A Great Game: The Dynamics of State Competition and Litigation

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ABSTRACT: We theorize a multi-dimensional picture of jurisdictional competition for corporate litigation. We test this theory by examining merger litigation in a hand-collected sample of 1117 takeovers from 2005 to 2011. We find evidence of state competition for merger litigation. Entrepreneurial plaintiffs' attorneys drive this competition by bringing suits in jurisdictions which have previously awarded more favorable judgments and higher fees and by avoiding unfavorable jurisdictions. States with an apparent interest in attracting corporate litigation respond in-kind by adjusting judgments and awards to re-attract litigation. These states award higher attorneys' fees and dismiss fewer cases when attorneys have been migrating to other jurisdictions. Our findings illuminate the dynamics and existence of jurisdictional competition for corporate litigation.

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I. INTRODUCTION

In December 2011, Chancellor Leo E. Strine, Jr., then the chief judge of the Delaware Chancery Court—the most prominent business court in the United States—awarded the largest plaintiffs' attorney fee in the court's history.[1] The amount, approximately $300 million, rewarded these attorneys for obtaining a $2 billion judgment in a class-action lawsuit brought against Grupo México, S.A.B. de C.V. in connection with Grupo México's acquisition of an 80% interest in Southern Peru Copper.[2] Chancellor Strine ruled that Grupo México abused its position as a shareholder of Southern Peru Copper to increase its ownership of the company.[3]

The award was notable not only because of the amount, but also because it came only a few weeks after Chancellor Strine had deliberately and publicly promoted the Delaware Court as a friendly haven for plaintiffs' attorneys to bring meritorious class-action litigation.[4] Professors Armour, Black, and Cheffins document evidence that Delaware may be "losing its cases" to other states, which could place its corporate preeminence at risk.[5] It is thus possible that substantial fee awards are a strategic response by courts as they attempt to compete for future class-action litigation.[6]

This Article examines the parameters and existence of state competition for corporate litigation. If states have incentives to compete for corporate litigation, we theorize that the nature of that competition is multi-dimensional. Class-action litigation on behalf of shareholders is typically brought by entrepreneurial plaintiffs' attorneys in state courts.[7] These attorneys often have a choice of where to bring suit, whether in the

1. The decision was *In re Southern Peru Copper Corp. Shareholder Derivative Litigation*, 52 A.3d 761, 819 (Del. Ch. 2011). For a discussion of the success and prominence of the Delaware courts, see generally Randy J. Holland, *Delaware's Business Courts: Litigation Leadership*, 34 J. CORP. L. 771 (2009); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1604–05 (2005).

2. *In re S. Peru Copper Corp.*, 52 A.3d at 819.

3. *See id.* The fee was later upheld on appeal in the Delaware Supreme Court. *See* Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1262–63 (Del. 2012).

4. In a symposium at Columbia Law School held in November 2011, then-Chancellor Strine asserted that the Delaware courts rewarded plaintiffs' attorneys who litigated successful cases, noting that the chancery court had previously awarded numerous million-dollar-plus attorneys' fee awards. *See* David Marcus, *Delaware's Chancery Grapples with Multijurisdictional Litigation*, DAILY DEAL, Dec. 9, 2011, *available at* 2011 WLNR 26934635.

5. *See* John Armour et al., *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1350 (2012); John Armour et al., *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605, 605 (2012) ("The trends we report potentially present a challenge to Delaware's competitiveness in the market for incorporations.").

6. *See* Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multijurisdictional Litigation*, 106 NW. U. L. REV. 1753, 1770–71 (2012).

7. The reason is that these claims often implicate state law and so are cited there naturally. As our statistics show, from 2005 to 2011 less than two percent of merger litigation was brought in federal court.

jurisdiction of the target's incorporation or another location where the target has a substantial presence, such as the target's corporate headquarters.[8] Entrepreneurial plaintiffs' attorneys constantly recalibrate the optimal jurisdiction in which to bring litigation.[9] We theorize that the result is a dynamic competition where plaintiffs' attorneys react to prior court decisions to bring future litigation in the most favorable forum.[10] Meanwhile, state courts, to the extent they compete to attract this litigation, respond to this movement by attempting to attract plaintiffs' attorneys through settlements and fee awards.

This Article examines how both attorneys and courts interact in this theoretical competition. It does so by examining state corporate merger litigation. Merger litigation is now the dominant form of corporation litigation.[11] This litigation almost always raises fiduciary duty issues and other important corporate law issues.[12] Because of its predominance and importance to preserving a state's case law, merger litigation is the type which Delaware and other states are likely to compete for, to the extent they do compete.

We analyze 1117 public transactions comprising all takeover deals announced and completed between 2005 and 2011 having a transaction value greater than $100 million. The sample is hand-collected by examining SEC filings, court filings, and other public documents to ascertain whether

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8. This is a point of jurisdiction. State law statutes allow for suit in a corporation's jurisdiction of organization. *See, e.g.*, DEL. CODE ANN. tit. 10, § 3111 (2013). Meanwhile, the location of a company's headquarters is a significant enough tie to sustain jurisdiction in all states. If a company has business outside these two jurisdictions, a suit there is also possible, depending upon the state's jurisdictional statute. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319–20 (1945).

9. *See* Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 144–45 (2004); *see also* ROBERT M. DAINES & OLGA KOUMRIAN, CORNERSTONE RESEARCH, RECENT DEVELOPMENTS IN SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS: MARCH 2012 UPDATE 2, 6–8 (2012), *available at* http://www.cornerstone.com/getattachment/03dcde90-ce88-4452-a58a-b9efcc32ed71/Recent-Developments-in-Shareholder-Litigation-Invo.aspx.

10. We thank Joseph A. Grundfest, W.A. Franke Professor of Law and Business, Stanford University School of Law, for bringing this notion to our attention.

11. *See* Thompson & Thomas, *supra* note 9, at 135.

12. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180 (Del. 1986) (holding that in the event of a change of control or break-up of the company enhanced scrutiny applied); Weinberger v. UOP, Inc., 457 A.2d 701, 711–15 (Del. 1983) (holding that in freeze-out mergers the requirements of fairness, including fair dealing and fair price, applied). *See generally* J. Travis Laster, Revlon *Is a Standard of Review: Why It's True and What It Means*, 19 FORDHAM J. CORP. & FIN. L. 5, 9–11, 53–54 (2013) (examining the *Revlon* standard and its progeny and arguing that a new standard of enhanced scrutiny should apply for stock-for-stock transactions). There are also fiduciary duties of disclosure which apply. *See* Lawrence A. Hamermesh, *Calling Off the* Lynch *Mob: The Corporate Director's Fiduciary Disclosure Duty*, 49 VAND. L. REV. 1087, 1163–64 (1996). For recent examples of the application of heightened fiduciary and disclosure duties, see *In re El Paso Corp. Shareholder Litigation*, 41 A.3d 432, 439–40 (Del. Ch. 2012); *In re Southern Peru Copper Corp. Shareholder Derivative Litigation*, 52 A.3d 761, 787–88 (Del. Ch. 2011); and *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 830 (Del. Ch. 2011).

litigation is brought challenging the merger. We also record the state in which the litigation is brought, disposition of this litigation, the parameters of any settlement, the attorneys' fees awarded, and other relevant variables. Litigation in our sample occurs at a sharply increasing comparative rate over the sample period, with 39.3% of transactions incurring litigation in 2005 compared to 92.1% in 2011.[13] There is a similar increase in the numerical rate of multi-jurisdictional suits, raising the possibility that courts now have a greater incentive to compete for litigation than in previous eras.[14]

We theorize that plaintiffs' attorneys continuously respond to the changing competitive landscape. Our empirical analysis supports this theory, and we find evidence that when attorneys face a choice in where to bring litigation, they respond to relatively low settlement rates in one particular state by moving to other state jurisdictions to file.[15] In other words, attorneys react to incentives provided by different types of settlements (which have a second-order impact on fee awards) across multiple jurisdictions. States thus have a choice: they must either compete to attract litigation, or cases will at some rate migrate to jurisdictions which are more willing to compete to attract litigation.[16]

In response to this dynamic, we also theorize that states which want to attract litigation will do so by allowing more claims to proceed and by awarding higher attorneys' fees than in other states. We also find some evidence of inter-state jockeying for litigation claims. There is significant variation across states in case dispositions and attorneys' fees, with venues such as Delaware, California, Tennessee, Nevada, and Georgia awarding fees significantly higher than those in states such as New Jersey, Illinois, and Maryland.[17] We also find similar variation in the unexpected case dismissal rates across various states.[18] Delaware in particular awards attorney fees that are on average $400,000 to $500,000 higher while dismissing a greater proportion of cases than other states.[19]

To more robustly test our theory of jurisdictional competition for corporate litigation, we document how states respond to attorneys' attempts to bring litigation in more favorable jurisdictions. We find evidence that states

13. *See infra* Table I.

