PANEL: DELAWARE'S WORLD: WHO ARE ITS COMPETITORS?†

MARK J. ROE[1]: I thought I would talk about shareholder access in the context of constraints in Delaware and the interaction among the corporate lawmaking jurisdictions in the United States.

As Jack Coffee mentioned in the introduction, this traditional model of jurisdictional competition has been worse for wear over the last ten or fifteen years. And there are several reasons for this, only one of which I want to talk about because I do not think that people think as much about this as they should. There is an aspect about how people do their jobs where even if you are competing in some distant sense, you do not think of this competition on any day-to-day basis. People go to work; do their jobs as professionals. It is hard for me believe that anybody on the chancery court is thinking on a day-to-day or even a week-to-week basis, "This is something I've got to think about in terms of jurisdictional competition"—though maybe the Delaware legislature does from time to time. The kind of things that motivate people on a regular basis are doing one's job well, self-respect that comes from doing one's job well, respect of peers, and so on.

There is an aspect to the old style—"race to the top, race to the bottom"—that in some ways, is demeaning to the legislature, the law council, and the Delaware courts that make Delaware law. If I were sitting there inside Delaware, I would think, "What do you mean? I can't do my job well unless there's a competitive framework standing around me that is driving a race to the top?" I think since this is not really the kind of thing that motivates people day-to-day, it

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is appropriate that this competitive model has worn down somewhat.

Nevertheless, we do hit constraints from time to time. Sometimes the constraints can affect behavior, and sometimes the constraints do not affect behavior directly, but shift lawmaking from one place to another even if never changing what we would do with the lawmaking that is left.

Three points that I want to make. The first is that U.S. corporate law is—and I think we also recognize this—made in Washington, and it is made in Delaware.

Second point—which maybe we do not all agree with—is that some portion of Delaware actions are reactions to U.S. actions. They may be slight. They are always embedded in lots of motivations, but some of that is often there. I think it is possible that there is some of that that could be detected in shareholder access Sections 112 and 113.[2] That does not mean that people in Delaware did not have shareholder access on their agenda at some point. Many people had that on their agenda beforehand. But the fact that it went through at the time it went through is at least consistent with a reaction to what is happening in Washington.

The third point, which is what I would like to emphasize, is that where Delaware comes out can sometimes—and sometimes on important matters—affect what happens in Washington. I think the post-Section 112 history in shareholder access has at least an element of that. My intuition is that it is not likely that little Delaware can do something that affects the American economy in a way that is not at least acceptable to the national players in the American economy. I think we probably recognize this. It cannot drift really far from the way national players in the polity want things to be.

[2] *See* DEL. CODE. ANN. tit. 8, § 112 (2012) (providing that a corporation's bylaws may require the inclusion of shareholder nominees in proxy solicitation materials relating to the election of directors); *id.* § 113 (providing that a corporation's bylaws may permit the reimbursement by the corporation of expenses incurred by a stockholder in soliciting proxies in connection with an election of directors).

A better way to think of the jurisdictional structure in which Delaware is embedded is not just the old style of state-to-state competition, but rather to think of Delaware as also interacting with Washington on many levels: with the SEC, with Congress, with courts interpreting the Securities Acts, and so on. This makes for a corporate lawmaking structure in the United States that looks a little bit more like the following: two parallel corporate lawmaking entities, a federal one and a Delaware one, giving us two major legislatures for making corporate law—the Delaware legislature, with the assistance of the Corporate Law Council[3] and the United States Congress. It also gives us two major non-legislative institutions impacting corporate law: the Securities and Exchange Commission and the Delaware Chancery Court. This has been on our minds from Sarbanes Oxley and repeated in some things that happened in Dodd-Frank but it has really been there to a greater or lesser extent for a long time—for a significant period of time, a significant amount of merger law was being decided by the federal courts interpreting the Williams Act.[4]

We can think of corporate law now in Delaware as divided into a couple of different subcategories in terms of jurisdictional influence. Part of it is discretionary in the sense that there is just no interjurisdictional influence. Another bit, mostly around the edges, was impacted by old-style state competition in the past and conceivably still is today in some places—*Airgas*,[5] maybe. Then there is a

[3] The Corporate Law Council of the Corporation Law Section of the Delaware State Bar Association is responsible for the annual review and modernization of the Delaware General Corporation Law.

[4] *See* Williams Act, 15 U.S.C. §§ 78m(d)–(e), 78n(d)–(f) (2012). The Williams Act, which provided for disclosure requirements in the tender offer context, was enacted in 1968, in response to perceived abuses. *See, e.g.*, William C. Tyson, *The Proper Relationship Between Federal and State Law in the Regulation of Tender Offers*, 66 NOTRE DAME L. REV. 241 (1990). The Act amended the Securities and Exchange Act of 1934 by adding Sections 13(d) and (e) and Sections 14(d) through (f).

[5] *See* Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48 (Del. Ch. 2011). In *Airgas*, Air Products made several hostile offers for Airgas, the last of which valued the company at $70 per share. *Id.* at 55. The Airgas

potential third dimension of not just federal authorities making some corporate law directly, but of Delaware results being affected by what people think is happening in Washington and what the impact of Washington could be—to the extent that corporate players, legislators or others, have what is going on in Washington in mind when something become a national issue.

There is a political economy contrast that could be on the plate too. The kinds of influences that are going to be important in Delaware are affiliated with a board-centric view. Delaware corporate law is going to be particularly board oriented. Influences on Delaware, such as managers, boards, and investors, are going to be very important in making federal legislation as well, although the relative balance might be slightly different.

The really big difference between Delaware and the feds is that when the feds make corporate law, there are just a whole lot of other players and other ideas that come into the mix. So while Delaware philosophy is more likely than not going to focus on the importance of the boardroom and making sure the boardroom works very nicely, there are going to be some federal policy makers who have a different emphasis—a capital markets orientation at the U.S. Treasury or at the SEC, for instance. If something gets on the agenda in Congress there are just a whole lot of other players that are going to be influential in what the output will be. Public opinion, which is often populist and sometimes anti-corporate, consumer groups who want to get something out of corporate America, and probably employees and the AFL-CIO have a little bit more muscle at the federal

board maintained that the company was worth at least $78 per share and kept in place a number of defensive measures, including both a staggered board and a poison pill, during a year-long battle for control of the company. *Id.* at 55–56. The chancery court upheld the Airgas defensive measures based on Delaware Supreme Court precedent that the combination of a staggered board and poison pill are note preclusive. *See id.* at 181–82 (citing Versata Enters. v. Selectica, Inc., 5 A.3d 586, 604 (Del. 2010)).

level than at the state level. There are just a whole bunch of other interests that are in play at the federal level that are going to be much less in play at the Delaware level. And so some portion of what Delaware does from time to time could be done in reaction to what is going on in Washington.

