made upon written motion by a member of the Delaware Bar who maintains an office in Delaware.[109] The Delaware courts routinely granted these motions. Indeed, prominent out-of-state counsel will frequently be on a first-name basis with Delaware judges.[110]

Once a *pro hac vice* motion is granted, Delaware counsel and out-of-state counsel agree between themselves on the division of responsibility for work done. Delaware counsel retains responsibility for the conduct of the litigation, but in practice the allocation often will be heavily weighted toward

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[105] In Delaware the prohibition is currently set out in Rule 5.5 of the Delaware Rules of Professional Conduct. *See* DEL. LAWYERS' R. PROF. CONDUCT 5.5, *available at* http://courts.delaware.gov/odc/DLRPCFebruary 2010.pdf.

[106] Carol A. Needham, *The Multijurisdictional Practice of Law and the Corporate Lawyer: New Rules for a New Generation of Legal Practice*, 36 S. TEX. L. REV. 1075, 1081 (1995) (discussing Land Title Abstract & Trust Co. v. Dworken, 193 N.E. 650, 652 (Ohio 1934)).

[107] DEL. CH. CT. R. 170(b), *available at* http://courts.delaware.gov/ rules/; DEL. SUP. CT. R. 71, *available at* http://courts.delaware.gov/rules/. An out-of-state lawyer seeking admission must certify that he is a member in good standing of the Bar of another state, will treat himself as bound by rules governing Delaware lawyers and will disclose disciplinary proceedings brought against him in the state where he is licensed to practice. DEL. CH. CT. R. 170(c)(i), (ii), (vi).

[108] Michael A. DiSabatino, *Attorney's Right to Appear* Pro Hac Vice *in State Court*, 20 A.L.R. 4th 855 (1983), §1[a]; Richard E. Mikels & David Hadas, Pro Hac Vice, *Pro or Con?*, 20 AM. BANKR. INST. J. 22, 22 (2002).

[109] DEL. CH. CT. R. 170(b); DEL. SUP. CT. R. 71.

[110] REPORT OF THE MULTIJURISDICTIONAL PRACTICE SPECIAL COMMITTEE TO DENNIS L. SCHRADER, ESQUIRE, PRESIDENT, DELAWARE STATE BAR ASSOCIATION 21 (Apr. 23, 2001) [hereinafter MULTIJURISDICTIONAL PRACTICE REPORT], *available at* http://www.dsba.org/ pdfs/MJPReport.pdf.

the out-of-state attorney.[111] Delaware counsel are expected to police the behavior of their out-of-state colleagues and ensure that out-of-state counsel understand the standards expected by Delaware courts.[112] Filings are often prepared primarily by out-of-state counsel, although Delaware counsel will normally review all filings to ensure they reflect Delaware procedures or customs.[113]

During the 1970s and 1980s, shareholder litigation in Delaware was channelled through a small coterie of Delaware lawyers thoroughly versed in practice before the Delaware Court of Chancery.[114] The Delaware law firms generally played a secondary role, leaving it to out-of-state law firms, whether acting on behalf of plaintiffs or defendants, to argue the motions and take primary responsibility for the litigation.[115] During the 1990s out-of-state plaintiff lawyers usually filed with the same Wilmington local counsel, Morris & Rosenthal, or, as it later became, Rosenthal, Monhait.[116] Richard Greenfield, a Philadelphia plaintiffs' lawyer who frequently litigated in Delaware and founder of the prominent Greenfield and Chimicles firm (listed as Chimicles & Tikellis in Table 2), said somewhat caustically in 1984 of the pattern, "[w]hy should I split my fee with them? . . . I have a comfortable practice, but nothing like those guys. They can make two or three million dollars for a couple weeks' work."[117]

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[111] State Line Ventures LLC v. RBS Citizens N.A., C. A. No. 4705-VCL (Del Ch. Dec. 2, 2009) (letter opinion by Vice Chancellor Laster).

[112] MULTIJURISDICTIONAL PRACTICE REPORT, *supra* note 110, at 21

[113] Francis Pileggi, *Interview with Chancellor William Chandler from the Delaware Court of Chancery*, DEL. CORP. & COM. LITIG. BLOG, at point #14 (June 17, 2011), *available at* http://www.delawarelitigation.com/2011/06/articles/commentary/interview-with-chancellor-william-chandler-from-the-delaware-court-of-chancery/.

[114] Williams (1984), *supra* note 28.

[115] E-mail correspondence with Randall Thomas (Feb. 28, 2012) (on file with author).

[116] E-mail correspondence with Lawrence Hamermesh (Feb. 17, 2012) (on file with author); e-mail correspondence with Randall Thomas, *supra* note 115.

[117] Williams (1984), *supra* note 28.

While an elite coterie of Delaware lawyers specialized in serving as Delaware counsel in shareholder suits, an identifiable plaintiffs' bar composed of law firms located elsewhere took the lead in launching and litigating those suits. Thompson and Thomas observed based on an analysis of shareholder suits filed in the Delaware Court of Chancery in 1999 and 2000 that sixteen law firms had collectively brought more than 65% of these suits.[118] All were based in New York City or in or near Philadelphia, and none was located in Delaware (Table 2). Thompson and Thomas excluded the Rosenthal firm from their count because they saw the firm as acting solely as Delaware counsel for out-of-state law firms, rather than bringing its own suits.[119]

As the 20th century drew to a close, plaintiffs' lawyers who specialized in litigating shareholder suits in Delaware courts stayed busy. A 1989 article in *American Lawyer* characterized the plaintiff lawyers who brought shareholder lawsuits in Delaware courts as the "Wilmington Filers[,]" "racing to the courthouse on the merest rumor of a deal, they file triplicate copies of one another's suits—complaints that themselves read like duplicates from every other case."[120] Plaintiffs' lawyers filing in Delaware were sometimes called "pilgrims[,]" with the point being they were "early settlers" who preferred to resolve cases quickly, which necessarily included being willing to settle cheaply too.[121] According to Jack Coffee, attorneys adopting this approach to shareholder litigation were held in low regard even by fellow plaintiffs' lawyers.[122]

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[118] Thompson & Thomas, *Class Actions* (2004), *supra* note 66, at 185–86.

[119] E-mail correspondence with Randall Thomas, *supra* note 115.

[120] Borden (1989), *supra* note 63.

[121] *Id.*; Coffee (1985), *supra* note 8, at 44.

[122] Coffee (1985), *supra* note 8, at 23; *see also* Borden (1989), *supra* note 63 (Wilmington Filers were "the bottom scrapers of the M&A world."); *supra* note 42 and accompanying text (remarks of William Lerach).

Corporate directors and the lawyers who represented them denounced the race to file first.[123] The pattern, however, was rational given the circumstances. When multiple complaints were filed arising from the same facts, Delaware courts traditionally took a hands-off approach when disputes arose as to who should be lead or co-lead counsel and admonished plaintiffs' lawyers to organize themselves on a case-by-case basis.[124] This created incentives to move quickly. One way for plaintiffs' firms to decide on the lead counsel role is for the lawyers involved to carry out an election.[125] This approach favors the law firm that is first to file because it can ensure that its allies file soon thereafter, and hopefully outvote other firms.[126] Being first to file is also advantageous because where the courts do intervene to resolve lead counsel disputes, the priority of commencing lawsuits is often a relevant factor.[127] In practice, it was the norm during the 1980s and at least part of the 1990s for the first-to-file firm to be named lead or co-lead counsel.[128] There was a twist, however, reflecting the need to join with Delaware counsel to bring suit in the Delaware courts.

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[123] Richard B. Schmitt, *Attorneys are Often Big Winners When Shareholders Sue Companies*, WALL ST. J., June 12, 1986, at 31.