14. *See infra* Table IX.

15. *See infra* Table IV.B.

16. This type of competition has previously been documented in the context of bankruptcy cases. *See* Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 978–79 (1999) (finding that with respect to bankruptcy litigation, "[f]orum shopping is not only prevalent, it has been increasing"). In this regard, we are building on the work with respect to corporate charters and competition for litigation first begun by Armour, Black, and Cheffins. *See generally* Armour et al., *Delaware's Balancing Act*, *supra* note 5.

17. *See infra* Part III.B.

18. *See infra* Table VII.

19. *Id.*

with business courts are responsive to entrepreneurial plaintiffs' attorneys' actions.[20] These courts respond to their prior track record of drawing in cases by offering higher or lower attorneys' fees when they have been capturing a relatively lower or higher proportion of case filings in the past.[21] We find no statistically significant evidence that states with business courts attempt to attract litigation by altering their case dismissal rates.

We also examine Delaware's response to entrepreneurial plaintiffs' attorneys and find no empirical evidence during our sample time period that Delaware adjusts its fee awards in response to attorney forum shopping. We do find, however, that Delaware courts dismiss fewer cases when cases migrate towards other jurisdictions.[22] Delaware thus appears to be catering to entrepreneurial plaintiffs' attorneys who prefer to diversify their returns by bringing multiple suits and obtain smaller awards in many cases rather than large awards in a smaller number of lawsuits.[23] These results illustrate that states with incentives to attract corporate litigation may respond to entrepreneurial plaintiffs' attorneys through differing strategies.

We ultimately conclude that there is evidence of state competition for corporate litigation, at least by some states including and beyond Delaware, and that such competition appears driven by attorneys and desired fees or expected settlements. However, the decision for courts to compete through fees and dismissals is also an endogenous one. It is plausible that state courts in relatively high demand face no real pressure to offer competitive attorneys' fees or that our results are driven by other unobserved in-state variables. It also may be that the competition we observe is driven by other factors specific to each state. Delaware, for example, may be acting in order to compete to attract merger litigation while other states may be acting (or taking no action) for other reasons which draw in merger litigation. And it may very well be that the inter-state jockeying we observe is primarily driven by Delaware's reaction to plaintiffs' attorneys' forum selection decisions. We discuss these matters further below.

States that are competing may also trade off the two variables of fee and dismissal rates—e.g., states offer greater fees to compensate attorneys for higher dismissal rates. We find evidence that states do award varying levels of fees and have differing dismissal rates for similar cases. We find that Delaware generally awards higher attorneys' fees perhaps to compensate for a higher dismissal rate, and dismissal rates decrease when Delaware loses prior cases to other jurisdictions. Overall, our evidence implies that Delaware may be favoring good cases by preferring to award higher attorneys' fee awards rather

20. *See infra* Table IX.

21. *Id.*

22. *Id.*

23. 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, 695 (1986).

than dilute its law and dismiss fewer cases to attract litigation. The extremely large award in the *In re Southern Peru Copper* case may be an indication that Delaware may compete more overtly as it balances dismissal rates against the ability to award higher attorneys' fees.[24]

Part I of this Article provides background to our theory of multi-dimensional competition for class-action litigation, situating it amidst prior debate on the competition for corporate charters and the possible role litigation may play in this competition. Part II provides background on the recent development of ubiquitous merger litigation. Part III provides our empirical analysis, applying our theory to analyze the competition for merger litigation (if any) among courts. Part IV concludes by discussing the implications of our analysis and possible policy prescriptions. By documenting the role of takeover litigation in the competition for charters, we ultimately add to a greater understanding of the forces and tensions driving corporate law and the competition for corporate charters.

II. THE COMPETITION FOR CORPORATE LAW, CORPORATE CHARTERS, AND LITIGATION

In this Part, we set forth our theory of competition for corporate litigation and how it may affect the market for corporate law and corporate charters. We theorize that state competition for litigation may occur for a number of reasons: states can derive significant revenue and prestige benefits by adjudicating large numbers of corporate litigation cases;[25] the creation of litigation centers can further draw in cases to the detriment of competitors;[26] corporate litigation also directly affects the competition for corporate charters; and corporate litigation implicates the fiduciary duties of a corporation's board of directors or other core corporate laws.[27] In order for a state to compete for corporate chartering, it must develop a body of law on these issues.[28] A failure to attract and maintain important fiduciary duty and

24. *In re Southern Peru Copper* was in one sense unique in that it went to trial and a judgment. *See In re* S. Peru Copper Corp. S'holder Derivative Litig., 52 A.3d 761 (Del. Ch. 2011). Such an event is very rare. But in such a case the judge not only awards damages but also sets the attorneys' fee. Compare this with how the bulk of merger litigation is disposed of: through settlement. In this case, the award of attorneys' fees is bound within some range depending upon the type of settlement. *See infra* Table IV.A.

25. Matthew D. Cain & Steven M. Davidoff, *Delaware's Competitive Reach*, 9 J. EMPIRICAL LEGAL STUD. 92, 97–98 (2012).

26. *See generally* Armour et al., *Delaware's Balancing Act*, *supra* note 5.

27. *See* CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS (6th ed. 2010); *see also* Darian M. Ibrahim, *Individual or Collective Liability for Corporate Directors?*, 93 IOWA L. REV. 929, 929 (2008) ("Fiduciary duty is one of the most litigated areas in corporate law."); Recent Case, In re Walt Disney Co. Derivative Litigation, *No. Civ. A. 15452, 2005 WL 2056651 (Del. Ch. Aug. 9, 2005)*, 119 HARV. L. REV. 923, 923 (2006).

28. *See* Jill E. Fisch, *Leave It to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 740–42 (2013) (discussing the features of Delaware law that make it

corporate law cases will undermine a state's ability to compete for corporate charters.[29] Delaware, and any other state that wishes to compete to provide corporate chartering services, thus may have significant incentives to attract these cases. By repeatedly deciding these cases, judges can build expertise and prominence and further buttress their state's stature and attractiveness.[30]

State competition for corporate litigation thus has theoretical underpinning in the competition for corporate charters. The competition for corporate charters posits that states compete for charters in order to derive benefits, primarily revenue from franchise fees.[31] In the case of corporate litigation, though, the states would compete to attract entrepreneurial plaintiffs' attorneys who make the litigation decision rather than managers who make the corporate chartering decision.[32] In catering to these attorneys, courts can either award higher attorneys' fees or allow more cases to proceed. In setting this balance, courts must still keep in mind that if they allow too many cases to proceed or award attorneys' fees that are excessively high, the managers who make the corporate chartering decision may no longer favor their jurisdiction since a low number of dismissals may be seen as diluting the state's corporate law, making it less attractive to corporate managers.[33]

This assumes that states do indeed compete. Prior research on state competition for public charters, though, is mixed. It is well-accepted that Delaware dominates the competition for public charters.[34] Roughly 50% of the Fortune 500 firms charter in Delaware, and 77% of companies engaging in an initial public offering on the New York Stock Exchange between 1995 and 1998 also chartered in Delaware.[35] Scholars have seized on this dominance to argue that there is no meaningful state competition, i.e.,

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attractive to corporations); Omari Scott Simmons, *Branding the Small Wonder: Delaware's Dominance and the Market for Corporate Law*, 42 U. RICH. L. REV. 1129, 1153–54 (2008) (suggesting criteria states should consider to attract corporations based on Delaware's dominant "brand" and position).

29. *See* Armour et al., *Delaware's Balancing Act*, *supra* note 5, at 1348–50.

30. *See, e.g.*, William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992) (praising the Delaware Court of Chancery for its contributions to corporation law).

31. *See* William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 665 (1974); Roberta Romano, *Law as a Product, Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 231 (1985); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 255 (1977).

32. *See generally* Stephen J. Choi, *Do the Merits Matter* Less *After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598 (2007) (finding that jurisdictional choices in terms of legal rules can affect plaintiffs' attorney filing conduct).

33. *See generally* Armour et al., *Delaware's Balancing Act*, *supra* note 5. Conversely, Faith Stevelman argues that Delaware risks losing its cases by over-reaching and attempting to draw in too much litigation. Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 137 (2009).

34. Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 684–85 (2002).

35. Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1566, 1572 (2002).