There is another channel which is worth thinking about. The other channel is that some things that Delaware is going to do, its decisions on what the best way to handle the problem is, can have an impact on what the federal authorities end up doing. There could be some aspect of federal-made corporate law that is effectively influenced by what is happening in Delaware. Some players on the federal level may withdraw because they think what is happening in Delaware is to their liking or satisfactory to their way of thinking. In other places, they may decide to act because they take a look at what is happening in Delaware.

Run through shareholder access for a couple of minutes and see how at least there are some questions that could map onto these considerations. One question is, "Would Delaware have acted on shareholder access in Section 112 without the recurrent U.S. activity on shareholder access during the prior decade?" In particular, what seems to have changed circa 2008, 2009, was an election. Due to change of composition at the SEC, it became much more likely in 2008 and 2009 that the SEC would really do something on shareholder access.

Look at the statute. Section 112 says that the bylaws "may provide" for inclusion of shareholder nominees in a proxy.[6] And so there seems to have been some drift from the decade before Section 112, as many Delaware lawyers were opining that this was not the proper action, i.e., that shareholder access was not something that was part of Delaware law subject to this or this proviso.[7]

So Section 112 says that the bylaws *may provide*. But because this is an elective activity, there is almost something

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[6] *See* DEL. CODE ANN. tit. 8, § 112; *supra* note 3.

[7] *See, e.g.*, Bernard S. Sharfman, *Why Proxy Access is Harmful to Corporate Governance*, 37 J. CORP. L. 387, 391 n.32 (2012).

circular in how Section 112 works. It is the standard structure for Delaware corporate lawmaking: enabling, but the board is left with the first shot at deciding what the rules should be, i.e., what the bylaws should be. When you think about it, under Section 112, shareholders, who would like to get access to the company's proxy statement to do something or contest something with the board, have a different sort of barrier or a barrier that has a different meaning in this context. Either they convince the board to concede and adopt a Section 112 shareholder access bylaw, or, if they cannot get board approval for the bylaw, they have to run a proxy contest of some sort in order to be able to get shareholder access to avoid a proxy contest in the future. So there is a circular quality to Section 112 for the shareholders—a potential catch-22. A lot of the muscle that comes from shareholder access going forward probably is coming from the interaction of Section 112 with Rule 14a-11,[8] as opposed to Section 112 alone.

So, what are the possible explanations as to why Section 112 was passed in 2009? There are several reasons. One is: people decide it was a good idea, and its time had come.[9] Another variation is: if it looks like proxy access is coming, Delaware could quite frankly think they will do a much better job managing it over time—i.e., that once something is

[8] *See* Securities and Exchange Commission Rule 14a–11, 17 C.F.R. § 240.14a–11, *invalidated by* Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011). Rule 14a-11 would have required public companies to include shareholder-proposed nominees to the board of directors in their proxy materials in certain circumstances. *See also* David B.H. Martin, *Implications of the Proxy Access Case*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Aug. 23, 2011, 9:15 AM), http://blogs.law.harvard.edu/corpgov/2011/08/23/implications-of-the-proxy-access-case/#more-20347.

[9] *See, e.g.*, William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067, 1087 (2002) ("[M]andating courts to issue injunctions that require boards to permit stockholders to choose between competing transactions in any and all circumstances would prevent informed, well-motivated boards from opposing transactions that they believe would injure the welfare of the corporations they serve.").

in place at the federal level, whether its congressional or whether it comes from the Securities and Exchange Commission, it moves slowly, and does not adapt as well as Delaware to changing circumstances. Another possibility, less favorable, is: stay relevant and make sure we are still in the game by doing something on one of the major issues at the time. Another possibility is: to follow up on—or maybe even clean up—some of the aspects of *Computer Associates*[10]—I have heard it said that the fiduciary out in *Computer Associates* seemed a little weird to some people when the conflicts just did not seem to be moving in the standard direction. Whatever the reason, the potential impact was that if Delaware allows some moderate access in Section 112, there was some significant possibility that federal authorities would say, "We don't need [Rule] 14a-11," maybe conceivably "we don't need any proxy access rules at all at the federal level."

Enacting proxy access could have an impact in several different ways. One is, to the extent Congress is in play, there is some doubt as whether the SEC has authority to do proxy access. If Delaware enacts proxy access, you can imagine some people in Congress saying, "We've got so many things on our plate just leave it alone; we don't need to do anything to validate SEC authority." If there is a lawsuit, once a major corporate law state has spoken on proxy access it becomes just a little bit harder for a federal court to wreck the state corporate statute. Another impact of a Delaware access statute on the books is that it provides ammunition for an "arbitrary and capricious" challenge to the SEC rule. The D.C. Circuit went off in a different direction,[11] but prior

[10] *See* CA, Inc. v. AFSCME Emps. Pension Plan (*Computer Associates*), 953 A.2d 227 (Del. 2008). In *Computer Associates*, shareholder AFSCME proposed a bylaw that would have required the company to reimburse shareholders for reasonable expenses incurred in conducting successful proxy contests. *Id.* at 230. The Delaware Supreme Court held the bylaw invalid because "the [b]ylaw mandates reimbursement of election expenses in circumstances that a proper application of fiduciary principles could preclude." *Id.* at 240.

[11] *See* Bus. Roundtable v. SEC, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) (invalidating Rule 14a–11 and holding that the SEC acted

to its decision these are the types of impact that the Delaware statute could have had.[12]

So if you think all the way on our left as being the board deference view, and all the way on the right is access for every little thing, some financial investors who would like access now and then for really important things fall somewhere in the middle. And if you looked at, on the array, where the different players were at different times, I think it is fair to say that Delaware moved from limited access at the beginning of the decade to Section 112-type access at the end of the decade.

How do we partly explain what went on in Delaware? I think we can partly explain it by looking to what was happening in Washington. Congress moved on access, from being inert on the issue. Pieces of access found their way into Dodd-Frank. The SEC was acting and thinking about access as it had been for a decade and it looked very likely that access was going to go through in some form at the SEC. So at least one possibility is that, as Congress moves along, there is a little bit of a gravitational pull, vis-a-vis Delaware. One of the considerations that might have run through peoples' minds in Delaware was, "Now that Congress has moved, and the SEC has moved there, we can't be over here; we've got to be a little bit over there."

