

# How Long Do We Have to Play the “Great Game”?

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The provocative title that Matthew Cain and Steven Davidoff Solomon have chosen for their cogent analysis of jurisdictional competition for corporate litigation—*A Great Game*—derives, perhaps, from the term used to describe the 19<sup>th</sup> century struggle between Great Britain and Russia for control of vast territories in central Asia.<sup>1</sup> The reference to this historical struggle between world powers may be appropriate if, as Cain and Davidoff Solomon posit, “[t]he competition [for representative shareholder litigation] is the game.”<sup>2</sup> They may have accurately depicted a long-running, evolving struggle among plaintiffs’ lawyers and courts in various jurisdictions to achieve hegemony over the industry of representative shareholder litigation. Recognizing that the namesake historical struggle encompassed control of Afghanistan, however, one surely has to hope that jurisdictional competition for corporate litigation is a “game” that will not go on for hundreds of years or be as costly and destructive as the historical “Great Game” has been.<sup>3</sup>

That hope that Cain and Davidoff Solomon’s *Great Game* will not have such long and far-reaching effects as its namesake is the cornerstone of these comments on the Article. As developed more fully below—and with no disrespect intended as to the importance of the paper—it is hoped that within ten years the Cain/Davidoff Solomon paper is likely to become a historical

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1. See, e.g., PETER HOPKIRK, *THE GREAT GAME: THE STRUGGLE FOR EMPIRE IN CENTRAL ASIA* (1992).

2. Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 500 (2015). For another response to Cain and Solomon’s Article, see Charles R. Korsmo & Minor Myers, *Competition and the Future of M&A Litigation*, 100 IOWA L. REV. BULL. 19 (2015).

3. Total funding for military operations in Afghanistan since September 11, 2001 was reported in 2014 to have been about \$686 billion. AMY BELASCO, CONG. RESEARCH SERV., RL33110, *THE COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11*, at 6 (2014). This figure is incremental (in addition to base costs of maintaining a military capability) and does not include collateral support costs (e.g., veterans’ post-service medical care) or financial impacts on military families from injury or death. See *id.* at 7.

curiosity: the Great Game of jurisdictional competition for corporate litigation will be over and its destructive aspects brought under control. What may end this Great Game, as the Article itself acknowledges,<sup>4</sup> is the increasingly frequent appearance of exclusive forum provisions in corporate charters and bylaws,<sup>5</sup> provisions that one can reasonably expect will largely eliminate the opportunity for interstate litigation competition among shareholder plaintiffs' counsel.<sup>6</sup>

Arriving at that expectation involves traveling an analytical route that differs somewhat from the one outlined in *A Great Game*. Before exploring that path more fully, however, it may be helpful to note some of the Article's useful contributions. First, as *A Great Game* and other scholarly efforts have correctly noted, plaintiffs' counsel are rational value maximizers, and therefore choose litigation forums by seeking lower dismissal rates (and, to a lesser extent, higher fee awards).<sup>7</sup> Second, the data in *A Great Game* confirms that at least from 2005 to 2011: (1) shareholder litigation challenging mergers of all kinds has become essentially ubiquitous;<sup>8</sup> (2) multi-forum litigation went from a rarity to more common than not;<sup>9</sup> and, (3) settlements of shareholder class actions in which the only consideration is supplemental or revised disclosure overwhelmingly predominate, and settlements in which deal consideration is increased are relatively rare.<sup>10</sup>

Although the depth and strength of the evidence presented in *A Great Game* are impressive, the three propositions noted above are no longer front-page news, although each is still disturbing. So, the authors strike off in search

4. Cain & Solomon, *supra* note 2, at 499 (noting that a purposeful effect of an exclusive forum selection provision "is to deal with the problem of multi-jurisdictional litigation and its perceived negative effects").