Delaware dominates.[36] Instead, if any competition occurs, it may be from the federal government.[37] Professor Roe argues that in light of its success, Delaware's primary fear is federalization.[38] Still, even if there is no state competition for Delaware, political economy theory would predict that Delaware would still be prone to cater to its corporate constituency in generating corporate law for no other reason than that it must constantly attract new charters to replace old ones.[39]

In light of the constrained competition for corporate charters, it may also be that the competition for corporate litigation is similarly constrained with only Delaware attempting to compete. State courts outside of Delaware, which are typically described as over-burdened and lacking expertise in corporate law, may simply choose not to compete, making Delaware the only competitor.[40] Nonetheless, the barriers to competition for litigation are lower than chartering, and while some states may choose not to compete, others may do so for reasons of prestige, local revenue, or even local favoritism for its lawyers of corporations.[41] The competition for corporate litigation may therefore exist even when the competition for charters does not.

Linked to this point about Delaware's incentives and role in any theory of state competition for litigation, a debate has also sprung up in recent years over whether Delaware is losing corporate litigation with adverse effects on its prominence in corporate chartering.[42] This scholarship posits that competition for corporate governance and related litigation is an important means by which Delaware creates case law and maintains its corporate preeminence.[43] The $300 million *Southern Peru* attorneys' fee award has been interpreted as a further attempt by Chancellor Strine to attract corporate

36. Kahan & Kamar, *supra* note 34, at 724 ("[F]or purposes of analyzing corporate law today, it suffices that any such competition has long since ended.").

37. Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 592 (2003).

38. *Id.* at 591–92. *See generally* Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491 (2005).

39. Mark J. Roe, *Delaware's Shrinking Half-Life*, 62 STAN. L. REV. 125, 132 (2009).

40. This model of state competition for litigation is one where Delaware is the only competitor, but in the merger litigation context federal intervention is not a threat as it is not an overt matter of corporate governance that the federal government has previously directed its attention.

41. *See* Larry E. Ribstein, *Delaware, Lawyers, and Contractual Choice of Law*, 19 DEL. J. CORP. L. 999, 1010–11 (1994) ("The benefits to Delaware lawyers help explain why the Delaware statute is designed to increase litigation in Delaware." (emphasis omitted)); Stevelman, *supra* note 33, at 70 ("Delaware's corporate lawyers have maximized their prestige, power, and professional opportunities by promoting Delaware's preeminence in corporate law.").

42. *See generally* Armour et al., *Delaware's Balancing Act*, *supra* note 5 (describing the balance between Delaware's corporate litigation and corporate chartering in preserving Delaware's dominance). For further discussion, see Cain & Davidoff, *supra* note 25, at 93 (noting that "Delaware has been losing its cases to other states and federal courts" (citation omitted)).

43. *See* Armour et al., *Delaware's Balancing Act*, *supra* note 5, at 1345.

shareholder litigation to Delaware.[44] The Wall Street Journal writing about the case stated that "[f]or some legal experts, [the $300 million award] raises questions about whether Delaware judges, who have criticized the plaintiffs [sic] bar for bringing corporate cases in other courts, are trying to show that Delaware is friendly to plaintiffs."[45] One of those commentators asserted in another Wall Street Journal article that "[t]he enormous fee award against Grupo Mexico seems . . . likely to be part of a conscious strategy for marketing the Delaware courts."[46]

Professors Armour, Black, and Cheffins descriptively document select competition for state litigation.[47] The authors document a trend towards (1) large mergers and acquisitions and leveraged buy-out litigation being filed outside Delaware and (2) litigation in multiple jurisdictions in large mergers and acquisitions transactions.[48] Armour, Black, and Cheffins conclude that "Delaware courts are losing market share in lawsuits, and Delaware companies are gaining lawsuits . . . filed elsewhere."[49]

The implication of these arguments is that the value of state law could be affected either positively or negatively if Delaware and other states compete by revising their law to attract corporate litigation.[50] It should be noted, however, that while Delaware may compete for merger litigation, other states may choose not to do so as is the case of corporate chartering.[51] Nonetheless, while chartering is sticky, the competition for litigation is more dynamic with each case presenting new opportunities to attract cases and the revenue and prestige that go with them. It may thus be the case that states do choose to compete for litigation but not chartering, making competition for each distinct. Alternatively, as in the case of corporate charters, it may be Delaware alone that drives this dynamic competing for select cases. This is a question further explored in this paper.[52]

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44. *See* Alison Frankel, *Record $285 Ml Fee Award Is Strine's Message to Plaintiffs' Bar*, REUTERS (Dec. 21, 2011), http://blogs.reuters.com/alison-frankel/2011/12/21/record-285-ml-fee-award-is-strines-message-to-plaintiffs-bar/.

45. Gina Chon & Joe Palazzolo, *An Early Christmas for These Lawyers: $300 Million in Fees for Shareholder Case Sets Off Debate*, WALL ST. J. (Dec. 28, 2011, 12:01 AM), http://online.wsj.com/news/articles/SB10001424052970204296804577124772580624142.

46. Ronald Barusch, *Dealpolitik: Is a Whopping Legal Fee a Marketing Pitch by a Delaware Court?*, WALL ST. J. (Dec. 28, 2011, 3:32 PM), http://blogs.wsj.com/deals/2011/12/28/dealpolitik-is-a-whopping-legal-fee-a-marketing-pitch-by-a-delaware-court/.

47. *See* Armour et al., *Is Delaware Losing Its Cases?*, *supra* note 5, at 605.

48. *Id.*

49. *Id.* (emphasis omitted).

50. *See* Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795, 1797 (2002) (examining competition between states from a race to the top and race to the bottom perspective).

51. Kahan & Kamar, *supra* note 34, at 742 (arguing that the state competition for corporate charters is non-existent).

52. Another area where competition may occur, which reinforces the competition for corporate charters, is in the choice of forum selections by corporations to ascertain whether

III. THE RISE AND RISE OF MERGER LITIGATION

In this Part, we examine the scope and scale of merger litigation over the time of our sample period, 2005–2011. We also discuss the vibrant academic response to the rise in merger litigation we document, and the various proposals for reform and assessment to address this issue. The descriptive statistics in this Part are compiled from our analysis of merger litigation from the period 2005 through 2011.[53]

A. *MERGER LITIGATION FROM 2005 TO 2011*

1. Trends over Time

Takeover litigation has existed for some time in Delaware.[54] However, in the past years it has experienced a significant uptick as almost every transaction is challenged. Table I sets forth our data on the merger litigation rate over the period 2005 through 2011.

Table I. Merger Litigation Rate (2005–2011)

Year	Deals	Litigation	% with litigation
2005	183	72	39.3%
2006	232	99	42.7%
2007	248	96	38.7%
2008	104	50	48.1%
2009	73	62	84.9%
2010	150	131	87.3%
2011	127	117	92.1%
Total	1117	627	56.1%

corporate litigants favor one jurisdiction over another. Professors Eisenberg and Miller document flight from Delaware in choice of law provisions in a sample of public and private merger agreements. Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1973, 2001–10 (2006). Professors Cain and Davidoff also examine 1020 merger agreements from 2004 to 2008 and find that this effect is absent in the public company context. Cain & Davidoff, *supra* note 25, at 94. Public companies overwhelmingly select Delaware as their choice for any merger agreement litigation. *Id.* Over the full sample period approximately 66% of agreements select Delaware governing law and 60% of agreements select Delaware as the choice of forum. *Id.* Professor Coates attributes the different findings of these two papers to the inclusion of private agreements in the Eisenberg and Miller sample and different jurisdictional preferences for public companies. John C. Coates, *Managing Disputes Through Contract: Evidence from M&A*, 2 HARV. BUS. L. REV. 295, 299–303 (2012).

53. We detail the collection method and details of our sample further in Part IV.A.

54. Thomas & Thompson, *supra* note 6, at 1759. *See generally* C.N.V. Krishnan et al., *Jurisdictional Effects in M&A Litigation*, 11 J. EMPIRICAL LEGAL STUD. 132 (2014) (discussing merger litigation in 1999 and 2000). For a review of the related issues around securities litigation, see Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1518 (2004) and James D. Cox & Randall S. Thomas, *Mapping the American Shareholder Litigation Experience: A Survey of Empirical Studies of the Enforcement of the U.S. Securities Law*, 6 EUR. COMPANY & FIN. L. REV. 164 (2009).

The rate of merger litigation is increasing: in 2005, 39.3% of transactions were subject to litigation while in 2010 and 2011, 87.3% and 92.1% of all transactions, respectively, experienced litigation.[55] The causes of this increase are not fully known but have been attributed to new law firm entrants into the market as the dominant plaintiffs' firms were broken up and lost control of the market for merger litigation.[56] This development allows for more potential suits and heightened competition during our sample period.