And then there is an additional impact. Once Delaware acts and moves to the center on proxy access, then there are reasons why Congress could lose interest in shareholder access and not push any further towards providing shareholder access. Possibly, there could be a reason for the SEC to move to other things on its agenda. And while the

"arbitrarily and capriciously" in failing to adequately assess the economic impact of the rule).

[12] *See* Brief for Investment Co. Institute & Independent Directors Council as Amici Curiae Supporting Petitioners, Bus. Roundtable v. SEC, 647 F.3d 1144 (2011) (No. 10-1305), 2011 WL 2014798 (arguing that the SEC acted arbitrarily and capriciously); Brief for State of Delaware as Amicus Curiae Supporting Petitioners, Bus. Roundtable v. SEC, 647 F.3d 1144 (2011) (No. 10-1305), 2011 WL 2014797 (arguing that Rule 14a-11 would compromise the Delaware statutory scheme).

D.C. Circuit did not base its decision on this, it could have been part of the basis for a circuit court decision condemning SEC action.[13] It was not, but it could have been.

In conclusion, what I have is not all that different from the idea that I started out with: that corporate law in the United States partly results from the interaction between Washington and Delaware. There are differences in influences and philosophy between Delaware and Washington. There are more general public influences on lawmaking, corporate lawmaking, in Delaware. Public opinions, which are sometimes populist, then anti-corporate; sometimes policy-makers with different ideals make their way into Deleware decision making. And then, there is the additional idea that that a lot of the influence can be two-way. Delaware's positioning can end up affecting where Washington comes out. I do not purport that this explains everything, but I think it explains some of American corporate lawmaking at both levels. And I think it is underplayed in our understanding of U.S. corporate lawmaking.

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BERNARD BLACK[14]: Delaware dominates the market for out-of-state incorporations. It has about 65% of all U.S. public companies and 80% of those who incorporate out of state. There has been a long discussion among academics as to why—is it substantive law? Not so clear. It is more likely to be judicial quality and developed precedent.

But to have the precedent, Delaware needs case flow. So the competitive advantage, the ability to charge a premium price, is going to depend partly on having the case flow and having the precedent. And all the academic debate—as long as I have been in the corporate law academy—has assumed that Delaware gets the cases. But increasingly, they do not.

[13] *See supra* note 11.

[14] Chabraja Professor, Northwestern University School of Law and Kellogg School of Management.

I am going to show you that. Delaware is increasingly losing corporate law cases involving Delaware companies. It is just going elsewhere. Less provable, but likely, is that some of those lost cases are important cases that Delaware ought to care about losing.

So let me show some data first. But to set it up, I want you to think about the balancing act that Delaware has to engage in, that it was doing successfully for a long time, but that it is not doing successfully now. Some more thought needs to be given to the question: how do you balance? You want to attract companies, but you also want to attract plaintiffs' lawyers. Because if do not attract the plaintiffs' lawyers, they are going to file suit somewhere else. But if you are too friendly to the plaintiffs' lawyers, you may annoy the companies who may decide not to incorporate in Delaware.

So Delaware has to balance those competing objectives. I think today the judges are going to have to do so consciously in a way they have not before. And they are facing competition from other states not in the form of an explicit effort to get incorporations, the traditional competition for incorporations—whether it exists or not. What Delaware is doing is facing a nuisance suit on every deal case. So the Delaware judges say, "I don't want to hear this." But it can be a nice important case to a local judge. So the local judge may be more friendly to those cases than Delaware in a variety of ways, and the plaintiffs' lawyers will respond.

First, some evidence. No perfect piece of evidence. What I am going to do is show you very quickly four data sets. Each of them are flawed, but they tell a consistent, and I think overall convincing, picture.

First data set: cases with reported decisions that we can find somewhere on the web—Westlaw, LEXIS, or the Delaware chancery website. We go through a massive search from 1995 on for all cases with one or more opinions of some kind on some kind of motion that shows up in writing. These are probably the more important cases because there exists at least one written decision. But maybe not, maybe some of them are unimportant. It is probably correlated though. There we find 729 cases; 554 involve Delaware companies. About half of those decisions are written in Delaware.

But, the time trend is interesting. Delaware's market share of reported decisions used to be 80%. It is now in the thirties.

Well, it is a biased sample. But it is biased pro-Delaware, because the Delaware judges write opinions. So do federal judges, but other state courts rarely write opinions. They are probably underrepresented. So you would really want to look for filed cases rather than cases with opinions. But that is hard, because there is no comprehensive source.

So what we are going to do is study three slices. We are going to look at large takeovers, mostly arms-length negotiations where the suits are the class action suits you heard about earlier. We are going to look at LBOs, which are interesting because they involve a conflict of interest—also class actions. Then we are going to take a slice of the options backdating cases, which are derivative cases, and see what we find.

Here are the top twenty-five M&A cases each year from 1994 on. The blue is Delaware, the yellow is not much bigger—that represents the other states. And the green is federal—a pretty small because it's hard to bring these class actions in federal court.

You see something similar. Delaware's share is not today what it once was. The number of cases is going up. But share is going down.

Another way to look at the data is to say, does Delaware see the case at all? So here the dark blue represents where Delaware is the only place where a suit was filed. The light blue represents where Delaware was one place where a suit was filed but not the only place. And red represents cases Delaware never saw at all. Basically, through 2001, Delaware always sees the case and is often the only place. Today, it often does not see the case at all, and it is never the only place. In four years, there is one case that was filed only in Delaware, and not somewhere else besides. So there is always this competition over case management.

Let us turn to LBOs. They are interesting because, unlike cases arising out of arms-length mergers, which many people think are junk cases, these are often good cases. There is a conflict. There are real damages awarded. There is sometimes real misbehavior, and Delaware is actually pretty tough on conflict of interest. This is not people running away from Delaware because they do not think they are going to get a fair hearing. Delaware is tough on conflict of interest. Yet the plaintiffs' lawyers are moving away from Delaware in the LBO cases as well. The blue line is going down—the cases are going to other state courts. Again, you cannot bring these cases in federal court very easily. Once again, Delaware used to always see the case—or almost always. Increasingly, it does not see the case at all, and it is rarely the only forum.

Okay, let me turn to derivative suits—options backdating cases; a big wave of cases that hit around 2005, 2006. Many of them were seen as strong cases with a good potential for damages—an opportunity for Delaware maybe to develop some case law on what the board should do to review compensation practices. A few of the cases end up in Delaware. There is a decision in 2007 that excuses demand[15] and lets the suit proceed. This is a plaintiff-friendly decision, but it is too late. The cases have all been filed elsewhere already.