[124] *See* Elliott Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797, 1846 (2004); *In re* Siliconix Inc. S'holders Litig., C.A. No. 18700-NC, 2001 WL 618210, at *1 (Del. Ch. May 25, 2001); TCW Tech. Ltd. P'ship v. Intermedia Commc'ns, Inc., C.A. Nos. 18336, 18289, 18293, 2000 WL 1654504, at *3 (Del. Ch. Oct 17, 2000).

[125] Coffee (1987), *supra* note 8, at 907–08.

[126] John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why 'Exit' Works Better Than Voice*, 30 CARDOZO L. REV. 407, 420 (2008).

[127] WILLIAM RUBENSTEIN, ALBERT CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 9.35 (4th ed. 2002); Mark Lebovitch, Jerry Silk & Jeremy Friedman, *Improving Multi-Jurisdictional Merger-Related Litigation*, ABA COM. & BUS. LITIG. COMMITTEE 3 (Feb. 14, 2011), *available at* http://apps.americanbar.org/litigation/committees/commercial/articles.html.

[128] Weiss & White (2004), *supra* note 124, at 1846.

The twist was that the first-to-file competition often took the form of a "race to the book"[129] rather than a race to the courthouse. It was standard practice for out-of-state lawyers to file with Morris & Rosenthal as local counsel.[130] Rosenthal, in turn, would rank the out-of-town lawyers in their "black book" based on how quickly they contacted Rosenthal with both a client and a complaint. The first lawyer in the book would usually end up controlling the case. Those who were second and third might be granted roles on the plaintiff's executive committee, while lawyers who contacted Rosenthal later could find themselves shut out completely. The "race to the book" system was sustainable in the near term, as long as out-of-state firms followed the norm of filing with Rosenthal rather than working with a different Delaware firm.[131]

V. CHANGES TO THE LITIGATION ENVIRONMENT, POST-2000

After 2000, several changes in the litigation environment for shareholder suits under both corporate and securities suits likely both increased the interest of many plaintiff firms in filing corporate lawsuits and encouraged filing claims outside Delaware. First, intensifying competition among plaintiffs' lawyers specializing in securities litigation had knock-on effects for the corporate law side of the plaintiffs' bar. Second, a switch in how the Delaware courts chose lead counsel may have encouraged smaller plaintiff law firms to file outside Delaware. Third, potential obstacles associated with launching a suit outside Delaware likely became less of a concern, due to technological and other changes.

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129 Lebovitch, Silk & Friedman (2011), *supra* note 127, at 1.

130 *See supra* note 116 and accompanying text.

131 Lebovitch, Silk & Friedman (2011), *supra* note 127. We have not found a convincing account of how Morris & Rosenthal policed the "file through us" system, but their large market share presumably gave them some way to punish defectors who used other Delaware firms as local counsel.

A. Intensified Competition among Securities Class Action Lawyers

During the 2000s there was increasingly vigorous jockeying among law firms who brought securities class actions for the lead counsel role. Various firms that were pushed out of securities class actions, especially smaller firms, responded by gravitating to corporate suits. This likely led to filing of more corporate lawsuits and plausibly contributed to the out-of-Delaware trend.

The erosion of Milberg Weiss' dominance of securities class actions during the 2000s was one catalyst for stronger competition among the firms which brought these suits. Milberg Weiss continued to dominate the securities class action market in the immediate aftermath of the PSLRA, but its healthy profits stimulated entry by competitors, who over time were able to attract major institutional clients, and thus compete for the lead counsel role. The *New York Times* reported in a 2002 article on securities litigation that law firms were "jumping into the business of suing companies, their directors or officers[,]" attributing the trend to lawyers striking out on their own from established firms or gravitating from other types of plaintiff-side litigation such as consumer fraud.[132] The draw was simple: "As the fees and the fame have grown . . . , the field has attracted a generation of relative newcomer firms."[133]

Grant & Eisenhofer, formed in 1997, was at the forefront of the new wave of plaintiffs' lawyers bringing securities cases.[134] The founders, Stuart Grant and Jay Eisenhofer, met in the early 1990s while practicing in the Wilmington office of Skadden Arps. Having noticed while at Skadden Arps that CalPERS, the massive California public pension fund, struggled to find a Delaware-based law firm to represent it on a corporate matter, they concluded that

[132] Jonathan D. Glater, *From Investor Fury, A Legal Bandwagon*, N.Y. TIMES, Sept. 15, 2002, at B1.

[133] *Id.*

[134] *See generally* Elizabeth Bennett, *Grant and Eisenhofer Continue Success in Corporate Law*, DEL. L. WKLY., Aug. 9, 2006, at 3.

institutional shareholders seeking to bring shareholder suits were under-lawyered. Grant and Eisenhofer shifted to the plaintiffs' side and impressed pension funds with the national orientation of their practice and their selectiveness in taking cases. As Eisenhofer told the *New York Times* in 2006, "[w]e don't have a single case where we are not lead counsel."[135] Grant & Eisenhofer quickly moved to the forefront of the plaintiffs' bar, ranking third on the SCAS 50 by 2003, and consistently in the top ten thereafter.[136]

The breakup of Milberg Weiss was an additional trigger for greater competition. Problems had begun in 2003, when the firm lost a number of senior partners, apparently because there were too few blockbuster cases to pursue.[137] The following year, Melvyn Weiss and William Lerach agreed that Milberg Weiss should split into an East Coast firm, which kept the Milberg Weiss name, and the West Coast-based Lerach Coughlin firm. Concerns that other law firms were successfully cultivating institutional clients was one cause.[138] The West Coast lawyers in the firm also thought the East Coast lawyers were counterproductively staid and the East Coast lawyers similarly felt the West Coast lawyers were counterproductively aggressive.[139] As a result, instead of one law firm being head and shoulders above the competition there were now two strong, well-funded plaintiff firms. [140]

Further (self-inflicted) disruption was to follow. In 2006, Weiss and Lerach were each indicted for paying kickbacks to named plaintiffs, prompting various institutional investor clients of these firms to take their business elsewhere. As the *New York Times* observed in an article entitled *A Class Action Shuffle* "[f]or class-action securities law firms,

[135] Ellen Rose, *A Class Action Shuffle*, N.Y. TIMES, July 7, 2006, at C6.

[136] The only exception was 2006, when Grant & Eisenhofer ranked 18th.

[137] Tamara Loomis, *In Spite of Reform Law, Milberg Weiss Emerges as Winner in Securities Suits*, N.Y. L.J., Apr. 22, 2003, at 1.

[138] O'Brien, *supra* note 89.

[139] *Id.*

[140] Fran Matso Lysiak, *Suiting Up*, BEST'S REV., Nov. 2004, at 80.

opportunity is in the air."[141] Lerach pled guilty to criminal charges in 2007; his firm was renamed Coughlin Stoia.[142] Milberg Weiss became known simply as Milberg after Melvyn Weiss similarly pled guilty in 2008.[143]

These successor firms by no means faded away. In 2008 Coughlin Stoia ranked 3rd in the SCAS 50 and Milberg ranked 6th, and in 2009, the two firms ranked 1st and 2nd respectively.[144] Nevertheless, the securities class action plaintiffs' bar had changed fundamentally. Milberg Weiss's dominance was a thing of the past. Boris Feldman, a securities litigator at Palo Alto-based Wilson Sonsini commented,

> For reasons of both retirement and incarceration, the plaintiffs' world we knew for decades is gone. There is no longer any dominant firm, nor even an oligarchy. Firms that had been under the influence of the market leaders are now free agents. New entrants have appeared, eager to protect their own piece of land.[145]

Thus, especially from about 2005 onward, competition among law firms in filing securities class actions was more intense than had during Milberg Weiss' heyday.

A further factor prompting stronger competition amongst law firms bringing securities suits involved class action out-outs. The PSLRA presumption that control of securities class actions would go to the law firm or firms whose clients had the largest losses was that plaintiff law firms would often form coalitions to capture the lead counsel role.[146] While rifts could develop, law firms sought to avoid making enemies so they would be invited to participate in future

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[141] Rose (2006), *supra* note 135.