Importantly, we also find in data unreported in the above table that 71.6% of targets in our sample have a state of incorporation which differs from its state of headquarters. In these instances, attorneys have discretion over the choice of where to bring shareholder actions, since multiple states can claim jurisdiction.[57] In our empirical analysis, we exploit this variation to examine the variables that influence this decision.

Multiple plaintiffs' attorneys may bring suits in more than one jurisdiction. They may do this in order to extract lower dismissal rates and higher attorneys' fees from one of these jurisdictions through the threat of litigating the case in the alternative jurisdiction.[58] Multi-state litigation has increased along with litigation rates generally as our data in Table II shows.

Table II. Merger Litigation Suits (2005–2011)

Year	Mean # suits per case	% multi-state claims
2005	2.2	8.3%
2006	2.6	26.3%
2007	3.1	21.9%
2008	2.8	30.0%
2009	4.6	41.9%
2010	4.7	46.6%
2011	5.0	53.0%

55. In 2013, the frequency was even higher and 97.5% of deals were subject to litigation. The average litigation attracted seven separate lawsuits. Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2013*, at 2 (The Ohio State Univ. Moritz Coll. of Law, Pub. Law & Legal Theory Working Paper Series, No. 236, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2377001.

56. This thesis has been put forward by at least two articles and jives with general theory about change and disruption in previously static markets. *See* Brian Cheffins et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, 2012 COLUM. BUS. L. REV. 427, 468; Boris Feldman, *Shareholder Litigation After the Fall of an Iron Curtain*, 45 REV. SEC. & COMMODITIES REG. 7, 7–8 (2012).

57. Attorneys may have discretion among multiple jurisdictions even if the target is incorporated in the same state as its headquarters, if, for example, the target conducts significant operations in another state. However, we find that suits are rarely brought in states other than the incorporation or headquarters state.

58. Armour et al., *Delaware's Balancing Act*, *supra* note 5, at 1371; Thomas & Thompson, *supra* note 6, at 1757.

In 2005, an average of 2.2 complaints were brought when litigation occurred in a transaction, and multi-state litigation occurred in 8.3% of all transactions that resulted in litigation. By 2011, an average of five lawsuits were brought per transaction, with litigation roughly corresponding to an average of five separate law firms involved with each transaction, and multi-state litigation occurred in 53% of all transactions with litigation. There is more than one complaint per transaction because multiple attorneys' law firms file separate complaints. The figures therefore roughly correspond to the number of law firms involved in a transaction. The rise in average complaints is thus likely attributable to the increasing number of law firms which specialize in bringing these plaintiffs' claims.[59]

Over the entire sample time period, 34.6% of transactions with litigation experienced multi-state litigation. Most of this litigation is brought in state as opposed to federal courts, and less than two percent of transactions file exclusively in federal courts. Accordingly, competition for this litigation, if it exists, is horizontally based among states and does not have a vertical component to date.[60]

While the rise in merger litigation is apparent over the years, the pattern of outcomes for merger litigation has remained largely the same. In our sample period, litigation with respect to transactions is dismissed by a court 28.4% of the time. The other 71.6% of transaction litigations result in some type of settlement. No transaction in our sample is decided by a jury and appealed to a final judgment, although this may be a result of the many years which it takes for a matter to reach such a final resolution via trial. Of transactions with litigation, 72.6% result in an attorneys' fee award, largely tracking the settlement rate. These figures support the conjecture that courts may exercise power over plaintiffs' attorneys through dismissals and the awarding of attorneys' fees rather than in solely through finding for plaintiffs on the merits of a case.

2. Types of Settlements

The bulk of merger litigation results in a settlement, and approximately 71.6% of litigation brought during our sample time period is settled. Table III sets forth the type of settlements over the size of our sample period from 2005 through 2011.

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59. C.N.V. Krishnan et al., *Zealous Advocates or Self-Interested Actors?: Assessing the Value of Plaintiffs' Law Firms in Merger Litigation* 1–3 (Vanderbilt Law & Econ. Research Paper No. 14–25, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2490098 (documenting the rise in the number of law firms specializing in mergers and acquisitions litigation). Professor Webber explains this as a herding phenomenon attributable to increased representation of small clients. *See* David H. Webber, *Private Policing of Mergers and Acquisitions: An Empirical Assessment of Institutional Lead Plaintiffs in Transactional Class and Derivative Actions*, 38 DEL. J. CORP. L. 907, 957 (2014) ("Another version of the herding explanation is that the number of complaints may also reflect interest by plaintiff law firms representing small clients.").

60. Cain & Davidoff, *supra* note 25, at 94.

Table III. Merger Litigation Settlement and Dismissal Rates[61]

Litigation outcomes	N	%	Mean attorneys' fees ($ in thousands)
Disclosure	316	55.1%	$749
Amendment & Disclosure	57	9.9%	$1761
Consideration Increase	14	2.4%	$9273
Amendment	7	1.2%	$1909
Consideration Increase & Disclosure	7	1.2%	$6735
Consideration Increase & Amendment & Disclosure	5	0.9%	$3635
Consideration Increase & Amendment	2	0.3%	$6079
Other	3	0.7%	$225
Subtotal	411	71.6%	
Dismissed	163	28.4%	$36
Total	574	100.0%	

We classify settlements into categories based on disclosure, amendment, and consideration increase. "Disclosure settlements" are settlements in which the target and acquirer agree to correct or provide additional disclosure to shareholders.[62] This disclosure is typically provided to settle state law claims by the plaintiffs alleging the target fails to disclose or otherwise misstates material information concerning the transaction.[63] Settlements which only require disclosure constitute 55.1% of the settlement types in the sample and are the most common type of settlement. In recent years, Delaware judges have complained about these cases, asserting that "disclosure only" settlements do not provide sufficient benefit to shareholders and instead serve as a bare rationale to dispose of the case and save the defendants litigation fees.[64]

61. We separate out "Amendment" settlements and "Consideration Increase" settlements separately from where there is also another type of settlement included in order to descriptively examine whether the difference matters.

62. *See, e.g.*, *In re* Sauer-Danfoss Inc. S'holders Litig., 65 A.3d 1116, 1121–22 (Del. Ch. 2011).

63. *Id.*

64. *See, e.g.*, Scully v. Nighthawk Radiology Holdings, Inc., No. 5890-VC, at 19 (Del. Ch. Dec. 17, 2010) (stating that disclosure settlements are a "cheap settlement"). *See generally* Steven M. Davidoff et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a*

"Amendment settlements" involve a change to the deal's transaction terms, and 12.3% of settlements are amendment settlements only or settlements which include an amendment settlement.[65] The most common type of amendment settlement in our data is a reduction of the termination fee. Other terms modified include post-sale closing limitations, extended appraisal periods, and modification or elimination of voting arrangements.[66] In comparison to "disclosure only" settlements, amendment settlements are perceived as more beneficial to shareholders as they can provide terms which allow for competing bidders to emerge, such as a lower termination fee or the modification or elimination of voting arrangements by significant shareholders to support the current transaction.[67] Alternatively, amendment settlements can provide more economic opportunity to shareholders such as providing a longer period for them to exercise appraisal rights.[68] The value of these settlements is illustrated by the fact that on average $1.76 million is awarded for a disclosure and amendment settlement compared to $749,000 for a "disclosure only" settlement.

Only 4.8% of transactions actually provide a monetary benefit to shareholders and are classified as consideration increase (this includes settlements which also contain an amendment or disclosure component). Consideration increases have a wide distribution with an average increase of $70 million in aggregate but a standard deviation of $152.8 million. The minimum consideration increase in the sample is $1 million and the maximum is $669.8 million.[69] Consideration increases provide quantifiable benefits to shareholders and as such stand-alone consideration settlements pay the most in attorneys' fees, averaging $9.2 million.[70]

The final Column in Table III reports average attorney fees by settlement type, including zeroes for court denials of fees. The average attorneys' fees for disclosures are $749,000, considerably lower than other settlement types. This supports the principle put forth by some that "disclosure only" settlements are not highly valued by the litigant participants or the courts.[71]

Proposal for Reform, 93 TEX. L. REV. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2398023.

65. *See, e.g.*, *In re* Compellent Techs., Inc., No. 6084-VCL, 2011 Del. Ch. LEXIS 190 (Del. Ch. Dec. 9, 2011).

66. In our sample, 55.9% of amendment settlements involve a reduction of the termination fee, 8.8% involve an extension of the time to exercise appraisal rights, 7.4% involve some limitation on post-closing resale of the company, and 5.9% involve a restructuring of voting arrangements.