Here is the data: there were 164 companies that we found that faced derivative suits; 126 were Delaware companies. We found 235 suits, 11% in Delaware. The rest split between federal and other states. They are derivative; you can bring these in federal court. In 3% of the cases,

[15] *See In re* infoUSA, Inc. S'holders Litig., 953 A.2d 963 (Del. Ch. 2007). Prior to commencing a derivative suit, a shareholder is required to make a "demand" on the board of directors to bring the action on behalf of the company. *See* DEL. CH. CT. R. 23.1. Demand will be excused as "futile" if the shareholder plaintiff can raise a reasonable doubt that the directors are disinterested or independent with regard to either the demand decision or the challenged transaction, or that the transaction was the product of a valid exercise of business judgment. Aronson v. Lewis, 473 A.2d 805, 814 (Del. 1984).

Delaware is the only place the suit is seen. In another 17%, Delaware sees only a piece of the action; 80% bypass Delaware entirely. No case law gets developed. Not that it gets developed somewhere else really—it just does not get developed.

Okay, next question, is Delaware losing just junk cases? Or is it losing good cases, too? We think—this is more speculation—that Delaware is losing some good cases. So remember: written opinion is proxy for a good case. LBOs are often good cases. We see cases with serious damages awarded or in settlement outside Delaware now. The options-backdating cases were often good cases; the board lack-of-good-faith cases also—the two principal decisions that are out there now are *Abbott*[16] and *Pfizer*,[17] both in federal court. Plus logically, if you are going to cut fees in good cases and bad, which Delaware is now doing, you are going to lose good cases and bad.

We have interviewed lots of plaintiffs' lawyers and defense lawyers about this. We talked to more than one Delaware judge—I am not going to tell you which ones. Part of the response was, "As long as we don't lose good cases, who cares? Junk cases—let them go somewhere else." Right. I do not think it is just the junk cases.

From now on, no data, just speculation—again, we talked to people and read a lot of cases. I do not think the trend is being driven by Delaware being less plaintiff friendly on the substantive law. Maybe a little bit—it is awfully hard at this

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[16] *See In re* Abbott Labs. Derivative S'holders Litig., 325 F.3d 795 (7th Cir. 2003) (holding that directors' conscious and intentional disregard of known risks indicated a lack of good faith and that their actions were not protected by the business judgment rule or the exculpatory clauses in the corporate charter).

[17] *See In re* Pfizer Inc. S'holder Derivative Litig., 722 F. Supp. 2d 453 (S.D.N.Y. 2012) (settling shareholder derivative actions against various senior executives and board members of Pfizer Inc. for breach of fiduciary duty by allowing unlawful promotion of drugs to continue despite numerous "red flags" of widespread and systemic improper drug marketing).

point to succeed on a *Revlon*[18] claim. But mostly, the trend is driven by things that just hit plaintiffs' lawyers, rather than substantive law. First, the fee cuts in both good cases and bad—bad being the disclosure-only, arms-length, third-party merger cases Second, a weakening of the first-to-file custom among the plaintiffs bar—that if you are first to file, you get a slice of the lead counsel action. Third, the PSLRA[19] is killing off discovery in securities cases. Plaintiffs' lawyers respond by trying to get the discovery in parallel corporate cases. You cannot get fast discovery in Delaware. You can somewhere else, though, so you file somewhere else. Fourth, there has been the emergence of some anti-plaintiff rhetoric from at least the more colorful of the Delaware chancellors, if I can call them that. And maybe that matters. Plaintiffs' lawyers do not like judges to say nasty things about them—or about their brethren. If it is not about you just yet, it might be the next time.

So a little bit more. During the 1990s, I think, not that long ago, the Delaware courts really favored plaintiff

[18] *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 501 A.2d 1239 (Del. Ch. 1985), *aff'd*, 506 A.2d 173 (Del. 1986). Revlon rebuffed a series of hostile offers from a company controlled by Ron Perelman and adopted a variety of defensive measures. At the same time, the Revlon board entered into exclusive negotiations with a "white knight" acquirer, private equity firm Forstmann Little & Co., and ultimately entered into an agreement with Forstmann that prevented an active auction of the company. The chancery court found that the board had breached its fiduciary duty in foreclosing other potentially higher bids. The court noted that, once the board decided to sell the company, even as a defensive measure, "[t]he directors' role changed from that of a board fending off a hostile acquiror bent on a breakup of the corporation to that of an auctioneer attempting to secure the highest price for the pieces of the Revlon enterprise." *Id.* at 1248.

[19] Private Securities Litigation Reform Act ("PSLRA"), Pub. L. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.). The PSLRA was intended to limit frivolous lawsuits brought under federal securities laws. It imposes new rules related to pleading, discovery, liability, and class representation, and awards fees and expenses. Prior to the PSLRA, plaintiffs could proceed past the pleading stage with minimal evidence of fraud and then use discovery to seek further evidence. Under the PSLRA, plaintiffs must present evidence of fraud before any discovery has taken place.

attorneys as private enforcers. They were relatively generous on fees—they moved toward percent of damages. You see articles by Bill Chandler and Carolyn Berger, in effect touting Delaware as friendly to plaintiffs' lawyers. "We award fees; come to Delaware"—that was the basic message. But we see a retrenchment in the last ten years. We see cutbacks. Yes, we see them in disclosure-only settlements. But we also see them in cases with real dollars awarded, where the judge looks and says, "I don't want to give 15%; I'll give 8%." More than once.

What else? The first-to-file presumption.[20] Delaware moves toward the PSLRA model of "let us find somebody who can actually do a good job with the litigation."[21] Now, there is a lot to be said for that, if you do not face competition from someone else. But if you are a plaintiffs' lawyer who might win on first-to-file, but who is not going to have the largest institutional client and who probably is not going to win in Delaware, what do you do? You go somewhere else.

Tag-along corporate suits. The issue there is access to expedited discovery, pure and simple. Delaware does not normally provide it, most other states do. This type of case did not used to exist. Now it is quite common. You almost have to go somewhere else.

Finally, some rhetoric. There is a tone of, "We just see all these junk cases. These are not good for anybody, except plaintiffs' lawyers." That is probably right. They may not be

[20] Prior to the 1995 passage of the PSLRA, courts usually selected the attorneys who were first to file a securities fraud complaint as the lead counsel for the plaintiff class in a securities class action suit. *See* James D. Cox & Randall S. Thomas, *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 COLUM. L. REV. 1587, 1597–98 (2006).