[142] DILLON & CANNON (2010), *supra* note 9, at 432–35.

[143] *Id.* at 457.

[144] SECURITIES CLASS ACTION SERVICES, THE SCAS FOR 2008 (2009); SECURITIES CLASS ACTION SERVICES, THE SCAS FOR 2009 (2010).

[145] Boris Feldman, *Shareholder Litigation After the Fall of an Iron Curtain*, REV. SEC. & COMMODITIES REG., Jan. 11, 2012, at 7–8.

[146] Coffee (2008), *supra* note 126, at 420.

alliances.[147] William Lerach, however, shattered this club approach in securities litigation arising from the WorldCom fraud.

In 2002, the Southern District of New York federal court awarded Bernstein Litowitz, which represented the New York State Common Retirement Fund, the lead counsel role in the WorldCom class action. It did so at the expense of Milberg Weiss, which was representing CalPERS.[148] Bill Lerach of Milberg Weiss, not content with playing a subsidiary role, convinced more than 120 institutions to "opt out" of the class action and become plaintiffs in individual actions brought in state courts. Because these cases involved fewer than 50 plaintiffs each, they were not subject to removal to federal court under SLUSA.[149]

The opt-out strategy was controversial even within Milberg Weiss, but delivered good results for those who followed Lerach's advice.[150] Lerach pursued a similar opt-out approach for securities litigation involving AOL Time Warner, attracting over 100 opt-out clients.[151] Institutional shareholders who opted out said they recovered more than 15 times as much, per dollar of potential damages, than they would have under the class action.[152] By 2008, opting out had become common, with leading securities class action firms regularly bringing opt-out cases on behalf of a wide range of institutional investors.[153] The upshot was that

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[147] *Id.* at 421.

[148] DILLON & CANNON (2010), *supra* note 9, at 360–61, 367–68.

[149] Coffee (2008), *supra* note 126, 426 ("the first major securities case in which numerous class members were solicited to opt out"); Joan Gilbert, *As WorldCom Turns, Cases Pile Up*, A.B.A. J., Sept. 2004, at 40, 44, 46; ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK'S COMMITTEE ON SECURITIES LITIGATION, COORDINATING RELATED SECURITIES LITIGATION: A POSITION PAPER 12–13 (2010), *available at* http://www.nycbar.org/pdf/report/Securities _Litigation_%20A.pdf.

[150] DILLON & CANNON (2010), *supra* note 9, at 368–71, 376; Coffee (2008), *supra* note 126, at 426.

[151] One of us (Black) was an expert witness for the plaintiffs in the three opt-out state suits.

[152] Coffee (2008), *supra* note 126, at 427.

[153] *Id.* at 428.

between 2000 and 2007, when Lerach exited the practice of law to serve his prison term, securities litigation had been transformed from a field where Milberg Weiss clearly dominated and its closest competitor—Bernstein, Litowitz — characterized by some as a "friendly" rival[154]—to one where a number of well-resourced law firms were competing with each other to gain the upper hand in securities cases.

Some have suggested that cross-over between plaintiffs' firms that specialize in securities class actions and specialize in shareholder litigation under corporate law is not substantial.[155] To the extent this is the case, jockeying among firms specializing in securities class actions was unlikely to have a substantial impact on corporate litigation, and thus on filing practice concerning Delaware companies. In fact, there has historically been considerable cross-over from securities to corporate litigation. To illustrate, with each of the law firms that filed ten or more shareholder suits in Delaware in 1999 and 2000 and was listed in Martindale-Hubbell in 2001, their Martindale-Hubbell profile indicated the firm had securities litigation expertise as well (Table 4).[156]

[154] DILLON & CANNON (2010), *supra* note 9, at 359.

[155] Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY L. REV. 1749, 1769 (2010) (finding little overlap between firms filing the most derivative suits in federal court and top firms in the SCAS 50). *See also* Jessica Erickson, *Corporate Misconduct and the Perfect Storm of Shareholder Litigation*, 84 NOTRE DAME L. REV. 75, 87 (2008); Feldman (2012), *supra* note 145, at 8 (discussing how traditionally class actions under securities law were typically not accompanied by a derivative lawsuit).

[156] Thompson and Thomas confirm the point, saying of the firms on their list, "[m]any of these firms are the same ones that frequently appear in securities fraud class actions." Thompson & Thomas, *Class Actions* (2004), *supra* note 66, at 185.

TABLE 4: SECURITIES LITIGATION EXPERTISE OF LAW FIRMS LISTED IN MARTINDALE-HUBBELL BRINGING 10 OR MORE SHAREHOLDER LAWSUIT COMPLAINTS IN THE DELAWARE COURT OF CHANCERY, 1999–2000

Rank	Law Firm	Reference to Securities Litigation Expertise in Martindale-Hubbell 2001
1	Goodkind Labaton	Securities fraud (vol. 12, NYC568B-571B)
3	Wechsler, Harwood	Securities litigation (vol. 12, NYC1482B-1483B
4	Abbey Gardy	Securities Litigation, including class actions (vol. 12, NYC39B)
5	Bernstein Liebhard	Securities Litigation, including class actions (vol. 12, NYC131B)
8	Milberg Weiss	Class actions, including securities (vol. 12, NYC926B-931B)
10	Wolf Popper	Securities (vol. 12, NYC1558B-1559B)
11	Wolf Haldenstein	Securities and class action (vol. 12, NYC1555B-1558B)
16	Kirby McInerney	Securities and other class actions (vol. 12, NYC753B)
17	Chimicles & Tikellis,	Class action practice, principally in areas of securities (vol. 14, PA208B-209B
20	Beatie & Osborn	Securities class actions litigation (vol. 12, NYC114B-115B)
21	Berger & Montague	Securities litigation (vol. 14, PA376B-378B)
24	Garwin Bronzaft	Securities class actions (vol. 12, NYC529B)

Source: Thompson & Thomas (2004), *supra* note 66; Martindale-Hubbell Law Directory (2001).

A list of law firms which filed the largest number of derivative suits in federal court in the mid-2000s illustrates the same pattern. In a study of derivative suits in federal court, Jessica Erickson identified twenty-two law firms which filed four or more derivative suits in federal court during 2005–2006.[157] Of these firms, ten were listed in the 2007 version of Martindale-Hubbell and the listings for nine of these ten indicated the firm had expertise in the area of securities litigation (Table 5).

TABLE 5: SECURITIES LITIGATION EXPERTISE OF LAW FIRMS FILING THE MOST DERIVATIVE SUITS IN FEDERAL COURT, 2005–06

Law Firm	Rank (No. of Derivative Suits)	Headquarters Location	Reference to Securities Litigation Expertise in Martindale-Hubbell 2007
Coughlin, Stoia (formerly Lerach Coughlin)	1 (34 suits)	San Diego	Complex litigation and class actions, including securities (M-H, vol. 2, CAA1640B-1642B)
Federman & Sherwood	3 (31)	Oklahoma City	Securities litigation. . .class actions (M-H, vol. 9, OK64B)
Kessler Topaz	4 (19)	Radnor, PA	Class action, securities litigation (vol. 10, PA759B-761B
Wolf Haldenstein	9 (8)	Chicago	Securities and class actions (vol. 5, IL731B)
Ostrager Chong	12T (5)	New York	None (vol. 8, NYC920B)

[157] *See* Erickson (2010), *supra* note 155. Prof. Erickson kindly provided to us the list of the most frequent filers for her dataset; the list is on file with the authors.