5. The leading researcher on the evolution of these provisions is Claudia Allen, who most recently reported that in the wake of a favorable opinion from the Delaware Court of Chancery (*Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013)), "112 Delaware corporations . . . adopted or announced plans to adopt exclusive forum bylaws from June 25, 2013, through October 31, 2013, and the pace of adoptions has not slowed since then." CLAUDIA H. ALLEN, CONFERENCE BD. GOVERNANCE CTR., TRENDS IN EXCLUSIVE FORUM BYLAWS 3 (2014), available at <http://ssrn.com/abstract=2411715>.

6. The key premise of that expectation is that courts in jurisdictions outside of Delaware will give effect to exclusive forum provisions and dismiss cases brought in violation of those provisions. Recent developments suggest that this premise is well founded. *Id.* at 6–8.

7. Cain & Solomon, *supra* note 2, at 480. ("Attorneys act in their self-interest to file opportunistic complaints in pursuit of settlement and payment of attorneys' fees."); *id.* at 494 (stating that evidence suggests that attorneys base their decisions where to file using prior dismissal rates); see also 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, 685 (1986) (explaining that the structure of shareholder class and derivative litigation "gives the plaintiff's attorney, not the client, the real discretion as to whether to commence suit"); Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 U. ILL. L. REV. 467, 494–96.

8. Cain & Solomon, *supra* note 2, at 475 tbl.I.

9. *Id.*, at 476 tbl.II.

10. *Id.*, at 478 tbl.III.

of fresher game (pun intended), examining the possibility that *courts*, and not just plaintiffs’ counsel, compete to attract representative shareholder litigation. Here, however, the evidence seems less compelling. There is interesting evidence that the courts of various jurisdictions behave differently in regard to dismissal rates and attorneys’ fee awards,<sup>11</sup> but the authors indicate that there is: (1) no statistically significant evidence that courts generally respond to their experience with representative shareholder litigation “by adjusting their settlement rates”; (2) no evidence that “[b]usiness [c]ourt states” compete “through settlement/dismissal rates”; and (3) at best only some evidence “that Delaware responds to losing cases by raising its settlement rates.”<sup>12</sup>

The authors preface the limited evidence of interstate judicial competition they identify with two important propositions. First, they recognize the uncertainty as to why a state—treated as a monolithic actor, rather than, more accurately, as a disparate set of judges, across disparate communities—would be motivated to promote in-state representative shareholder litigation.<sup>13</sup> Second, perhaps more importantly, “it is difficult to fully control for endogeneity in the competition arena.”<sup>14</sup> As explained below, for notable example, the finding that the Delaware courts have raised their settlement rates may be driven not by a competitive response to a threat of losing litigation, but by other dynamics of multi-forum litigation.

The authors of *A Great Game* were almost surely inspired in their search for evidence of state competition by the \$300 million fee award in the *Southern Peru* litigation in the Delaware Court of Chancery.<sup>15</sup> The result in that case launches their Article, and the authors almost immediately raise up the story of then-Chancellor Strine’s admonition to a gathering at Columbia Law School that his court “had previously awarded numerous million-dollar-plus attorneys’ fee awards.”<sup>16</sup> Referring to contemporaneous suggestions that Delaware was “losing its cases,” the authors raise the possibility that “substantial fee awards are a strategic response by courts as they attempt to compete for future class-action litigation.”<sup>17</sup> Put another way, the implicit conclusion is that Chancellor Strine, facing an exodus of litigation from the Delaware courts, pulled a \$300 million fee award out of his bag of goodies

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11. *Id.* at 495 tbl.IX.

12. *Id.* at 496.

13. *Id.* at 497 (“[I]t is not necessarily the case that all states are motivated in the same manner to compete and attract cases.”).

14. *Id.*

15. *See Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).

16. Cain & Solomon, *supra* note 2, at 467 n.4 (citing David Marcus, *Delaware’s Chancery Grapples With Multijurisdictional Litigation*, DAILY DEAL, Dec. 9, 2011, available at 2011 WLNR 26934635).

17. *Id.* at 467.

and bruited it about publicly to entice shareholder plaintiffs' lawyers to bring their cases in Delaware.