[21] *See* 15 U.S.C. § 77z-1(a)(3)(B)(i) (2011) ("[T]he court . . . shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members . . . ."); *see also In re* Revlon, Inc. S'holders Litig., 990 A.2d 940 (Del. Ch. 2010) (replacing lead counsel who had provided inadequate representation to owners of common stock in previous actions with new counsel to ensure the class was adequately represented).

good for anybody except plaintiffs' lawyers. But the plaintiffs' lawyers do not like the judges to say this in public.

So, what can Delaware and Delaware companies do if they would rather have the cases in Delaware—and whether they do is an open question. Maybe rethink the posture on fees in cases where there are real dollar recoveries. Do whatever you want on the disclosure-only settlements. But if there is a real dollar recovery, maybe we have to move back towards the more generous position of the 1990s. How do you choose lead counsel? It is perfectly sensible to say, "We want good counsel, not just first-to-file counsel with a boilerplate complaint." The question is: how do you get there without chasing the good cases away entirely? Expedited discovery would be a rule change. You could do it if you wanted to—if the courts wanted to. Finally, rhetoric is optional. I do not think it actually changes the substance.

What can companies do? Well, the big issue out there is forum selection provisions. Those can go in the charter. My guess is, if you put it in your charter, and the shareholders vote for it—that litigation against your directors shall be brought in Delaware—it will probably be valid and will be upheld by the federal courts and respected by the other state courts. You put it in the bylaws, much less certain—this is the directors deciding for themselves where they will be sued. Some court somewhere else might be skeptical about enforcing that, and at least one court refused to do so.[22] Even worse, a lot of the bylaw provisions out there are not, "You have to sue in Delaware," but rather, "You get to sue wherever you want, but we get to bring it to Delaware, we the board, if we want to." It is even less likely that a court somewhere else is going to accept that sort of ex post look of, "We'll bring it to Delaware if it's to our advantage to do so."

So far, the forum selection trend has been limited. It might not stay that way—we do not know. Why? Well, the defense lawyers tell us it is not so clear that it is a good idea. Everybody agrees that if you have a good suit, have good

[22] *See, e.g.*, Galaviz v. Berg, 763 F. Supp. 2d 1170 (N.D. Cal. 2011) (holding that a board-approved bylaw mandating that shareholder derivative suits be brought solely in Delaware was not enforceable).

facts, you would rather be in Delaware. So, now I am a defense lawyer. What if the plaintiffs have good facts? Where do I want to be? Not in Delaware. So they kind of like having the ability sometimes to say, "You know what? We will not file a motion to stay. We will push the litigation out of Delaware. We think we can settle it on better terms." So the defense counsel are not so keen—at least the ones we have talked to. Some like forum selection provisions, and some do not.

So back to my title, "The Balancing Act." Delaware has lost litigation market share. If it does not change, things may get worse, may stay the same. It is losing some good cases, we believe. It is losing some opportunity to shape law. If it changes too much, will you lose incorporations? We do not know.

Is this competition for market share in litigation good or bad from a policy perspective? I am an academic; I like to ask those questions. I do not know. I like competition, but this is a weird kind of competition. On the one hand, it can keep Delaware honest. On the other hand, nobody thinks that plaintiffs' lawyers are out to maximize social welfare. We give them a set of incentives, and they follow those incentives. And those might improve social welfare. But that is not necessarily what the incentives were for. You guys will have your own views.

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KATE LITVAK[23]: I want to talk about some empirical evidence that we have about Delaware, and the impact of Delaware on Delaware companies subject to Delaware law and the economy as a whole. I am an empiricist, I do empirical work in corporate law, in corporate finance, and in financial accounting.

The big question is: is Delaware somehow different? And we have a lot of theoretical reasons to believe that it is different. You have heard some of these reasons: the

[23] Professor, Northwestern University School of Law.

substantive law might be better, the judges might be significantly better, the lawyers might be significantly better. Lots of good reasons to think Delaware is different. But this is, of course, highly debatable. There are good reasons to believe that Delaware may be different not by so much, or if it is different, then the impact of the difference is not significant enough. This is where the empirical people like me come in—we want to measure things.

A state of the art on the empirical evidence is as follows. We now know that Delaware firms have higher market valuations, loosely speaking. And there was a very famous paper published in 2001 about this.[24] However, these results were recently challenged by showing that this is not true in all years.[25] In some years, Delaware firms are doing better than the rest, and sometimes they are not doing better than the rest. There is also evidence in a recent paper[26] that Nevada seems to be doing worst based on some of the accounting characteristics—they have more accounting risk statements. We also have some evidence that Delaware firms have higher institutional ownership and they have more forced turnover. So there is a ton of evidence suggesting that there is something good going on in Delaware and something good/bad going on in Nevada. And

[24] *See* Robert M. Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525 (2001) (arguing that Delaware corporate law improves firm value and facilitates the sale of public firms, and concluding that Delaware firms are worth more than similar firms incorporated elsewhere and are more likely to receive takeover offers).

[25] *See* Guhan Subramanian, *The Disappearing Delaware Effect*, 20 J.L. ECON. & ORG. 32 (2004) (finding that small Delaware firms were worth more than small non-Delaware firms during the period 1991–1996 but not afterwards, and that larger firms exhibit no "Delaware effect" for any year during the period 1991–2002).

[26] *See* Michal Barzuza and David C. Smith, *What Happens in Nevada? Self-Selecting into Lax Law* (Virginia Law and Econ. Research, Working Paper No. 2011-08, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1644974## (finding that Nevada attracts firms that have a significant likelihood of reporting financial results that later require restatement).

so you may see all these papers and make conclusions about this.

My bottom line is: all empirical results on the impact of Delaware on anything that you have seen are spurious. They are all results of mis-specified empirical tests. And the same is true for the Nevada results.

I will proceed in two ways. First, I will explain to you very intuitively—this is not a technical audience; I will not go into econometrics, but I will give you an intuition—why this is so. And then I will show you that not only are they wrong econometrically, but the error is not harmless, that it in fact produces wrong results. So if you remember anything from this talk, that is what you should remember.

What is wrong in the current studies of the impact of Delaware? It is the selection problem. The selection problem is as follows: firms choose to incorporate in Delaware. And firms also have a variety of unobserved characteristics that we cannot measure. And it is possible that those unobserved characteristics drive both the choice of incorporation state and the outcome variable that we are trying to measure—the market valuation, or accounting restatements, etc.

This is a very bad combination. When you have a combination of a selection by the objects of your study and the unobserved characteristics of that object, then you basically cannot make any meaningful conclusions about what you find unless you can do very tricky econometrics that none of the prior studies have done.