67. For a discussion of the merits of amendment settlements, see *In re Compellent Techs., Inc.*, 2011 Del. Ch. LEXIS 190, at *53–63. On merger agreements and deal protections generally, see Steven M. Davidoff & Christina M. Sautter, *Lock-up Creep*, 38 J. CORP. L. 681 (2013).

68. Gilliland v. Motorola, Inc., 859 A.2d 80, 86–88 (Del. Ch. 2004) (explaining the mechanics and need for appraisal rights).

69. These figures are not reported in Table III.

70. *See supra* Table III.

71. *See* Davidoff et al., *supra* note 64, at 2.

3. Attorneys' Fees

The drivers of merger litigation are shareholder plaintiffs' attorneys' firms. For these firms, shareholder litigation is a business and attorneys' fees drive their conduct. A number of papers examine class-action corporate litigation. Professor Coffee argues that plaintiffs' attorneys in corporate litigation are "utility-maximizing entrepreneurs" who manage a portfolio of cases with the expectation that only a portion of these cases will be successful.[72] Coffee theorizes that plaintiffs' attorneys are social welfare-increasing private attorney generals, and he examines several reasons why attorneys bring non-meritorious actions.[73] Coffee concludes that these "actions are uniquely vulnerable to collusive settlements that benefit plaintiff's attorneys rather than their clients."[74]

Coffee's analysis is supported by a second seminal analysis by Professors Weiss and White.[75] The authors undertake a detailed analysis of plaintiffs' attorneys and corporate litigation, examining 104 class-action filings involving mergers in Delaware from 1999 to 2001.[76] The authors find that shareholder litigation is a lawyer-driven process rather than one that is operated for the benefit of shareholders.[77] Attorneys act in their self-interest to file opportunistic complaints in pursuit of settlement and payment of attorneys' fees.[78]

Because merger litigation is almost always brought as a class-action case on behalf of shareholders, courts are the body deciding to award attorneys' fees. In this regard, lower court judges have great discretion to award attorneys' fees.[79] In Delaware it appears that attorney fees awards are rarely appealed, since there is a norm for the Delaware Supreme Court to defer to the Chancery Court on the issue of fees.[80]

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72. Coffee, *supra* note 23, at 677.

73. *See generally id.*

74. *Id.* at 677.

75. *See generally* Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797 (2004).

76. *Id.* at 1822–23.

77. *Id.* at 1851–52.

78. *Id.* at 1855–56. This is consistent with the findings of Berger and Pomeroy. *See generally* Carolyn Berger & Darla Pomeroy, *Settlement Fever: How a Delaware Court Tackles Its Cases*, BUS. L. TODAY, Sept.–Oct. 1992, at 7.

79. In Delaware, attorneys' fees are awarded by the court applying the *Sugarland* factors. *See* Sugarland Indus., Inc. v. Thomas, 420 A.2d 142, 149–50 (Del. 1980). These provide great discretion to the court to fashion what it believes is an appropriate fee. *See In re* Compellent Techs., Inc., No. 6084-VCL, 2011 Del. Ch. LEXIS 190, at *63–71 (Del. Ch. Dec. 9, 2011) (awarding fee for an amendment settlement on the basis of the increased chance of a topping bid due to the amendment of the merger agreement).

80. As noted, a very rare example is the recent appeal of the *In re Southern Peru Copper* attorneys' fee, which was upheld with one dissent by the Delaware Supreme Court. Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1262–63 (Del. 2012).

In addition, there is prior documentation of variance in attorneys' fee awards by judges to meet their caseload. Professors Helland and Klick study attorneys' fees in class actions generally. They find that judges will exercise their discretion to award higher attorneys' fees when their caseload is high in order to avoid extended fee dispute and additional work.[81] Another study has found that in class actions, generally attorneys' fee awards are lower when market mechanisms are used to set fees or when there is a monitor in the form of a strong shareholder plaintiff.[82]

In Table IV.A we examine trends in attorneys' fees in merger litigation over time in order to examine whether there is similar variation as found in prior studies.

Table IV.A. Fees and Settlement Type (2005–2011)

	Attorneys' Fees, if positive ($ in thousands)			Non-Disclosure Settlements
Year	**N**	**Mean**	**Median**	**%**
2005	34	$1766	$450	31.7%
2006	64	$1835	$528	33.3%
2007	53	$994	$550	12.7%
2008	33	$865	$588	13.9%
2009	44	$1704	$638	10.6%
2010	82	$1263	$583	16.2%
2011	55	$1430	$580	12.7%

During our sample period, average attorneys' fee awards fluctuate somewhat from year to year, but over the sample period the median fees rise modestly from $450,000 in 2005 to just under $600,000 in 2011. The rise in median attorneys' fees occurs despite a decrease in non-disclosure settlements. Non-disclosure settlements comprise on average 31.7% of settlements in 2005 and 33.3% of settlements in 2006, but fall to 10.6% of settlements in 2009 and 12.7% of settlements in 2011.

To the extent that this is not merely fluctuation in the short-term, the decrease in non-disclosure settlements or increase in disclosure-only settlements may be attributed to the increased rate of merger litigation during this time period and parties settling these weaker additional cases. The comparative increase in disclosure-only settlements may also be due to more

81. Eric Helland & Jonathan Klick, *The Effect of Judicial Expedience on Attorney Fees in Class Actions*, 36 J. LEGAL STUD. 171, 172 (2007).

82. *See* Michael A. Perino, *Markets and Monitors: The Impact of Competition and Experience on Attorneys' Fees in Securities Class Actions* 2–3 (St. John's Univ. Sch. of Law, Legal Studies Research Paper Series, Paper No. 06-0034, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=870577.

liberal Delaware case law requiring increased disclosure in connection with mergers, case law which the Delaware courts promulgated during this time period.[83] In either case, the rise in attorneys' fees despite the increase in disclosure settlements supports the proposition that attorneys' fees have been increasing across the board during the sample time period. The corresponding increase in attorneys' fees commensurate with the rise in litigation cases also implies that states may be paying higher fees to attract these cases.[84]

Examining whether attorneys' awards vary among states, Table IV.B sets forth the number of settlements for selected jurisdictions during our sample period as well as the mean and median attorneys' fees.

Table IV.B. Attorneys' Fees by Jurisdiction and Size

Settlement Jurisdiction	N	%	Mean Attorneys' Fees ($ in thousands)	Median Attorneys' Fees ($ in thousands)
DE	124	29.5%	$2049	$651
CA	60	14.3%	$931	$546
NY	27	6.4%	$1884	$505
TX	26	6.2%	$1169	$613
FL	20	4.8%	$1043	$530
IL	15	3.6%	$777	$750
NJ	15	3.6%	$1260	$525
MD	13	3.1%	$606	$540
NV	10	2.4%	$1788	$489
OH	10	2.4%	$638	$495
PA	10	2.4%	$1656	$263
All others	90	21.4%	$1110	$500
Total	420	100.0%		

According to our findings, in cases that are settled, Delaware is responsible for 29.5% of the settlements while California is responsible for 14.3% and New York for 6.4%. In these cases, Delaware courts award median attorneys' fees of $651,000, an amount higher than Delaware's next two competitors, California ($546,000) and New York ($505,000). Illinois awards

83. Lloyd L. Drury, III, *Private Equity and the Heightened Fiduciary Duty of Disclosure*, 6 N.Y.U. J.L. & BUS. 33, 45–46 (2009); Blake Rohrbacher & John Mark Zeberkiewicz, *Fair Summary II: An Update on Delaware's Disclosure Regime Regarding Fairness Opinions*, 66 BUS. LAW. 943, 944–47 (2011).

84. We also examine average attorneys' fees awarded. Excluding litigation in which no fee is awarded, the average attorneys' fee award is $1.4 million. Fee awards range from a minimum of $50,000 to a maximum of $26 million. Including all outcomes (including the zero fee awards), fees average $1 million.

the highest median attorneys' fees ($750,000), while Pennsylvania awards the lowest median attorneys' fees ($263,000). The considerable variation in average attorneys' fee awards across states implies that states may compete for litigation through the awarding of differential fees. However, it is also possible that the quality of cases brought varies by state, which could explain some of the variation in fees. We empirically investigate case merits, fee awards, and settlement rates in the following Subpart.

Finally, there is the question of how and whether Delaware is competing during the time of our sample period. This can be rephrased more colloquially as: who is winning the competition for cases? Table V.A examines which states are winning cases based on the proportion of cases captured over the full sample period. In the absence of competition and if attorneys select jurisdictions randomly, then each state should win about 50% of the cases in which jurisdiction is up for grabs.