This characterization of *Southern Peru* as bait to reel in shareholder litigation, however, leaves much to be desired in terms of explanatory power. The judgment itself in that case was huge—on the order of \$2 billion, including pre-judgment interest.<sup>18</sup> Further, it followed hard-fought litigation, including a full trial on the merits, and given the imprimatur of a committee of ostensibly independent directors, a judgment for the plaintiffs was at long odds. Under long-settled prevailing standards, a huge fee award was inevitable in that case, no matter what was being said at the time about interstate case flows.<sup>19</sup> Thus, unless one believes that the determinations of liability and the remedy were conjured up in order to justify a notoriously attractive fee award—a farfetched story—there is nothing on which to premise an argument that the fee award was motivated by competition or fear of losing cases.

Accordingly, looking somewhere other than state courts' competitive urges to find the explanation for the increased rate of settlements in representative shareholder litigation in Delaware may be more useful. In this regard, the most intriguing finding in *A Great Game* is the evidence "indicating that the more suits filed the more likely the case is to settle."<sup>20</sup> The authors suggest several causal explanations of this result: greater plaintiffs' resources and commitment giving rise to better (or at least richer for plaintiffs' lawyers) outcomes, or more meritorious situations attracting greater numbers of suits. Those explanations likely account for at least some of the correlation between numbers of suits and numbers of settlements.

But I suggest another explanation, one that some scholars have previously asserted:<sup>21</sup> namely, that the association of increased numbers of lawsuits with an increased rate of settlement—particularly disclosure-only settlement—derives from an insidious, race-to-the-bottom dynamic of multi-forum litigation. That dynamic has been explained as follows. First, a rational, value-maximizing counsel for a plaintiff shareholder who perceives that class actions are already pending in another forum will find it personally attractive to file a parallel suit in a different forum. Second, in turn, and if lacking any ready means to force all shareholder litigation into a single forum, defendants

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18. *Ams. Mining Corp.*, 51 A.3d at 1250.

19. In determining the appropriate award of attorneys' fees in representative shareholder litigation, the Delaware courts apply the so-called (and perhaps ironically named) "Sugarland" factors: (1) the benefits achieved in the action; (2) the efforts of counsel and the time spent in connection with the case; (3) the complexity of the litigation; (4) the contingent nature of the case; and, (5) the standing and ability of counsel. *See id.* at 1255–62; *In re Cox Commc'ns, Inc. Shareholders Litig.*, 879 A.2d 604, 640 (Del. Ch. 2005) (citing *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 147–50 (Del. 1980)).

20. Cain & Solomon, *supra* note 2, at 490.

21. Myers, *supra* note 7, at 470–72; Leo E. Strine, Jr. et al., *Putting Stockholders First, Not the First Filed Complaint*, 69 BUS. LAW. 1, 3 (2013).

and their counsel, rather than seek dismissal and resist expedited discovery and class certification, will promptly accede to both, in order to make it more likely that the case will proceed and be resolved in the forum in which they prefer to litigate. Then, in a move best calculated to even further reduce the risk of litigation in a non-preferred forum, the parties will also reach a prompt settlement, especially if (as with disclosure-only settlements) the cost is less than engaging in more extended discovery. Given a lack of a reliable, expeditious mechanism to force all representative litigation into a single forum, defendants will position matters to arrive at a second-best solution in the case of a weak lawsuit that may nonetheless survive dismissal in an inexperienced court: namely, a prompt settlement in which the principal cost is plaintiffs’ attorneys fee (which *A Great Game* pegs at about \$500,000 or so, at the median).<sup>22</sup>

If this paradigm of shareholder representative litigation activity were being observed in practice, one would expect to see exactly what *A Great Game* finds: (1) increasing frequency of multi-forum litigation; (2) increasingly dominant use of disclosure-only settlements; (3) a correlation between these two phenomena; and, (4) substantial attorneys’ fee awards despite the relative lack of value in disclosure-only settlements.<sup>23</sup> The authors thus rightly conclude that their “findings give impetus to those in Delaware [and elsewhere, for that matter,] who advocate that companies adopt forum selection clauses.”<sup>24</sup> It increasingly appears that such clauses will be validated and, in jurisdictions other than the selected forum, applied routinely to dismiss representative shareholder litigation in favor of permitting such litigation to proceed in the selected forum.<sup>25</sup>