So let me show you something. Here is a very intuitive example that everybody can relate to. Suppose you want to study hospital deaths, and you want to ask whether big teaching hospitals, that have a lot of machinery and fancy doctors, but also have a lot of residents who are very tired, have higher death rates. The problem in those kinds of studies is that we cannot directly measure the health of underlying patients. We have some proxies for health, but we do not really have a good measure of health. And it is possible that big teaching hospitals get the sickest patients.

So suppose you find that big teaching hospitals have the highest death rates. Well, you can interpret that whatever way you want. You can say, well, they kill people, and they kill people because they have all these residents who are overworked and under-slept. Or you can say, no, they save lives; it is just they do not save enough lives to overcome the underlying sickness of patients that they get. Which is also plausible if they in fact get the sickest patients. It is also possible that all of this is irrelevant; they are not any better or worse than any other hospital. They just get sick patients.

And the point is this: you cannot conclude anything about the quality of the hospital by looking at this kind of study unless you can directly measure the underlying health characteristics of people, which you cannot. So, if you would not believe that kind of hospital study, then you should not believe the studies of the effect of Delaware law on company characteristics. Okay? That is the underlying intuition behind it.

And notice that it does not help to say, as some people, "I'm not claiming causation—I just want to show correlation. If I want to show correlation, I don't have to deal with any of the really fancy mathematics that are involved in these studies." This does not help because, as I just showed you in the hospital example, your correlation can be completely spurious. The true correlation could have the reverse sign. Or it could be nonexistent. Or it could have a correct sign. We just do not know. It is not that all prior studies of the effect of Delaware have incorrect results. It is just that we do not know if they have a correct result or not, in the same way that we cannot know the stuff about hospital impacts.

So next question. So far what I have said, econometrically, is right. You know, there is math and it is—[*Audience Laughter*]—you know, in math you are right or wrong, and I am right. There is just no way to debate this.

The big debate question is: is it a harmless error? Sometimes people say, "Well I'm right, you know, it doesn't really affect the outcome so much." And what I am going to show you is some evidence that the error is not harmless. It is not just that the people did not go through every trick. It is that they, in fact, got results that we cannot believe. Again, it is not that what they have got is wrong. It is just that they have found results that we cannot believe.

For example, there are possible compounding factors. It is possible that maybe instead of studying the effect of Delaware, we are studying the effect of out-of-state incorporation in general. Maybe firms that incorporate out of state are just different. Maybe their management is more sophisticated, or maybe they have fewer local political connections, so they do not care about local incorporation. Or maybe—who knows—maybe when we study the Delaware effect, we in fact study an out-of-stateness effect.

So let us see. Here is what I did. The first part of this project is to start to poke holes in existing results and see whether existing results are robust. That is, if you slightly change a specification, and you get a completely different result, something must be wrong with the result.

So here is what I did. I get a large sample of all U.S. publicly-traded companies from 1987 through 2010, and they have got lots of measures of performance. And this is my contribution to the world. Prior studies only used one measure; I use about fifteen. And so I use financial measures of performance, an accounting measure of performance, and I use liquidity and correlation of stock prices—all kinds of things, just basically whatever people have come up with. And I ask, "Does the fact of out-of-state incorporation predict all those other measures?" And then I ask, "Does the fact of Delaware incorporation predict those measures? Or Nevada incorporation?" And so then I say, "Let me control for out-of-stateness and see whether Delaware is still important." It is a very simple research design.

And here it is briefly. You see that the fact of out-of-state incorporation predicts corporate goodness in a whole bunch of different ways. So clearly, firms incorporated out of state are just better than the rest in various measures. And then I said, "Well, let me see whether being in Delaware also predicts corporate goodness." And it does. And you know, in most measures, it predicts corporate goodness. And then I said, "Well, let me control for out-of-stateness and see whether Delawareness predicts corporate goodness." And all of a sudden, most of these results disappear. And then I say, "Well, let me come up with a different control for out-of-stateness." And now we see the Delawareness completely disappear.

So when you properly control for the fact of out-of-state incorporation, the Delaware result is gone, in every one of these measures. It is not just one measure—in every one of them. So summary: Delaware predicts goodness in a whole bunch of different measures—financial measures, accounting measures. However, when you account for out-of-stateness, Delaware does not predict anything anymore. So you cannot really attribute stuff to Delaware law.

Here is another very celebrated result. This is basically a measure of market valuation, the premium the market places on companies and corporations in Delaware. And in separate years, in basically every year, I find a very significant premium put on Delaware companies. Delaware is always good. However, Nevada is also always good, almost. Well, this has got to be wrong, right, because Nevada is not good. Delaware is good. Nevada is bad. [*Audience Laughter*] So something is wrong. Again, you see the point of the story. When you trick the specification by just a little bit, and you get vastly inconsistent results, the specification cannot continue. So then I say, "Well, let me then account for out-of-stateness." So I ask whether Delaware still predicts excess market valuation, controlling for out-of-stateness, and the answer is "no." However, Nevada does. So Nevada's good—right? And Delaware is not good?

Again, the point is: all of this stuff is spurious. Everything here just should not be done. The bottom line is: we cannot tell whether Delaware improves anything. It is possible that it does. We just cannot tell. And we should be really careful when we hear the sort of claims that we have found that Delaware really is great. We do not know. We found Nevada is bad. We do not know. It is possible; we just cannot tell. Okay, thanks.

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LAWRENCE A. HAMERMESH[27]: I will try to keep that in mind. Thanks, Bill. Kate, Bernie, Mark—I love your work, you know. Great stuff, especially when you are talking about Delaware. Now hardly any "buts" at all. But, [*Audience Laughter*] Bernie, I am not going to comment much about your paper because I am anxious to hear more about what Stuart has to say about that, for obvious reasons. But Mark and Kate, I do have a few things to raise with you folks.

Mark, you posed the question early on about whether Delaware would have amended or enacted Section 112 without impetus from Washington. And I checked with my mentor here, Stuart, and we both agreed the answer is clearly "no." So you can bank that one. But my take on why that is so is a little more elaborate, perhaps, and I thought I would just mention some of the salient points.

I think the importance of another D.C.-Delaware interaction needs to be brought out some more. And that is the very curious interaction between the SEC and the Delaware Supreme Court, and the Constitutional amendment that was the precursor to all that.