Table V.A. State % of Merger Litigation (2005–2011)

State	Total	N	%
DE	278	124	44.6%
CA	81	60	74.1%
NY	43	24	55.8%
TX	37	26	70.3%
MD	27	13	48.2%
FL	26	19	73.1%
IL	22	13	59.1%
MA	22	9	40.9%
NJ	18	15	83.3%
PA	16	10	62.5%
NV	13	10	76.9%
TN	10	7	70.0%

Table V.A provides general empirical evidence in line with the predictions, with many states winning (i.e., attracting) more than 50% of cases that can possibly be filed in that state. For example, Nevada attracts 76.9% of cases involving targets headquartered in a state that differs from the incorporation state, New Jersey attracts 83.3%, Florida attracts 73.1%, California attracts 74.1%, and Texas attracts 70.3% of cases. In contrast, Massachusetts only attracts 40.9% of cases that could be filed that jurisdiction. Finally, Table V.B examines the percentage of cases captured by Delaware over the sample time period.

Table V.B. Delaware % of Cases Captured

Year	Total	N	%
2005	22	11	50.0%
2006	37	13	35.1%
2007	32	11	34.4%
2008	26	7	26.9%
2009	31	18	58.1%
2010	77	36	46.8%
2011	53	28	52.8%

We find fluctuation during this time period, which is indicative of the dynamic nature of the competition for litigation. In 2005, Delaware attracted 50% of cases, a number that fell to 26.9% in 2008 and rose to 52.8% in 2011.

B. THE MERGER LITIGATION CONTROVERSY

The rise in merger litigation has brought controversy in its wake. In a number of speeches and opinions, Delaware judges have complained about the volume and quality of these complaints. It has also been the subject of much criticism for engendering meritless litigation.[85]

In academia, the debate has also centered on whether this litigation, and in particular whether multi-jurisdictional litigation, is a social good. Professors Griffith and Lahav examine the wealth effects of merger litigation, theorizing that merger litigation benefits defendants by providing them with low-cost settlements through which to purchase global releases precluding future claims.[86] These allow buyers to gain valuable insurance by preventing future

85. *See, e.g.*, JOEL C. HAIMS & JAMES J. BEHA, II, RECENT DECISIONS SHOW COURTS CLOSELY SCRUTINIZING FEE AWARDS IN M&A LITIGATION SETTLEMENTS 4 (2013), *available at* http://media.mofo.com/files/Uploads/Images/130418-In-the-courts.pdf ("[T]he Chancery Court will not rubber stamp fee awards in merger litigation."); Phillip R. Sumpter, *Adjusting Attorneys' Fee Awards: The Delaware Court of Chancery's Answer to Incentivizing Meritorious Disclosure-Only Settlements*, 15 U. PA. J. BUS. L. 669, 688–91 (2013) (describing Delaware courts' criticism of merger litigation); Robert M. Daines & Olga Koumrian, *Merger Lawsuits Yield High Costs and Questionable Benefits*, N.Y. TIMES DEALBOOK (June 8, 2012, 10:38 AM), http://dealbook.nytimes.com/2012/06/08/merger-lawsuits-yield-high-costs-and-questionable-benefits/ (stating that merger litigation may "impose excessive costs on the companies involved and their shareholders" while delivering uncertain benefits); Ann Woolner et al., *When Merger Suits Enrich Only Lawyers*, BLOOMBERG (Feb. 16, 2012, 12:59 PM), http://www.bloomberg.com/news/2012-02-16/lawyers-cash-in-while-investor-clients-get-nothing-in-merger-lawsuit-deals.html ("The greatest benefit is for the plaintiffs' attorneys." (quoting John C. Coffee, Jr. of Columbia University) (internal quotation marks omitted)). *See generally* Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55 (1991).

86. Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053, 1057–58 (2013).

claims at low cost.[87] Reframing the issue in this manner, the authors find that such a market should be encouraged and that centralizing such claims in one jurisdiction would not be optimal.[88] Instead, to ensure that preclusion is properly granted, the authors recommend increased judicial oversight and communication over merger litigation.[89]

Professor Myers posits that merger litigation is detrimental to both shareholders and corporate law and proposes that corporations be allowed to prioritize litigation filed in the state of incorporation.[90] He argues that the problem of multi-forum litigation works to the benefit of plaintiffs' attorneys who can leverage this opportunity to extract undue fees.[91] He instead proposes that this litigation should be brought in the jurisdiction of incorporation and recommends transfer and removal procedures to accomplish this.[92]

Professors Thomas and Thompson theorize that "shareholders adjust their preferred approaches seeking to constrain managerial opportunism, including shifting litigation from one jurisdiction to another."[93] They ultimately conclude that the increase in these lawsuits reflects "fee distribution" opportunities sought out by plaintiffs' attorneys who arbitrage litigation among jurisdictions.[94]

Vice Chancellor Strine and Professors Hamermesh and Jennejohn address general issues around multi-jurisdictional litigation and which court should adjudicate these claims. They argue that the rise in merger litigation implies "potential systemic dysfunction," as claims of Delaware law are adjudicated outside of Delaware in courts of less competence.[95] The authors propose that the "first-filed" doctrine, which gives preference to the jurisdiction where suit is first filed, be replaced "by meaningful consideration of affected parties' interests and judicial efficiency."[96]

Finally, Fisch, Griffith and Davidoff Solomon empirically analyze voting patterns in the wake of merger agreement settlements.[97] The authors find no evidence that shareholders change their votes in light of the additional disclosure made in disclosure settlements.[98] In light of this, the authors

87. *Id.* at 1058.

88. *Id.* at 1058–59.

89. *Id.* at 1115–16.

90. Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 U. ILL. L. REV. 467, 471–72.

91. *Id.* at 470–71.

92. *Id.* at 533–38.

93. Thomas & Thompson, *supra* note 6, at 1755.

94. *Id.* at 1757.

95. Leo E. Strine, Jr. et al., *Putting Stockholders First, Not the First Filed Complaint* 3, 73–74 (Harvard John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 740, 2013), *available at* www.law.harvard.edu/programs/olin_center/papers/pdf/Strine_740.pdf.

96. *Id.*

97. Fisch et. al., *supra* note 64, at 1.

98. *Id.* at 4.

propose that state courts stop awarding attorneys' fees for disclosure settlements. Instead, if these claims have merit they should be litigated in federal court, which is better situated to assess these claims. The authors posit that this would diminish the amount of "meritless" litigation.[99]

As can be seen from the variety of proposals and analyses, there is a wide divergence of opinion and thought on not only the efficacy of merger litigation, but also any proposed reforms. However, the general bent of this scholarship has been that the rise of merger litigation absent jurisdictional effects is not an economically detrimental event.[100] In addition, none of these papers focus on the effect of Delaware's law on this competition and the current response of Delaware courts.[101] This Article attempts to provide direction by theorizing the competition component to the merger litigation problem. We seek to do this through an empirical analysis of merger litigation in the next Part.

IV. DATA COLLECTION AND EMPIRICAL ANALYSIS

A. DATA COMPILATION

Our sample contains all transactions listed in the FactSet MergerMetrics[102] database announced from 2005 through 2011 that meet the following criteria: (1) the target is a U.S. firm publicly traded on the New York Stock Exchange, American Stock Exchange, or NASDAQ stock exchanges; (2) the transaction size is at least $100 million; (3) the offer price is at least $5 per share; (4) the merger agreement is signed and publicly disclosed through an SEC filing; and (5) the transaction is completed.[103] These filters result in a sample of 1117 takeover transactions.

From MergerMetrics, we obtain data on the transaction value, offer price, consideration offered, form of acquisition (tender offer/merger), competing bids, target industry, and offer price. We also obtain from MergerMetrics transaction terms, including the presence or absence of a go-shop, use of an independent committee to approve the transaction, the type of transaction

99. *Id. See generally* Stevelman, *supra* note 33.

100. *But see generally* Fisch et al., *supra* note 64 (finding that disclosure settlements do not statistically influence voting on mergers and recommending that judicial approval of these settlements be more searching).

101. Professors Armour, Black, and Cheffins do address this in the context of whether Delaware is losing its cases, but instead focus on Delaware's role in this competition, not other states'. *See generally* Armour et al., *Is Delaware Losing Its Cases?*, *supra* note 5. For a historical view of jurisdictional competition in M&A litigation, see C.N.V. Krishnan et al., *supra* note 54.

102. MergerMetrics is a database of M&A data which offers "[i]n-depth research on mergers involving US public targets." FACTSET MERGERS, http://www.mergermetrics.com (last visited Oct. 31, 2014).