Law Firm	Rank (No. of Derivative Suits)	Headquarters Location	Reference to Securities Litigation Expertise in Martindale-Hubbell 2007
Spence Law Firm	12T (5)	Jackson, WY	Plaintiff's business litigation (vol. 12, WY32B)
Weiser Law Firm PC	12T (5)	Wayne, PA	Securities class actions (vol. 10, PA831B
Bragar Wexler	15T (4; 8 firms filed four actions)	New York	Securities law (vol. 8, NYC145B-146B)
Harwood Feffer	15T (4)	New York	Securities litigation (vol. 8, NYC548B)
Milberg Weiss	15T (4)	New York	Securities litigation, (vol. 8, NYC843B-846B

Sources: Firms and number of derivative suits supplied to the authors by Jessica Erickson (see Erickson (2010), *supra* note 155); Martindale-Hubbell Law Directory (2007).

Plaintiffs' law firms which brought securities class actions but also had, or could readily acquire, the ability to bring corporate lawsuits began in the 2000s to pursue the corporate side with greater vigor. According to a 2006 press report based on interviews with securities litigators, "big firms that have made their reputations in [securities] class actions are jumping into derivative litigation with a heretofore unseen verve."[158] William Lerach called the trend "unprecedented[.]"[159]

[158] Justin Scheck, *Class Rules Not So Bad After All*, RECORDER (San Francisco), July 3, 2006.

[159] *Id.*

Options backdating litigation provides an example of the greater emphasis on corporate lawsuits. With a typical backdating scenario, a company assigned to stock options a strike price based on the price at which the shares were trading at a date prior to that when the options were actually granted, but claimed the grant was "at the money." This provided employees, and sometimes executives, with more valuable in-the-money options, without disclosing this to shareholders. Doing so avoided the unfavorable accounting treatment for "in-the-money" option grants—the need to record the grant as a related compensation expense.[160] Academic research uncovered a pattern of options being granted when stock prices reached low points and rising quickly thereafter; prompting follow on news stories about particular firms and SEC investigations, starting in 2005.[161] Civil litigation soon followed.

A shareholder plaintiff pursuing an options backdating claim potentially could bring a securities class action based on misdisclosure, under Rule 10b-5. The shareholder could also bring a derivative action, alleging that directors or officers who benefitted from backdating, authorized it, or failed to notice or stop it, breached their fiduciary duties.[162] Derivative claims proved to be the more popular choice among plaintiffs' attorneys because a 10b-5 action requires that the misdisclosure be "material" and many options backdating disclosures led to small or no share price reactions.[163]

Historically, derivative suits rarely led to large settlements.[164] Options backdating cases, in contrast, offered

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[160] Christy L. Abbott, *The Shareholder Derivative Suit as a Response to Stock Option Backdating*, 53 ST. LOUIS U. L.J. 593, 597–98 (2009).

[161] *Id.* at 599.

[162] *Id.* at 595.

[163] Ashby Jones, *Firms Settle Backdating Suits: Some Private Cases End in Agreements; More Deals Ahead*, WALL ST. J., Nov. 19, 2007, at A15.

[164] GOULDEN (2006), *supra* note 9, at 260 ("An investor who felt she or he had been bilked could sue (with a derivative action), but the amounts involved were usually so trivial that a suit made no economic sense."); Julie Creswell, *One Route Seems Closed, So Lawyers Try Different Lawsuit*

the potential for substantial settlements. When we investigated options backdating cases as part of our analysis of litigation patterns involving Delaware companies, we found 165 instances encompassing both Delaware and non-Delaware companies where derivative actions were filed based on backdating allegations, versus only forty companies which faced securities class actions. We were able to identify cash settlements in forty-nine of these derivative suits, with total payouts of nearly $1.9 billion.[165]

Other potentially lucrative derivative suits also caught the attention of plaintiffs' firms. Lawyers who filed a derivative action based on accusations that Larry Ellison, CEO of Oracle, had engaged in insider trading received more than $22 million in fees and expenses in a 2005 California state court settlement which resulted in Mr. Ellison making a $100 million contribution to charity.[166] Likewise, a 2008 $115 million settlement of a derivative suit based on allegations that senior executives of American International Group ("AIG") benefited from improper corporate payments was the largest derivative action settlement to that point in Delaware Court of Chancery history.[167]

The shift toward derivative litigation affected both leading plaintiffs firms and their smaller counterparts. For example, Lerach Coughlin filed "dozens" of options backdating derivative suits;[168] as did Kessler Topaz. Grant &

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in Stock-Option Scandal, N.Y. TIMES, Sept. 5, 2006, at C4 (quoting Kevin LaCroix, a director of a directors' and officers' insurance broker).

[165] This is a lower bound on the number of settlements with payments. Our principal source for many of the settlements was the company's disclosure in its 10-K annual report. Companies must disclose only material litigation events and a fair number of companies did not disclose the outcomes of option backdating cases.

[166] Mike Langberg, *Did Ellison Sidestep Insider Trading Accusation,?"* SAN JOSE MERCURY NEWS, Sept. 20, 2005.

[167] Elizabeth Bennett, *In a Sea of Troubles, Settlement Brings A Little Good News for AIG*, DEL. L. WKLY., Sept. 24, 2008, at 1.

[168] Scheck (2006), *supra* note 158.

Eisenhofer, in addition to being lead counsel in the AIG derivative litigation, brought some major backdating cases.[169]

Smaller firms had, if anything, even stronger incentives to place greater emphasis on corporate lawsuits, and less on securities suits. A nimble, smaller law firm might win a race to the courthouse, so has a fighting chance to be named lead counsel if being first-to-file is an important factor in determining who is named lead counsel. In contrast, for securities cases, the PSLRA presumption that the law firm representing shareholders with the largest stakes left small firms, which lacked the resources to develop working relationships with public pension funds and other institutional shareholders, on the sidelines. The intensive investigation needed to meet the PSLRA pleading standards further advantaged the major securities firms. Some small firms abandoned securities law entirely.[170] Corporate suits were sufficiently similar in subject matter to offer a natural area for smaller plaintiffs' firms to move to.[171] As law professor Jack Coffee observed in a 2006 interview, "[w]hat you might call the bottom feeders get more easily into this business."[172]

The changes to the environment for securities class action litigation likely helped to prompt the sharp rise in corporate suits after 2000. In a 2010 interview a senior litigator at Dechert, a major corporate law firm, maintained that "greater velocity" in shareholder lawsuits relating to mergers has occurred due to a migration by plaintiff law firms that previously tended to focus on securities class actions.[173] The

[169] Bennett (2008), *supra* note 167; *RiskMetrics Ranks Grant & Eisenhofer Number 1 Law Firm in 2008 for Highest Average Recoveries in US Class Action Settlements,* SCIENCE LETTER, Apr. 14, 2009.

[170] DILLON AND CANNON (2010), *supra* note 9, at 269–72, 366; Deger (2001), *supra* note 96.

[171] Interview with Ted Mirvis of Wachtell Lipton (Apr. 20, 2010); Creswell (2006), *supra* note 164.

[172] Scheck (2006), *supra* note 158 (quoting Professor Coffee).

[173] Ken MacFadyen, *Low Plaintiffs A Bar?*, MERGERS & ACQUISITIONS: DEALMAKERS J., Oct. 2010, at 22 (corporate litigator at the Dechert

changes may also have contributed to the out-of-Delaware trend. One way in which this would have occurred would have been via the post-PSLRA growth in "tagalong" derivative suits filed in parallel with related securities litigation.[174]

A tagalong derivative action can be launched by a firm that has a pending federal securities class action and is seeking discovery in the corporate case, to bolster its complaint in the securities case. Under the PSLRA, a securities law complaint must provide highly specific facts pointing to liability, obtained *without* benefit of discovery, to survive a motion to dismiss. Factual discovery in the parallel corporate case might help to provide those facts.[175] Alternately, a firm different that is not taking the lead role in a securities class action lawsuit will launch a parallel derivative suit. Firms that failed to be appointed lead counsel in the securities suit would be potential contenders, as would firms that did not think it worthwhile to even try to win lead counsel status in the securities suit.[176] Tagalong suits attracted smaller law firms that had previously brought securities class actions switched to bring tagalong derivative suits.[177] As Boris Feldman of Wilson Sonsini recently said with regard to the popularity of tagalong

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corporate firm attributes "greater velocity" in corporate lawsuits to plaintiff firms migrating from securities to corporate litigation).