As most everybody here knows, there was an amendment of the Delaware Constitution that kind of emerged, as I understand it, from discussions between the Chief Justice of the Delaware Supreme Court and the General Counsel at the SEC about, "Hey, wouldn't it be a great idea since we have all these state law issues that are, in effect, dispositive of some our Rule 14a-8[28] decisions, why don't we just get a

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[27] Ruby R. Vale Professor of Corporate and Business Law, Widener University School of Law.

[28] Securities and Exchange Commission Rule 14a-8, 17 C.F.R. § 240.14a-8 (2012). Rule 14a-8 requires companies to include shareholder proposals in their proxy materials for a vote at an annual or special meeting of the shareholders, unless the shareholder has failed to comply

direct pipeline to the Delaware Supreme Court, and then ask them to ask Justice Jacobs what he thinks about a particular state law issue?"

So the Delaware Constitution gets amended.[29] And lo and behold, a year later there is a case that comes from the SEC to the Delaware Supreme Court on what had been a long-festering issue about the relationship between bylaws doing certain things and the exclusive power of directors. That issue, to my mind, was a long barrier to development of a lot of corporate techniques in the area, particularly bylaws. And when the *Computer Associates*[30] opinion came out, what had been uncertain about the legal viability of proxy access bylaws or proxy reimbursement bylaws, in my mind at least—and I am only speaking for myself here—completely changed the picture. To my mind there was no longer any serious uncertainty about the validity of a proxy access bylaw.

That being the case—at least if you accept my take of it—when you get to the 2008 elections—and as you point out, the fairly obvious shift in the politics in Washington, and the certainty that the SEC would revisit proxy access—I mean, it was almost promised by the predecessor—it did not seem like much of a move for Delaware to say, "Gee, this is already the law; the most we're going to do is address the 'fiduciary out' aspect that came out in the *Computer Associates* opinion," for whatever that was worth. And that was played out on a hypothetical stage, at best.

And so, I did not think of it as much of a move, except for the fact that it had what we in Delaware thought might be a useful signaling function in the political battle that we knew

with certain procedural requirements or the proposal falls into thirteen substantive bases for exclusion.

[29] In 2007, Delaware amended its Constitution to allow the Delaware Supreme Court "to hear and determine questions of law certified to it by . . . the United States Securities and Exchange Commission . . . where it appears to the Supreme Court that there are important and urgent reasons for an immediate determination of such questions by it." DEL. CONST. art. IV, § 11, cl. 8.

[30] *Computer Associates*, 953 A.2d 227 (Del. 2008); *see also supra* note 10.

was coming down the line. To be able to say to the world, "Look, Delaware law actually does deal with this, and if there was any doubt about it, here are Sections 112 and 113, and it is perfectly clear." Not a big give, maybe not much of a get, but my bottom line out of all this is that the story does play perfectly into your take about the fact that corporate governance issues do get played out on a state versus, or state and federal stage. And so I was just trying to see if I could elaborate on that a little bit, and then hope you will accept that as a very friendly amendment.

There is a point in your paper that I want to mention. I do not think you touched on it much. And that is the question of the relative weakness of Section 112. And certainly when Section 112 was enacted, at that moment, it did not really do much. It did not do much because, as you pointed out, in order to put the bylaw into place against management's will, you needed a proxy contest, in effect. But for the same reason that we knew that there was going to be ferment in Washington about proxy access, we also suspected there would be ferment on Rule 14a-8 and the election exclusion.

So, in enacting Section 112, there was not in any way a realistic hope on anybody's part in Delaware that this was all just going away because nobody is going to adopt these bylaws—because management will not, and the stockholders will not because it is too expensive. I think the expectation was that there was going to be serious ammunition that can be spent in this context. And it is only now, finally, after mandatory access was adopted, and then struck down, that the SEC ultimately decided to proceed—it was not a foregone conclusion—and let Rule 14a-8's election exclusion liberalization go on its own. So only now do we have a regime in which Section 112 can play out the way I think people thought it originally might. But, as I said, for me the salient point is that it is not a big give.

Kate, I am going to talk just a bit about your paper, ask you some questions about it. Do not answer them yet. You can do it offline if you want. But first of all, this was a very disturbing paper to me, in two ways—[*Audience Laughter*]—

well, three. You know, trying to understand it is always more than I can do.

But in substance, two disturbing aspects of it. The firmness with which you demonstrate the spuriousness of earlier studies is disturbing to me because, as someone who sometimes has to wear a policy hat, as much as I said, "Yay!" when Rob Daines came out with his study[31]—"Gee, we're doing things right; this is great!"—I never really quite believed that. And so you have proved me right. And on the other hand, I did not believe Guhan[32] either when he said, "Oh, Delaware's bad." And so when you say, "We cannot tell," I kind of believe you.

But that does not do much for me as a policymaking matter. And that gets to my second area of disturbance. There is a strong undertone in your paper of "law doesn't matter"—or if it does, we cannot tell how it does. And that gives me, again, in my policymaking role, a little bit of discomfort, and probably gives people like Bill Chandler a little discomfort.

Is there a lesson in the paper for anything about the way policy ought to get shaped? I guess that is the core of my question. More specifically—and I will end with this—you have this interesting variable that you tease out about out-of-stateness. And as your study seemed to demonstrate, it is a pretty powerful factor. I would like to capture that factor and bottle it, and convince people that they really ought to be more about out-of-stateness themselves, because Delaware has done very well in the competition for out-of-state incorporation.

Part of me says, yeah, go ahead and build that up, because we want to persuade people that they ought to get out of their home towns and go out on the road and raise their "Tobin Q."[33] And that is a good thing. I am not sure

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[31] *See* Daines, *supra* note 25.

[32] *See* Subramanian, *supra* note 26.

[33] "Tobin's Q," developed by James Tobin, is the ratio between the market value and the replacement value of the same physical asset. *See generally* James Tobin & William C. Brainard, *Asset Markets and the Cost*

that would work. I guess the real question I am posing is: can we understand more about this out-of-stateness factor? You identify the chromosome. You identify some of the characteristics that might map under that chromosome. But I am not sure I am getting a clear story about why those characteristics really belong on the same chromosome. It seems to be important, but I am not sure why. That is all I have. I will let Stuart and Bernie talk for a while.

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STUART M. GRANT[34]: Bernie, I was asked to comment on your paper about Delaware losing cash flow. And I think some of it is—cash flow—close enough—*case flow*. [*Audience Laughter*] But of course, you know, losing *case* flow is to Delaware losing *cash* flow, and that is actually important. I would say for those of you who are Delaware judges, really the only important takeaway you need from Bernie's paper is: raise plaintiff fees, and everything will be solved! [*Audience Laughter*]

But for the rest of you who need to take away more than that, you know, multi-jurisdictional litigation is a significant problem, I think not only for the Delaware courts. When I talk to my friends in the defense bar, it is the biggest challenge that they have now. How do you deal with a situation where you have a deal, and it is being challenged in Delaware—it is being challenged in the home state court—and it is also being challenged in one or possibly two federal courts?