If exclusive forum provisions become prevalent, and are enforced promptly and routinely in non-selected forums, the hypothesis suggested here—with one caveat—is that the marked increase in frequency of deal litigation, multi-forum proceedings, and disclosure-only settlements observed in *A Great Game’s* 2005–2011 sample will level off or recede. Indeed, because the adoption and enforcement of exclusive forum provisions are a relatively recent phenomenon, largely post-dating *A Great Game’s* data period, it is possible that the hypothesized leveling off or decrease may already be taking place or have at least started. And as exclusive forum provisions become more

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22. Cain & Solomon, *supra* note 2, at 481–82 tbls.IV.A–B.

23. See Steven M. Davidoff et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. (forthcoming 2015), available at [http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1774&context=faculty\\_scholarship&sei-redir=1&referer=http%3A%2F%2Fwww.bing.com%2Fsearch%3Fq%3DConfronting%2Bthe%2BPeppercorn%26src%3DIE-TopResult%26FORM%3DIE11TR#search=%22Confronting%20Peppercorn%22](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1774&context=faculty_scholarship&sei-redir=1&referer=http%3A%2F%2Fwww.bing.com%2Fsearch%3Fq%3DConfronting%2Bthe%2BPeppercorn%26src%3DIE-TopResult%26FORM%3DIE11TR#search=%22Confronting%20Peppercorn%22) (finding no effect of revised settlement disclosures on voting behavior).

24. Cain & Solomon, *supra* note 2, at 499.

25. ALLEN, *supra* note 5, at 6–8.

widely adopted, this hypothesis could become empirically testable: one could repeat the authors' study, this time controlling for whether a company has an exclusive forum provision in place, and examining whether there is a positive correlation with reduced multi-forum litigation,<sup>26</sup> reduced settlement rates, and reduced prevalence of disclosure-only settlements.

The one caveat to all this is the omnipresent concern analogous to squeezing a balloon: exerting pressure against one problem may simply shift the pressure, causing another problem to emerge. If, as we have already established, shareholder plaintiffs' counsel are resourceful value maximizers who recognize multi-forum litigation as a source of leverage to promote settlements and more frequent (and perhaps higher) fee awards, they can be expected to exploit the legal weak point of exclusive forum provisions. Specifically, they might resort to advancing claims in a way that such provisions could not reach, by asserting federal proxy disclosure claims and bringing breach of fiduciary duty claims by way of supplemental jurisdiction.<sup>27</sup> In other words, the next phase of the Great Game might be competition between state and federal forums, rather than competition among courts of different states, as the source of leverage for shareholder plaintiffs' counsel. For now, *A Great Game* suggests that such state/federal competition is at best limited, with less than 2% of transactions challenged exclusively in federal court.<sup>28</sup>

And such competition will likely remain limited, even if exclusive forum provisions sharply curtail shareholder litigation in multiple state forums for several reasons. For one thing, fiduciary duty-based class actions brought in federal court in connection with federal proxy claims would likely be subject to the full panoply of procedural limitations imposed under the Private Securities Litigation Reform Act of 1995,<sup>29</sup> and federal court fee awards in class actions are not as clearly attractive to plaintiffs' lawyers as those the Court

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26. By definition, such a correlation would seem to be inevitable, if those provisions are routinely enforced.

27. Claims that a merger proxy statement contains material false statements or misleading omissions arise under Section 14(a) of the Securities Exchange Act of 1934 and SEC Rule 14a-9, and under Section 27(a) of that Act, fall within the exclusive jurisdiction of the federal courts. See 15 U.S.C. §§ 78n, 78aa (2012); 17 C.F.R. §240.14a-9 (2014). And, in a federal case asserting violations of Rule 14a-9, "[o]nce federal question jurisdiction exists, it is within the trial court's discretion to exercise supplemental jurisdiction over those state law claims that derive from a common nucleus of facts," including state law claims of breach of fiduciary duty. *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1220 (10th Cir. 2000), *aff'd*, 532 U.S. 588 (2001).