[174] On the nomenclature, see, e.g., Erickson (2010), *supra* note 155, at 1778.

[175] Under the PSLRA, plaintiffs in securities class actions are prohibited from obtaining discovery until after a case had survived a motion to dismiss, and courts are required to dismiss a class action lawsuit unless the plaintiff alleged "with particularity . . . facts giving rise to a strong inference" that the defendants had acted with the required state of mind. 15 U.S.C. §§ 77z-1(b), 78u-4(b)(3)(B) (discovery); 15 U.S.C. § 78u-4(b)(2) (pleading standard). In contrast, in most states, discovery can still proceed in the parallel corporate lawsuit. *See Lower Court Ruling Will Encourage 'Tag Along' Derivative Suits, Say Directors*, ANDREWS SEC. LITIG. & REG. REP., Apr. 14, 1999, at 5.

[176] *See Derivative Suits*, ORRICK, http://www.orrick.com/practices/securities_litigation/derivative_suits.asp (last visited May 2, 2012).

[177] Deger (2001), *supra* note 96.

derivative suits "the explanation is obvious: different suits for different folks."[178] NERA Consulting has reported that the fraction of settled securities class actions accompanied by a parallel derivative suit ranged between 11% and 26% annually between 1997 and 2002, but then grew steadily to 65% in 2007 and has remained above 50% since.[179]

These parallel derivative suits may have contributed to the out-of-Delaware trend because for a tagalong suit, filing in Delaware is often disadvantageous. Many other states grant expedited discovery requests routinely; in contrast, Delaware is sparing in doing so. A firm seeking discovery in a corporate lawsuit, to bolster its securities complaint, thus has reason to file outside Delaware.[180]

B. Assignment of the Lead Counsel Role

Intensified competition within the plaintiffs' bar in bringing corporate lawsuits may have interacted with changes in how non-Delaware firms partnered with Delaware counsel, and changes in how the Delaware courts assigned the lead counsel role to encourage some firms to bring suits against Delaware companies outside Delaware. The cozy Delaware market for lawyers of the 1980s began to open up soon thereafter. During the 1990s, a growing number of firms established branch offices in Delaware,[181] with a likely incentive being to avoid the need to partner

[178] Feldman (2012), *supra* note 145, at 9.

[179] JORDAN MILEV, ROBERT PATTON, SVETLANA STARYKH & JOHN MONTGOMERY, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2011 YEAR-END REVIEW 16 (2011), *available at* http://www.nera.com/67_7557.htm.

[180] We discuss the interplay between the PSLRA pleading requirements and expedited discovery rules, the likely contribution of tagalong suits to the out-of-Delaware trend, in *ABC Balancing Act* (2012), *supra* note 1, Part III.F.

[181] David Marcus, *Restless in Wilmington*, DAILY DEAL, Sept. 5, 2005; *At the Center of the Corporate Governance Discussion: A Practitioner's View of the Delaware Court of Chancery*, METROPOLITAN CORP. COUNSEL, Nov. 2004, at 49 (interview with Barry Klayman, managing partner of Wolf Block, a plaintiffs' firm that established a Wilmington office in 1995).

with local counsel. Talented lawyers based in major Wilmington firms also struck out on their own, such as Stephen Lamb, Vice Chancellor on the Delaware Court of Chancery from 1997 to 2009, who left Skadden Arps to open up his own law firm in 1995, and Travis Laster, later appointed Vice Chancellor, who co-founded Abrams & Laster in 2005.[182]

The greater within-Delaware competition led to the weakening of Morris & Rosenthal's dominance as the partner firm of choice for most plaintiff firms and likely also to the demise of the comparatively orderly "race to the book" the firm orchestrated.[183] By the mid-2000s Morris & Rosenthal was still highly active but its monopoly had ended.[184] David Webber has compiled data on 454 shareholder derivative and class actions filed in Delaware between 2003 and 2009, including plaintiff law firm participation.[185] Unlike Thompson and Thomas, he did not exclude Morris & Rosenthal or other Delaware-based firms when compiling his data. Thus, every case Webber examined had a Delaware-based law firm or the Delaware branch of a law firm headquartered elsewhere associated with it. Based on his data it appears that the Delaware office of Chimicles & Tikellis, and Wilmington-based Rigrodsky Long, have joined Morris & Rosenthal (now Rosenthal, Monhait) as firms that regularly act as Delaware counsel for suits brought by out-of-state firms. Each of the three firms were involved in substantially more cases than any other firm, including all of the top five firms non-Delaware firms on the Thompson and Thomas 1999-2000 list.

[182] Marcus (2005), *supra* note 181.

[183] *Supra* note 129 and related discussion.

[184] David H. Webber, Private Policing of Mergers and Acquisitions: An Empirical Assessment of Institutional Lead Plaintiffs in Transactional Litigation (2011) (unpublished working paper).

[185] Webber (2011), *supra* note 184, at 16–17. Professor Webber has kindly supplied us with an updated list of law firms, which we rely on here.

TABLE 6: LAW FIRMS RANKED BY NUMBER OF DELAWARE CORPORATE LAWSUITS BROUGHT, 2003–09 (INCLUDING THE FIVE NON-DELAWARE FIRMS BRINGING THE LARGEST NUMBER OF LAWSUITS IN 1999 AND 2000)

Rank	**Law Firm**	**Number of Cases Involved**	**Head Office**	**Delaware Office (N/A if Head Office in Delaware)**	**Thompson/Thomas Rank**
1	Rosenthal, Monhait	108	Wilmington, DE	N/A	N/A
2	Chimicles & Tikellis	51	Haverford PA	Yes	17
3	Rigrodsky Long	46	Wilmington DE	N/A	N/A
4	Milberg Weiss	26	New York	No	9
5	Brualdi Law Firm	25	New York	No	N/A
6	Wolf Popper	18	New York	No	11
7	Farqui & Farqui	17	New York	Yes	10
8	Weiser Law Firm	17	Radnor PA	No	N/A
9	Prickett Jones	16	Wilmington DE	N/A	N/A
10(T)	Kessler Topaz	15	Radnor PA	No	2
10(T)	Bernstein, Liebhard	15	New York	No	5
10(T)	Lerach Coughlin	15	San Diego CA	No	N/A
13 (T)	Goodkind Labaton	14	New York	Yes	1
18	Weschler, Harwood	10	New York	No	3
19 (T)	Abbey Gardy	9	New York	No	4

Sources: List of law firms provided by David Webber (from database compiled for Webber (2011), *supra* note 184); Thompson & Thomas (2004a), *supra* note 66; Martindale-Hubbell 2000, 2003–09; internet searches.

The demise of Rosenthal Monhait's monopoly was accompanied by the replacement of its orderly race-to-the-book system, and hence to greater need for the Delaware courts to resolve battles over the lead counsel role. In a 2000 decision, Chancellor Chandler noted this trend, saying "[o]ver the past ten years, members of the Court of Chancery have been asked, with increasing frequency, to become involved in the sometimes unseemly internecine struggles within the plaintiffs' bar over the power to control, direct and (one suspects) ultimately settle shareholder lawsuits filed in this jurisdiction."[186] Straightforward races to the courthouse ensued, as plaintiff lawyers assumed that being first to file would provide them with an edge in contests to be named lead counsel.[187] Thompson and Thomas report that of 623 M&A-related class actions filed in Delaware courts in 1999 and 2000 almost 70% were filed within three days of the announcement of the transaction.[188]

The hasty filing habit persists in Delaware.[189] Nevertheless, Delaware is no longer the obvious destination

[186] TCW Tech. Ltd. P'ship v. Intermedia Commc'ns, Inc., C.A. Nos. 18336, 18289, 18293, 2000 WL 1654504 (Del. Ch. Oct. 17, 2000).