So I think when we look at the problem, it is not just about what is happening to the development of Delaware law. Really it is about what is happening in the marketplace for transactions. And I think your work really carries over beyond just Delaware law. But it is fair to say that Delaware clearly is losing its opportunity to develop Delaware law.

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of Capital (Cowles Foundation Paper 440, 1977), *available at* http://cowles.econ.yale.edu/P/cp/p04a/p0440.pdf.

[34] Managing Director, Grant & Eisenhofer P.A.

Now Delaware has seemed to, or Delaware and its allies have seemed to, try two ways to change this. The first is our new Chancellor has his "stay in your own lane" approach, where he has spoken frequently, be it in transcript or in opportunities like that, encouraging other over-burdened courts to say, "Why do you want to take on Delaware cases when we have our own expertise in our court, and this is what we do? Do you really need to reach out and grab something?"

The second has been championed by the Wachtell Lipton firm, our sponsors here, to contractually bind shareholders to litigate in Delaware exclusively. And while those both seem to be interesting methods, I think the Madisonian view of a federalist system is really going to ultimately lead to neither of those being highly successful.

Now, no doubt some cases are filed outside of Delaware for less than noble goals of angling for fees. But I think there are a lot of really legitimate challenges as to why folks file outside of Delaware. And if our theme is: who are Delaware's competitors, I think it goes back to the old adage: "we have met the enemy and he is us." Because I think the court itself is creating opportunities for others to go elsewhere. And I would like to share some of these opportunities.

Interestingly enough, when we say "elsewhere," Delaware is, you know, almost like the Mitt Romney. Elsewhere is not anyone very specific. It is anyone other than Delaware sometimes. And so I think one of the things we can do is really look at the Delaware Chancery Court. And I would like to stress a few of the things that you said, and add to that list, about the perception. And it is really important to talk about perception, because I think often we are what we are perceived to be. And, Kate, I really appreciated your work which shows that we really are what we are perceived to be, because we cannot empirically prove what we really are.

So if we are only left to, "We are what we're perceived to be," let me share some of the perceptions that are floating around some of the plaintiffs bar. Now, I do not necessarily hold all or even any of these perceptions. I may—I am not disclosing which I do or do not. But I think there are perceptions out there that cause people to file elsewhere.

The first of which—and I think you mentioned it in your paper—is there appears to be an unwillingness to order expedited discovery early in certain cases. And I think this is causing people to go elsewhere. And I think we have seen it often in Texas, which seems to be willing to schedule things very quickly on an ex parte basis—there is not necessarily a challenge to the entry of an expedited discovery order. And this was, as I remember, Delaware, two decades ago. If you filed a case, you got an expedited discovery order. You did not have to have a hearing, i.e., set up to have an argument over whether expedited discovery was going to be ordered. And I think that is a significant factor in causing people to say, "I need to go elsewhere." And even when expedited discovery is ordered, the order may not expedite things as much as one would like, at least on the plaintiff side, prior to the proxy or the preliminary proxy coming out.

Which leads into point two—that there seems to be often an unwillingness in Delaware to schedule a preliminary injunction before a proxy is out. And I understand the argument against that to say, "Well, we are not going to have serial preliminary injunctions because you are not going to challenge what you know now and then next Thursday challenge something else, and the Thursday after challenge something else." And you are going to have challenges to the disclosures. But for a state that prides itself on really hating disclosure-only settlements, to say that before you bring your preliminary injunction, "We really want you to have all the disclosures out there," seems counterproductive. And I think it leads to plaintiffs saying that there may be better jurisdictions.

Third, there seems to be an unwillingness to enjoin a transaction if there is no other bidder. Now, I get that. Do you really want to be the judge who takes the decision away from the shareholders and says, "Yeah, there's something wrong here. But am I going to not let the stockholders vote and say, well, do I really want that premium transaction, when really there's nothing else to offer?" And there has been a lot of discussions on whether *Revlon*[35] really means anything in the context of where there are not at least two bidders.

Now, I am pleased to say that there have been transactions that have been enjoined. The *Del Monte*[36] case was certainly one where there was a premium offer, the transaction was enjoined to go push a "go-shop," and the deal protections were struck down. But it seems to be a rare situation in which the courts are willing to enjoin a transaction. And there are published opinions where the court has said, "You know, I'm troubled by this, but I'm not going to prevent the shareholders from deciding for themselves."

Two other points. Bernie, you tend to say that in the good cases there is not a belief that the balance is tipped in favor of management. I think that is not necessarily the perception throughout the field. I think that plaintiffs feel it is extremely difficult to win a plaintiffs case in Delaware. And so substantively they are looking elsewhere, particularly on issues where you may be able to get a jury. For example, option backdating. The idea of putting that in front of a New York jury as opposed to having it heard in the chancery court is very, very palatable to a plaintiff, and probably very unpalatable to a defendant, despite the fact that former Chancellor Chandler and former Vice Chancellor Lamb have very, very strong views about the impropriety of backdating, spring-loading, all that. The message was loud and clear and yet lots of folks still felt that they were better off to go elsewhere.

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[35] *See supra* note 18.

[36] *See In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813 (Del. Ch. 2011). *Del Monte* concerned the acquisition of Del Monte Foods Co. by a group of private equity funds. The court of chancery enjoined a vote on the merger for twenty days, finding that collusion between the sell-side advisor and the private equity funds led to a flawed process to seek other potentially higher offers (a "go-shop") before the private equity transaction was finalized. *Id.* at 840.

Finally, the issue about determining who is lead plaintiff and lead counsel still is a problem in Delaware. Delaware has, in its view of self-organization, basically stepped back and said, "Plaintiffs, you all figure out, you know, what to do here." And that often takes up a month of time in a case that may only be two or two-and-a-half months. This gets to be a real problem. Other jurisdictions seem to have been more willing to step in and pick folks to lead litigation.

I just wanted to emphasize a lot of the points that you made, which I think really present a challenge to the Delaware courts in being able to develop Delaware law as fully as it ought to be. Because, to some extent, they are pushing litigation into other courts. And really, it is the Delaware courts that I think are going to have to make the adjustment to, as you say, attract folks to want to come back in and litigate in Delaware.