103. Virtually all withdrawn mergers have their class-action litigation dismissed as moot; thus, by focusing only on completed mergers our sample does not exclude relevant litigation and settlement outcomes.

(management buy-out, private equity acquisition, or strategic combination), sale process, headquarters, and state of incorporation of targets. For information concerning merger litigation, we review by hand merger proxy statements and tender offer documents filed with the SEC to determine if litigation is brought with respect to the transaction. We also document all class-action litigation brought in connection with a merger.[104] For litigation outcomes, attorneys' fees, and settlement terms, we review public filings and obtain actual court filings. Court filings are obtained directly from the court, from public filings on the LexisNexis File and Serve Database or Bloomberg Law, and are also individually reviewed.

B. EMPIRICAL ANALYSIS

In this Subpart, we empirically analyze the hypothesis that state courts attempt to attract litigation cases through attorneys' fee awards and/or case settlement rates. Our theory is that plaintiffs' attorneys will drive this competition by selecting jurisdictions to bring litigation where optimal results will occur. Courts that choose to compete will respond by adjusting fees paid and dismissal rates. In addition, while we believe that Delaware has strong incentives to engage in this competition, we acknowledge that the motivations of other courts to compete may be less or even absent.

We test this theory by using a two-stage regression. In stage one, we run regressions to control for the quality of the cases. We do so in order to account for variables which affect case quality. It also allows us to disentangle the component of fee awards and settlements that are based on case merits from the component that is driven by a competition motive. In particular, we look at case merits since in unreported results we find that over 97% of multi-jurisdictional cases involve corporations incorporated under Delaware law, meaning that the law is the same in almost all cases. Having accounted for case quality, we then take the residuals from those regressions, which are the unexplained parts of the cases.[105] These residuals are in part attributable to unexplained factors driving case dispositions and attorneys' fees and therefore are designed to assess a court's discretion in deciding a case or approving an attorneys' fee award. We then conduct a second-stage regression on these residuals to test whether attorneys or courts provide evidence to support our theory of competition. We use residuals because this works as a

104. Our approach captures all litigation brought in connection with a merger but excludes a small number of suits brought by individual activist shareholders or hostile bidders. Notably, we do not distinguish between whether the suit is brought as a class-action or derivative claim, instead looking at all class-action litigation. Nonetheless, this litigation is often pleaded as a direct claim due to the uncertainty of Delaware law on this issue and the ability to avoid the demand futility requirements of derivative litigation. *See* Strine et. al., *supra* note 95, at 22–23 n.58.

105. By construction, the residuals from the first regression are uncorrelated with the independent variables of interest in the first regression. *See, e.g.*, WILLIAM H. GREENE, ECONOMETRIC ANALYSIS 219–20 (4th ed. 2000).

control for the fee award or settlement rate that would be expected given the validity of a case absent any competition motive.[106]

In stage one, we predict the litigation settlement rates and attorneys' fee awards (Table VI) using only case-based information. This includes variables that capture the validity of cases, such as transaction size, payment in cash, management buyouts, tender offers, and transactions with low offer premiums. We believe that these transaction characteristics in particular are likely to highlight fiduciary duty issues which may arise.[107] We also control for the number of suits brought in a given case, which may proxy for the merits of a case along dimensions that we fail to capture in the other variables.

In the second step, we construct the residuals from the first-stage models in Table VI. We then analyze the residuals in Tables VIII and IX to determine whether they support our theory that attorneys respond to unexpected case settlements or fee awards and courts similarly react to the loss of cases.

We begin with stage one by examining case quality. In Table VI, we examine the factors that predict whether merger litigation will be brought (Column 1), settlement and dismissal rates (Column 2), and factors affecting attorneys' fees (Column 3).[108]

106. This two-step procedure is similar to including all control variables in one large regression. *See generally* JEFFREY M. WOOLDRIDGE, ECONOMETRIC ANALYSIS OF CROSS SECTION AND PANEL DATA (2d ed. 2010).

107. These are also factors commonly used in other studies. *See, e.g.*, Krishnan et al., *supra* note 59, at 12.

108. "Cash Payment" indicates the consideration paid is all cash; "Management Buyout" is an acquisition with management participation; "Tender Offer" is a merger structured as a direct offer to target shareholders; "Auction" indicates the transaction is initiated as an auction among multiple bidders instead of a privately negotiated sale; "Go-shop" indicates that the merger agreement includes a provision that allows the target company to actively solicit other potential bidders for a specific limited period of time after the merger agreement has been signed; "Low Offer Premium" is an indicator variable that equals one if the offer premium is below the sample median for a given year, and zero otherwise; "Target Special Committee" is an indicator variable that equals one if the merger was approved by a special committee of target directors, and zero otherwise; and "# Suits Filed" is the total number of lawsuits filed across all jurisdictions for a given transaction. The sample is defined Part IV.A. P-values from robust standard errors are reported in parentheses with ***, **, and * representing significance at the 1%, 5%, and 10% levels, respectively.

Table VI. Predicting Litigation, Settlements, and Attorneys' Fees

	Litigation = 1 No Litigation = 0	**Settlement = 1 Dismissed = 0**	**Attorneys' Fees ($ in thousands)**
	(1)	**(2)**	**(3)**
Log Transaction Value	1.682***	0.971	433.885***
	(0.000)	(0.715)	(0.001)
Cash Payment	1.855***	0.721	-310.528
	(0.000)	(0.212)	(0.328)
Management Buyout	2.798*	0.732	57.124
	(0.057)	(0.471)	(0.888)
Tender Offer	1.377*	0.708	-197.702
	(0.073)	(0.136)	(0.337)
Auction	1.318*	1.026	-204.784
	(0.056)	(0.897)	(0.475)
Go-shop	3.248***	1.604	593.515
	(0.000)	(0.157)	(0.336)
Low Offer Premium	1.43***	1.293	246.639
	(0.009)	(0.188)	(0.352)
Target Special Committee	1.694***	0.889	502.179
	(0.001)	(0.586)	(0.207)
# Suits Filed		1.102***	267.197***
		(0.010)	(0.005)
N	1093	563	345
Pseudo R^2	11.99%	2.91%	22.95%

Columns 1 and 2 are logit models with coefficients presented as odds ratios: A coefficient greater than one has a positive relation to the dependent variable, and a coefficient less than one has a negative relation.[109] In Column 1, we regress the presence (=1) or absence (=0) of litigation against variables that are likely litigation predictors. Similar to prior studies, we find that litigation is more likely to be brought in larger transactions and transactions where a breach of fiduciary duties is more likely.[110] The coefficients for Management Buyout, independent committee of directors or Target Special Committee, and Go-shop are positive and significant.[111] Each of these variables identifies a transaction that is likely to be subject to heightened

109. For further explanation of odds ratios, see J. SCOTT LONG & JEREMY FREESE, REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA 177–78 (2d ed. 2006).

110. *See, e.g.*, C.N.V. Krishnan et al., *Shareholder Litigation in Mergers and Acquisitions*, 18 J. CORP. FIN. 1248 (2012).

111. *See supra* note 108 and accompanying text (defining these variables).

fiduciary duties or judicial scrutiny because of management involvement or a lack of a competitive bid process. In addition, the independent variable, Low Offer Premium, equals one if the offer premium is below the sample median for a given year and zero otherwise. Mergers with low offer premiums are about one-and-a-half times more likely to experience litigation (significant at the 1% level) than transactions with above-median offer premiums, which is consistent with shareholders bringing suit in an effort to seek better offers. The variables Log Transaction Value and Cash Payment are also positive and significant. The finding with respect to transaction size may be due to the fact that in larger transactions, higher attorneys' fees can be more easily paid by targets. Cash transactions are likely positive because these are almost always subject to heightened fiduciary duties on the board as it is a change of control for the target corporation's shareholders.[112]

In Column 2, we examine variables that indicate settlement rates. The dependent variable equals one if litigation is brought and the litigation is settled and zero if the litigation is dismissed by the court. Several variables are marginally significant (based on unreported AIC tests), though not so at the 10% statistical level. In Column 2, the variable number of suits filed is positive and significant, indicating that the more suits filed the more likely the case is to settle. This result could be attributable to the fact that more suits indicates a higher number of plaintiffs' attorney resources and commitment to a case, or it could simply reflect the merits of a given case that attracts greater litigation proceedings. In the latter explanation, the higher number of suits indicates that plaintiffs' attorneys' firms assess the merits beyond the variables included in our table to encompass particular factual circumstances. The more attractive the case merits, the more suits that are filed under this hypothesis, a theory supported by the findings in Table VI.