[187] The presumption likely was in operation despite Chancellor Chandler saying in *TCW* that it was a "myth . . . that the first to file a lawsuit in this Court wins some advantage in the race to represent the shareholder class." *TCW*, 2000 WL 1654504 at *3.

[188] Thompson & Thomas, *Class Actions* (2004), *supra* note 66, 182–83. *See also* Weiss & White (2004), *supra* note 124, at 1827 (Of 104 mergers of Delaware-incorporated public companies occurring between 1999 and 2001, 77 occurred within one day of the merger announcement.).

[189] In our dataset of large M&A transactions, when a suit in a deal involving a Delaware target was filed in Delaware, half of the time the suit was filed within two days after the announcement; for Delaware targets in our LBO dataset, the median number of days from announcement to first lawsuit was four. *ABC Losing Cases* (2012), *supra* note 1 (manuscript at 13 tbl. 2).

of choice for nimble law firms seeking to gain an edge by filing promptly. Instead, rapid filing likely conveys lesser benefit in Delaware than in many other states. Beginning with *TCW Technology* in 2000, the Delaware courts have paid attention to whether a law firm represents a major shareholder, and to the quality of the complaint. In *TCW* itself, where a dozen shareholder suits were filed challenging a merger transaction, when the suits were consolidated, Chancellor Chandler assigned the Kansas Public Employees Retirement System as lead plaintiff and its lawyers Grant & Eisenhofer as lead counsel.[190] He identified three factors that a Delaware court would focus on if called on to choose lead counsel, these being the quality of the pleadings filed, the energy and enthusiasm demonstrated by the attorneys, and the economic stake each plaintiff had in the litigation, with preference to be given—similar to the PSLRA—to the shareholder with the largest economic interest.[191] The Delaware Chancery Court confirmed in a 2002 case, *Hirt v. U.S. Timberlands Service Co.*, that the relative economic weights of the competing litigants would be afforded "great weight" and indicated as well that the credentials of the attorneys bringing the suits would be important.[192]

Delaware's de-emphasis of first-to-file as an ordering principle, plus the simple fact of growing competition for the lead role in Delaware, created incentives for some plaintiffs' lawyers to file elsewhere. This was especially true for smaller firms who lacked major institutional clients and could hope to benefit from the greater vibrancy of the first-to-

[190] *TCW*, 2000 WL 1654504, at *3.

[191] *Id.* at * 4.

[192] C.A. No. 19575, 2002 WL 1558342 (Del. Ch. June 9, 2002). The Delaware courts subsequently indicated that the size of a plaintiff's holding was not to be used to generate a mechanical ranking but rather was relevant in determining whether the plaintiff had an incentive to monitor counsel. *See In re* Revlon Inc. S'holders Litig., 990 A.2d 940, 955 (Del. Ch. 2010); Wiehl v. Eon Labs, C.A. Nos. 1116-N, 1117-N, 1119-N, 1125-N, 1134-N, 1136-N, 1139-N, 2005 WL 696764, at *3 (Del. Ch. May 22, 2005). For more details on Delaware's doctrine on whom to prefer as lead counsel, see *ABC Balancing Act* (2012), *supra* note 1, Part III.E.

file custom elsewhere.[193] Assume that a modest-sized plaintiffs' firm is acting on behalf of an individual investor who owns a few hundred shares in a company incorporated in Delaware law but headquartered elsewhere and is capable of filing quickly. The firm aspires to be lead counsel or lead co-counsel. It can bring suit in Delaware, or in the headquarters state. In Delaware, filing quickly is unlikely to help much, nor is the firm likely to prevail as lead counsel if it has to compete with another firm that has a major institution as a client. This firm thus has an incentive to file elsewhere, and promptly, hoping to prevail in what Chancellor Strine has labeled the "lead counsel Olympics race[.]"[194] It appears this is what in fact happened.[195]

Suits with an individual as lead plaintiff are scarcely obsolete in Delaware. In David Webber's study of 454 shareholder derivative and class actions filed in Delaware between 2003 and 2009, the lead plaintiff in 278 instances (61%) was an individual.[196] On the other hand, the proportion of cases where an institutional shareholder is the lead plaintiff has increased over time, with public pension funds and labor unions often taking the lead plaintiff role.[197] And the percentage for suits against Delaware companies brought outside Delaware with individuals as named plaintiffs could well be higher than it is in Delaware but we are not aware of a source of data on that issue.

C. Restrictions on Litigation by Out-of-State Attorneys

The rules governing out-of-state practice were significantly loosened in the 2000s. This made it easier for

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[193] For additional development of this argument, see *ABC Balancing Act* (2012), *supra* note 1, Part III.E.

[194] King v. VeriFone Holdings Inc., 994 A.2d 354, 357 (Del. Ch. 2010).

[195] For evidence of races to the courthouse in option backdating cases, most of which were filed outside Delaware, see Creswell (2006), *supra* note 164 ("The suits are a throwback to the days when lawyers raced to the courthouse with an individual plaintiff in tow . . . ."). On where options backdating cases were filed, see discussion *supra* Part II.A.

[196] Webber (2011), *supra* note 184, at 8.

[197] *Id.*

plaintiff firms to sue outside Delaware, and plausibly contributed to the out-of-Delaware trend. Delaware, as we have seen, is relatively friendly to suits by out-of-state firms, as long as they partner with Delaware counsel.[198] Consider then the choice faced by a New York-based firm considering a corporate lawsuit against the directors of a Delaware company, headquartered in Texas. Prior to 2000, the path the New York law firm would have to follow to sue in Delaware was relatively straightforward. Not only would Delaware courts routinely grant admission *pro hac vice* but an out-of-state attorney specializing in corporate litigation probably would have been well acquainted with the typical practice of filing with Morris & Rosenthal. There correspondingly was a well-worn path for out-of-state firms to follow.

The path elsewhere, such as in Texas state court, would have been less well known, and harder to navigate. A New York lawyer with a client owning shares in a Texas-headquartered company would not be able to bring the suit in Texas on its own. [199] The out-of-state firm would instead have to partner with local counsel and seek *pro hac vice* admission.[200] A 1967 law review article said "judges have not

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[198] *Supra* notes 105–31 and related discussion.

[199] ABA, REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE, INTRODUCTION AND OVERVIEW (Aug. 16, 2002), *available at* http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisditional_practice.html (setting out the general proposition that an individual cannot practice law in a state unless the state has licensed him to do so). On the position in Texas, see TEX. GOV'T. CODE ANN. §81.102(a), (b)(1) (2004) (prohibiting out-of-state lawyers from practicing in Texas except according to rules of the Texas Supreme Court).

[200] Peter M. Panken & Mirande Valbrune, *Do Good Fences Make Good Neighbors - Representing Nationwide Clients Where They Do Business - But You are Not Admitted*, 29 ALI-ABA BUS. L. COURSE MATERIALS J. 7, 8 (2005); *IADC Submits Model Pro Hac Vice Rule to ABA Multijurisdictional Practice Commission*, DEFENSE COUNSEL J., Apr. 2001, at 148, 157; Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5 - An Interim Assessment*, 43 AKRON L. REV. 729, 745 (2010); TEX. RULES ANN., Rule XIX (2011) (requirements for participation in Texas proceedings by a non-resident attorney).

usually used unreasonably their discretion to deny *pro hac vice* admission."[201] Law review commentary indicates that admission, in most cases, remained "routine".[202] But there was still more complexity and risk than in Delaware.