28. Cain & Solomon, *supra* note 2, at 467 n.7.

29. See 15 U.S.C. § 78u-4 (2012) (establishing various procedural requirements for private class actions arising under the Securities Exchange Act of 1934, including, among other things, certifications to be filed with complaint, procedures for determining the lead plaintiff, pleading state of mind, establishing loss causation, and proportionate liability). I gratefully acknowledge Koji Fukumura as the source of this observation.

of Chancery has awarded.<sup>30</sup> Going to federal court would be, therefore, of limited appeal to shareholder class action plaintiffs’ lawyers. In any event, if exclusive forum charter or bylaw provisions limit federal venue to the district court in the state of incorporation, as many such provisions do,<sup>31</sup> one can imagine (especially in a small state like Delaware) that the judges can more readily cooperate in ensuring that the single appropriate forum is promptly identified.<sup>32</sup> The threat, then, of playing competing forums against each other to minimize the risk of dismissal and to gain settlement leverage would appear to be attenuated, if any potential for jurisdictional competition were limited to state and federal courts in the same state.

Of course, if the federal courts increasingly come to be the selected forum for representative shareholder litigation, there is little that the states can do about it, aside from validating forum selection charter and bylaw provisions that limit the choice of federal court venue. But if judges, Congress, or both, perceive that federal courts are becoming a haven for shareholder class actions in a way that replicates the problems already observed with multistate forum litigation, one can expect one, or both, of two possible responses. First, the federal courts could more aggressively use their statutory discretion to decline to exercise jurisdiction by finding that state breach of fiduciary duty claims substantially predominate over proxy disclosure claims.<sup>33</sup>

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30. On purely federal law claims, the federal courts have tended to rely less on benefit achieved by the litigation than on the often less lucrative “lodestar” approach which determines reasonable attorneys’ fees by reference to “the number of hours worked multiplied by the prevailing hourly rates.” *Perdue v. Kenny A.*, 559 U.S. 542, 546 (2010). In *Perdue*, the Court addressed “the question whether the calculation of an attorney’s fee, under federal fee-shifting statutes . . . may be increased due to superior performance and results.” *Id.* Although the Court rejected an absolute prohibition against such an increase, the Court noted that “there is a ‘strong presumption’ that the lodestar figure is reasonable,” and that only in “rare circumstances” would the “lodestar” approach fail to yield a reasonable fee. *Id.* at 554. If the claims that succeed are based on state law, on the other hand, a federal court exercising diversity jurisdiction will apply the state law standard of determining the amount of the attorney’s fee award. *See Feuer v. Thompson*, Nos. 10–CV–00279 YGR, 12–CV–00203 YGR, 2013 WL 2950667, at \*2 (N.D. Cal. June 14, 2013) (“Because Delaware law governs the claims, it also governs the fee award.”). Further, “[t]he method of calculating a fee is an inherent part of the substantive right to the fee itself, and a state right to an attorneys’ fee reflects a substantial policy of the state.” *Mangold v. Calif. Pub. Utils. Comm’n*, 67 F.3d 1470, 1479 (9th Cir. 1995). Any variation in approach to the fee determination “would likely lead to forum-shopping.” *Id.* Presumably, if a fee award is based on a state law breach of fiduciary claim, state law fee award doctrine would control, as it does in diversity jurisdiction cases.

31. ALLEN, *supra* note 5, at 4 (describing and counseling adoption of bylaws that select a single federal venue where the selected state’s courts lack subject matter jurisdiction).

32. In such circumstances, the so-called “one forum motion,” which calls upon courts in multi-forum litigation to confer with one another to determine which action should proceed, would be largely unnecessary. *See Strine et al.*, *supra* note 21, at 62 n. 219.

33. *See* 28 U.S.C. § 1367(c)(2) (2012) (“The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction . . .”).