Rules on *pro hac vice* admission are derived in each state from a patchwork of court rules, statutes, administrative regulations, and case law.[203] Correspondingly, an out-of-state lawyer would have had to research the law with care to ensure he was following the correct protocol.[204] An improper filing or a breach of a court rule could persuade a local judge that the *pro hac vice* motion should be denied.[205] Even if an out-of-state attorney complied fully with relevant requirements, *pro hac vice* admission was not guaranteed. The local judge had complete discretion to grant or deny the request, with or without a hearing.[206] Rulings on *pro hac vice* admission motions rarely included written explanations that would provide guidance and reduce uncertainty for subsequent applicants.[207]

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[201] Edward F. Sherman, *The Right to Representation by Out-of-State Attorneys in Civil Rights Cases*, 4 HARV. C.R.-C.L. L. REV. 65, 75 (1968–1969).

[202] Samuel J. Brakel & Wallace D. Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699, 702 (1975) ("Admission *pro hac vice* is evidently a routine matter in all states."); William T. Barker, *Extrajurisdictional Practice by Lawyers*, 56 BUS. LAW. 1501, 1525 (2001) ("[A]dmission is normally granted as a matter of course.").

[203] Panken & Valbrune (2005), *supra* note 200, at 21; Christine R. Davis, *Approaching Reform: The Future of Multijurisdictional Practice in Today's Legal Profession*, 29 FLA. ST. U. L. REV. 1339, 1352 (2002).

[204] Panken & Valbrune (2005), *supra* note 200, at 21; Nina Corbut, *The Ethics of Multijurisdictional Law Practice*, OHIO LAW., Mar./Apr. 2010, at 11, 12.

[205] Don C. Keenan, *Pro Hac Vice: Revitalizing a Wounded Specialty*, 4 AM. J. TRIAL ADVOC. 23, 31 (1980).

[206] Carol A. Needham, *Negotiating Multi-State Transactions: Reflections on Prohibiting the Unauthorized Practice of Law*, 12 ST. LOUIS U. PUB. L. REV. 113, 118 (1993).

[207] Stephen E. Kalish, *Pro Hac Vice Admission: A Proposal*, 4 S. ILL. U. L.J. 367, 372 (1979); ABA (2002), *supra* note 199, at 13 (noting that "decisional law . . . is sparse").

There were highly publicized cases where things went awry. A 1979 ruling by the U.S. Supreme Court in *Leis v. Flynt* that a *pro hac vice* applicant in Ohio state court had no right to procedural due process "surprised the nation's *pro hac vice* practitioners" and "pleased . . . opposing counsel confronted with defeat at the hands of a skilled out-of-state attorney."[208] Likewise, a 1998 ruling by the California Supreme Court in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court* that New York lawyers who represented California clients in a proposed arbitration could not charge for their legal fees because they had practiced in California when not authorized to do so and without associating with local counsel "shocked the legal community."[209] If things did go awry, the consequences could be serious for an out-of-state law firm because it would be unable to collect fees for its work.[210]

The federal courts in the company's headquarters state would sometimes be an available forum, but also would not have provided a smooth road either, for an out-of-state law firm.[211] The Federal Rules of Civil Procedure give each district court the right to make and enforce the rules governing practice within the district.[212] Some district courts

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[208] Leis v. Flynt, 439 U.S. 438 (1979); Keenan (1980), *supra* note 205, at 23.

[209] Jane Hawthorne Merrill, *Multijurisdictional Practice of Law under the Revised South Carolina Rules of Professional Conduct*, 57 S.C. L. REV. 549, 549 (2006) (discussing Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1 (Cal. 1998)). *See also* Barker (2001), *supra* note 202, at 1502 ("Attention of the practicing bar was drawn forcefully by . . . *Birbrower*."); Martha Neil, *Easing Up*, 88 A.B.A. J. 47, 47 (2002) ("*Birbrower* shocked many in the U.S. legal community.").

[210] Kalish (1979), *supra* note 207, at 373; Merrill (2006), *supra* note 209, at 579.

[211] Kalish (1979), *supra* note 207, at 367. We discuss when federal jurisdiction is likely to be available in *ABC Balancing Act* (2012), *supra* note 1.

[212] *See* 28 U.S.C. § 1654 (2012) (admission of lawyers to practice); *id.* § 2071(a) (grant of rule-making authority to district courts); FED. R. CIV. P. 83 (discussed in Keenan (1980), *supra* note 205, at 32–33); Michael S. Ariens, *A Uniform Rule Governing the Admission and Practice of Attorneys*

grant admission to out-of-state attorneys with few conditions.[213] More often, the local district court rules require that lawyers appearing before the court be members of the bar of the state in which the district is located and provide for *pro hac vice* admission for out-of-state lawyers associated with local counsel.[214]

During the 2000s, concerns about *pro hac* vice admission should have eased. In 2000 the American Bar Association, spurred by *Birbrower*, established a Commission on Multijurisdictional Practice.[215] The Commission saw multijurisdictional practice of law as often needed to serve clients' needs, and sought greater uniformity of rules and fewer restrictions on multijurisdictional practice and proposed liberalizing significantly the ABA's rules on multijurisdictional practice.[216] In 2002, the ABA implemented the Commission's recommendations and amended Model Rule of Professional Conduct 5.5 to reflect the modern practice of lawyers licensed in one jurisdiction often rendering legal services in another.[217] The ABA simultaneously adopted a model rule on *pro hac vice* admission so as to foster uniformity and predictability and encourage liberal admission, with a key change being to allow an out-of-state lawyer to offer legal services related to a legal proceeding before filing for admission if authorization

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Before United States District Courts, 35 DEPAUL L. REV. 649, 651–52 (1986).

213 Sherman (1968–1969), *supra* note 201, at 75.

214 Ariens (1986), *supra* note 212, at 652–53, 658; Sherman (1968–1969), *supra* note 201, at 71; Robert L. Misner, *Local Associated Counsel in the Federal District Courts: A Call for Change*, 67 CORNELL L. REV. 345, 345, 347 (1982).

215 Gary A. Munneke, *Multijurisdictional Practice of Law: Recent Developments in the National Debate*, 27 J. LEGAL PROF. 91, 99–100 (2003); Cynthia L. Fountaine, *Have License Will Travel: An Analysis of the New ABA Multijurisdictional Practice Rules*, 81 WASH. U. L. Q. 737, 740, 743 (2003).

216 ABA (2002), *supra* note 199, at 2–3, 11–14; Neil (2002), *supra* note 209, at 47, 49; Fountaine (2003), *supra* note 215, at 744–45.

217 Greenbaum (2010), *supra* note 200, at 729–30; Munneke (2003), *supra* note 215, at 114–16.

could be reasonably expected.[218] The reforms were called "the most significant change in the way cross-jurisdictional practice is treated in two hundred years"[219] and "a significant move toward the nationalization of law practice."[220]

By 2010, overall conformity with the ABA model law was "very good" as fourteen states had adopted the changes verbatim, twenty-nine had adopted similar rules, and a number of other states had incorporated aspects of new Model Rule 5.5.[221] For litigators, restrictions on out-of-state legal practice are correspondingly of considerably less concern than they would have been a decade or two ago. As a federal court judge said in a 2010 law journal article, *pro hac vice* admission of out-of-state lawyers has become, in many instances, little more than a perfunctory clerical process."[222] The judge worried that "many local attorneys are essentially loaning their name, and by extension their reputation and law licenses, to out-of-state lawyers without sufficient scrutiny."[223] The greater ease of filing elsewhere has in turn plausibly contributed to the out-of-Delaware trend.

Technological advances further eased concerns an out-of-state law firm might have had about filing outside Delaware. Logistically, it is now considerably easier to practice law nationally than it was fifteen or twenty years ago. Readily accessible electronic research tools make it easier and cheaper for a lawyer to study the laws and procedural rules

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[218] Fountaine (2003), *supra* note 215, at 750–51; Munneke (2003), *supra* note 215, at 118; Eli Wald, *Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Profession in a Global Age*, 48 SAN DIEGO L. REV. 489, 504 (2011).

[219] Munneke (2003), *supra* note 215, at 120.

[220] Wald (2011), *supra* note 218, at 504.

[221] Greenbaum (2010), *supra* note 200, at 735. Texas and New York were not among these states, however.

[222] G. Ross Anderson, *Renting Your Law License Can Be Dangerous: Avoiding the Rubber-Stamp Mentality Surrounding Pro Hac Vice Admissions*, 21 S.C. LAW. 44, 44 (2010).

[223] *Id.*

of another state.[224] Liaising with local counsel and with clients can be accomplished easily through the internet, e-mail, and cell phones, none of which were common twenty years ago.

A learning process likely reinforced these trends. Once the path of suing a Delaware company in Texas has been followed enough times in the Texas courts, out-of-state firms will learn whom the good local partner firms are in each major city. Plaintiff firms will also learn which courts are hospitable to out-of-state firms, not least when approving attorneys' fees as part of proposed settlements of shareholder litigation. Plaintiff-friendly district courts can be sued in again; unfriendly ones can be avoided.[225]

These regulatory and technological changes facilitating out-of-state practice plausibly worked in combination with intensified competition among plaintiffs' lawyers to contribute to the trends toward both more corporate lawsuits generally, and more out-of-Delaware filings. The changes should have eased the way generally for shareholder lawsuits to be filed by out-of-state lawyers, both in Delaware and elsewhere, and thus plausibly contributed to the rising frequency of corporate litigation. With the out-of-Delaware trend, returning to our Texas public company example, twenty years ago our New York City firm would have seen suing in Delaware as the self-evident default choice. The choice is now less obvious, and might depend in part on where others filed in a particular instance because a firm might file in Texas rather than Delaware if its competitors have done the opposite We would therefore predict, and indeed find, that the proportion of corporate lawsuits involving Delaware public companies filed in Delaware should have dropped, roughly from the early 2000s onwards. Moreover, because out-of-state filing in Delaware has long been straightforward, we would expect this effect to be more

[224] Corbut (2010), *supra* note 204, at 11, 15; Wald (2011), *supra* note 218, at 495.

[225] In our interviews with plaintiffs' counsel, they advised us that the reputation of the local court was an important factor in deciding where to file.

pronounced for Delaware firms than for those incorporated away from their home state, but not in Delaware. This again is consistent with our empirical results.

VI. CONCLUSION

As we document elsewhere, since the mid-1990s, the rate of corporate litigation involving Delaware companies has increased, and the proportion of cases filed in Delaware courts has fallen. In this Article, we discuss changes affecting the plaintiffs' bar specializing in corporate and securities law over a roughly similar period, with key trends including intensified competition between plaintiffs' law firms, securities law reforms prompting some firms to move away from securities class actions into corporate litigation, and the shrinking of regulatory and technological barriers to lawyers bringing suit outside their home state litigation. These changes likely contributed to a general increase in corporate lawsuit rates for all public companies, wherever incorporated, and likely contributed to the out-of-Delaware trend for suits involving Delaware firms.

Though our empirical evidence on the out-of-Delaware trend only extends back to the mid-1990s, to place matters in context, we extend our historical analysis of corporate and securities litigation, and the firms that bring these cases, back to the 1970s, when securities class actions first emerged as an important litigation phenomenon. Securities class actions continued to grow in the 1980s, a decade when corporate lawsuits also grew in prominence, spurred by the 1980s takeover boom. Nevertheless, the litigation environment lacked the competitive bustle that would become evident in the 2000s, with jockeying among law firms bringing corporate lawsuits in Delaware constrained by the gate-keeping function Morris & Rosenthal performed.

By the mid-2000s, matters looked quite different. The 1995 enactment of the PSLRA gave a major edge in securities cases to law firms representing institutional shareholders, and to firms that could invest in the intensive fact development needed to survive a pre-discovery motion to dismiss under heightened pleading standards. The breakup and then implosion of Milberg Weiss and the emergence of law firms such as Grant & Eisenhofer meant there were more firms well suited to wooing institutional shareholders as named plaintiffs. Smaller firms were pushed out of securities litigation; some moved to corporate litigation, where they faced lower barriers to bringing a successful suit. Morris, Rosenthal's gatekeeping function weakened, as new firms opened in Delaware to handle corporate cases, and some out-of-state firms opened Delaware branch offices. The result in Delaware, was, to quote Chancellor Strine, "fragmentation" among plaintiffs' firms and "more of a melee."[226] The "different suits for different folks" environment that emerged likely helped to boost the corporate law litigation rate for public companies, whether incorporated in Delaware or elsewhere.

The law firms who began to bring corporate lawsuits since 2000, or increased their focus on corporate suits, often had reason to sue outside Delaware. The Delaware Chancery Court indicated, beginning in 2000s that when the plaintiff firms could not agree among themselves on lead counsel, it would, similar to the presumption under the PSLRA, favor firms who represented large shareholders and provided well-drafted complaints. Launching lawsuits in other states, where courts typically attached more weight to the order of filing, became an attractive option for nimble law firms that could specialize in filing quickly. At the same time, regulatory and technological changes made filing in a different jurisdiction considerably more straightforward.

Though changes to the plaintiffs' bar plausibly contributed both to increased litigation rates and to the out-of-Delaware trend, the evidence for a link is more equivocal for the latter trend. As we develop in related research, the out-of-Delaware effect likely has a number of causes. For instance, a jaundiced view of the plaintiffs' bar expressed by some Delaware judges and a growing willingness on the part of Delaware courts to scrutinize and sometimes cut attorneys' fees in settlements plausibly encouraged lawyers

[226] *Supra* note 5 and related discussion.

to shun Delaware courts and file elsewhere.[227] Moreover, whilst changes in how the Delaware courts chose lead counsel may have combined with developments in the plaintiffs' bar to encourage filing lawsuits outside Delaware, these changes in Delaware might have produced a similar effect on forum choice even without intensified competition among plaintiffs' lawyers.

To study the extent to which changes to the plaintiffs' bar contributed to the out-of-Delaware trend, one would ideally want to study all corporate law complaints filed in state and federal court, code the plaintiff firms who bring them, and analyze trends over time. This is not feasible. Finding, let alone examining, every corporate law complaint in all fifty states plus federal courts would be a daunting task. Even if all dockets could be accessed and analyzed, it would be hard to identify satisfactorily who was bringing the lawsuits. Often, the local law firms named on the dockets are not calling the shots. Instead, these firms are often principally "referral firms" which maintain a client list of potential plaintiffs and refer these plaintiffs to other firms that do the real litigation work.[228] And even if firms could be correctly identified, it is unclear how solidly one could establish causation because we would still not know the factors that went into forum choices.

We do, however, seek in our related empirical research to test the effects of factors related to changes within Delaware—cuts in plaintiff lawyers fees and changes in the allocation of lead counsel role in Delaware litigation—match up in time with litigation trends.[229] The results are somewhat equivocal, and would be made more so if one recognized that the trends discussed here occurred at similar times. Thus, we cannot assess with confidence the extent to which the out-of-Delaware trend results from factors purely in the hands of the Delaware courts, or of non-Delaware-specific factors such

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[227] *ABC Balancing Act* (2012), *supra* note 1.

[228] E-mail correspondence with Jessica Erickson (Jan. 31, 2012) (on file with the authors).

[229] *ABC Losing Cases* (2012), *supra* note 1, Part VI.

as the changes in the plaintiffs' bar and in the regulation and technology affecting out-of-state litigation we described in this Article. Nevertheless, our analysis suggests that developments affecting the plaintiffs' bar may well have contributed importantly to trends affecting corporate litigation involving public companies, and to the out-of-Delaware trend. Our case study also illustrates how academic study of the industrial organization of the plaintiffs' bar can improve our understanding of the regulation of the publicly traded firm.

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