Second, as it did with state court class action litigation in the Securities Litigation Uniform Standards Act of 1998,<sup>34</sup> Congress could limit federal class action jurisdiction based on supplemental jurisdiction over fiduciary duty claims.

The direction of future inter-jurisdictional competition for shareholder litigation is thus not entirely predictable. The availability of charter and bylaw provisions other than exclusive forum provisions clouds the picture even further by potentially limiting ability of stockholders to initiate class or derivative actions. During the data period examined in *A Great Game*, the initials “ATP” would have been familiar only to biology students.<sup>35</sup> As anyone who has read this far now knows, however, *ATP Tour v. Deutscher Tennis Bund* is a controversial opinion of the Delaware Supreme Court<sup>36</sup> that has sparked substantial innovation in the design of charter and bylaw provisions designed to limit shareholder litigation.<sup>37</sup> Whatever form such provisions take—whether stringent fee-shifting provisions of the sort at issue in *ATP* or other deterrents like minimum shareholder support conditions<sup>38</sup>—their future

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34. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998).

35. ATP stands for adenosine triphosphate, which is “often referred to as the energy currency of the cell.” THE DICTIONARY OF CELL AND MOLECULAR BIOLOGY 56 (John M. Lackie, ed., 5<sup>th</sup> ed., 2013).

36. *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 555 (Del. 2014) (holding “that fee-shifting provisions in a non-stock corporation’s bylaws can be valid and enforceable under Delaware law [and that] bylaws normally apply to all members of a non-stock corporation regardless of whether the bylaw was adopted before or after the member in question became a member”).

37. See John C. Coffee, Jr., *Fee-Shifting Bylaw and Charter Provisions: Can They Apply in Federal Court?—The Case for Preemption*, at 1 (Ctr. for Law and Econ. Studies, Columbia Univ. Sch. of Law, Working Paper No. 498, October 10, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2508973](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2508973) (noting that the trend toward adoption of fee-shifting provisions “is accelerating,” and the use of such provisions “is becoming part of the standard IPO game plan”); Lawrence A. Hamermesh, *Consent in Corporate Law*, 70 BUS. LAW. 161, 166–68 (2014).

38. See e.g., Section 7.3 of the Bylaws of GWG Holdings, Inc., a Delaware corporation:

Except where a private right of action at a lower threshold than that required by this bylaw is expressly authorized by applicable statute, a current or prior Stockholder or group of Stockholders (collectively, a “Claiming Stockholder”) may not initiate a claim in a court of law on behalf of (1) the Corporation or (2) any class of current or prior Stockholders against the Corporation or against any director or officer of the Corporation in his or her official capacity, unless the Claiming Stockholder, no later than the date on which the claim is asserted, delivers to the Secretary written consents by beneficial stockholders owning at least three percent (3%) of the outstanding shares of the Corporation as of (i) the date on which the claim was discovered (or should have been discovered) by the Claiming Stockholder, or (ii) if on behalf of a class consisting only of prior Stockholders, the last date on which a Stockholder must have held shares in order to be included in the class.

GWG Holdings, Inc., Amendment to Bylaws (Form 10-Q) (Nov. 13 2014, available at [http://www.sec.gov/Archives/edgar/data/1522690/000121390014008040/f10q0914ex3i\\_gwgholding.htm](http://www.sec.gov/Archives/edgar/data/1522690/000121390014008040/f10q0914ex3i_gwgholding.htm)).



impact on shareholder litigation will depend on a host of unpredictable circumstances, including the extent to which they are upheld or limited by legislatures and courts in the various states, Congress, or perhaps even the SEC.<sup>39</sup>

In sum, despite (and even because of) all these uncertainties, one thing seems clear: if the “Great Game” of inter-jurisdictional competition for shareholder litigation is still being played ten years from now, it will be under different rules, and the behavior documented in *A Great Game* will have become an historical artifact.

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39. Coffee, *supra* note 37, at 10 (describing the possibility of invalidation on preemption grounds, regulation by Delaware statute, and an interstate “race to the bottom” to validate such provisions).