In Column 3, we model expected attorneys' fee awards by using ordinary least squares regression ("OLS") of the size of the award (in thousands) against the same set of independent variables outlined in the prior table.[113] Column 3 focuses only on the subset of cases involving a settlement. It thus provides OLS coefficient estimates *conditional* on a case not being dismissed by the court, which excludes most of the zero attorneys' fee observations. Not surprisingly, attorneys' fees are positively correlated with transaction size, significant at the 1% level. The number of suits filed is positive and highly significant, consistent with the notion that plaintiffs file multiple suits for more risky transaction structures and where cases have more promise for a satisfactory outcome. With this in mind, we then construct residuals to proxy for unexpected fee awards in subsequent analysis.

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112. *See, e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (holding that when a change of control of the corporation is inevitable, the duties of directors turn to auctioneers to obtain the highest price reasonably available).

113. For more on OLS estimation, see WOOLDRIDGE, *supra* note 106, at Ch. 4.

We next conduct the second stage of our regression to examine whether attorneys and state courts act in the merger litigation context consistent with a competition theory. The first perspective is that of attorneys. If states do in fact award differential rates of settlements and fees, one might expect attorneys to respond to these incentives over time by litigating more heavily in jurisdictions that are perceived as being more attorney-friendly. The second perspective is that of state courts. State courts may respond to attorney forum-shopping by attracting litigation through case settlements and attorneys' fees that exceed what would be expected given the case merits as modeled in Table VI. States that decline to compete for such litigation would then have negative residuals while states that choose to compete to a greater extent would have positive residuals. Absent any state competition for litigation filings, we would expect the residuals to average roughly zero across all states. Thus, any difference above (or below) zero across states will reflect effort (or lack thereof) to attract filings through unexpected settlement rates and/or attorneys' fee awards. We explore both perspectives in succession in the following tables.

Table VII reports average residuals from the models across the most frequently involved jurisdictions calculated from Table VI.

Table VII. Cross-Section of Attorneys' Fees and Settlements

State	N	Settlement/Dismissed Residual	Attorneys' Fees Residual ($ in thousands)
DE	216	(4.3%)	$426
CA	106	(4.4%)	$98
TX	59	(37.7%)	($674)
NY	52	17.8%	$145
FL	31	24.3%	$37
MD	24	10.3%	($1212)
NJ	24	3.4%	($1100)
IL	23	57.5%	($918)
MA	23	(2.1%)	$337
PA	22	(21.3%)	$881
MN	18	5.8%	($524)
TN	18	(17.6%)	$488
OH	13	30.0%	($113)
GA	12	(84.0%)	$2745
NV	12	12.2%	$197
CT	10	20.0%	($533)

The Settlement/Dismissed Residual are constructed from Column 2 of Table VI while the Attorneys' Fee Residual is constructed from Column 3 of Table VI. The spreads reveal considerable variation among states. For example, Georgia, Pennsylvania, and Texas dismiss a significantly larger proportion of cases than one would expect. These states appear to be unwilling to compete for additional litigation filings based on settlement rates. In contrast, Nevada produces significantly positive unexpected settlement rates and attorneys' fees, consistent with its expressed desire to attract more litigation filings.[114] Other states fall somewhere in the middle. For example, Delaware has a slightly negative settlement rate—indicating a modest propensity to dismiss worthy cases. Yet it also appears to balance this tendency with a positive average attorneys' fee award. Thus some states may attempt to counterbalance the negative effects of dismissal rates with a positive incentive through attorneys' fees.

We next turn to exploring whether attorneys respond to incentives provided by settlement rates and fees. If attorneys are rational economic actors, one would expect that attorneys, when given the choice, would file cases in those states that have previously provided the most attractive climate for such proceedings. [115] Attorneys generally have a choice to file in at least two states on those cases in which target firms have headquarters in a state other than the incorporation state.[116] Table VIII thus explores which states attorneys select for the filing: the headquarters or incorporation state. The appropriate modeling choice for such analysis is multinomial logit. With only two discrete outcomes, this is equivalent to the logit model.[117] In our models, the dependent variable equals one if attorneys bring suit in the target's state of incorporation and zero if in the state of the target's headquarters. The one/zero assignment is purely arbitrary; we could switch the roles and the coefficients would invert. As in prior logit models, we report coefficients as odds ratios so that a coefficient greater than one is positive and less than one is negative.

As for the independent variables in Table VIII, we first construct the settlement residuals from Column 2 of Table VI and the fee residuals from Column 3 in Table VI. We then limit the sample analysis in Table VIII only to those cases involving a target with a state of incorporation that differs from the state of its headquarters, since these represent cases with attorney

114. *See generally* Michal Barzuza & David C. Smith, *What Happens in Nevada? Self-Selecting into Lax Law*, 27 REV. FIN. STUD. 3593 (2014).

115. We acknowledge that one driver of multi-jurisdictional litigation may be plaintiffs' attorneys jockeying for fees amongst themselves by filing in differing jurisdictions. In unreported regressions, we are unable to find any independent effect of attorneys' fees or dismissal rates on the presence or absence of more law firms in multiple jurisdictions. Thomas & Thompson, *supra* note 6, at 1762.

116. *Id.* at 1765.

117. *See* WOOLDRIDGE, *supra* note 106, at 565–66.

discretion over jurisdictions in which to file. Next, we construct the average settlement residual and fee residuals for all sample cases previously decided by the incorporation state and headquarters state during the prior 24 months. If attorneys respond to these types of incentives created by state competition, we predict a positive relation between the choice to litigate in the target's incorporation state and that state's prior settlement and fee residuals, and/or a negative relation between the choice to litigate in the target's *incorporation* state and the prior residuals for the *headquarters* state.

Table VIII. Do Attorneys Respond to States' Prior Case Settlements and Fees?[118]

Logit: Choice to litigate in target state of incorporation vs. state of headquarters		
Residuals	**(1)**	**(2)**
Settlement, Inc.	3.6	
	(0.713)	
Settlement, HQ	0.468**	
	(0.031)	
Attorneys' Fees, Inc.		0.999
		(0.969)
Attorneys' Fees, HQ		0.993
		(0.616)
N	251	242
	(3)	**(4)**
Settlement Difference	2.153**	
	(0.03)	
Attorneys' Fees Difference		1.006
		(0.652)
N	251	242

Table VIII reports results from the logit models with coefficients reported as odds ratios (coefficients less than one are negative and greater than one are positive). Columns (1) and (3) are the residuals from Column 2 in Table VI; Columns (2) and (4) are the residuals from Column 3 of Table VI.

Column 1 includes only the settlement residuals and documents a negative relation between prior settlement residuals in the headquarters state and the choice to litigate in the incorporation state. In other words, attorneys are more likely to bring the suit in the headquarters state if that state has

118. The sample is defined in Part III.A. P-values from robust standard errors are reported in parentheses with ***, **, and * representing significance at the 1%, 5%, and 10% levels, respectively.

previously awarded an unexpectedly high rate of settlements or low rate of dismissals. Column 2 includes only attorneys' fee residuals. We find no significant results between prior attorneys' fee residuals in the headquarters state and the choice to litigate in the incorporation state.

Another way to view attorney forum-shopping is on a relative basis: as a choice between the incorporation state and the headquarters state. Columns 3 and 4 in Table VIII report similar models to those in Columns 1 and 2, but use the relative difference of residuals across states. That is, the independent variables are the differences in settlement and fee residuals of incorporation state minus the headquarters state. If attorneys respond to competition, we expect to observe positive coefficients on these variables, as they gravitate towards or away from the incorporation state if it has previously produced higher or lower settlements or attorneys' fees. The coefficient for settlement difference is positive and significant meaning that attorneys do respond to reduced settlement rates by shifting their place of jurisdiction for litigation. Taken collectively, the results in Table VIII provide evidence that attorneys respond to incentives on both an absolute and a relative basis when faced with a choice of where to bring shareholder litigation based on dismissal and settlement rates but not attorneys' fees. This finding rebuts prior anecdotal evidence of attorney conduct reported by others, namely that plaintiffs' lawyers respond to attorneys' fee awards.[119]

Thus far, we have documented one side of our theory of competition: we find evidence that attorneys respond to incentives. We now turn to documenting the other side of this competition theory: whether state courts actively compete to provide these incentives. In Table IX, we examine using ordinary least square regression how state courts respond to forum shopping by entrepreneurial plaintiffs' attorneys by adopting a similar empirical strategy to that in Table VIII. We theorize that if courts respond to the continual migration of litigation filings then they will adjust either their fee awards or dismissal rates. In Table IX, we also examine all litigation brought and not just multi-jurisdictional suits, since court responses can extend to both subsets of cases in order to provide a signal to attorneys for future cases.

We examine in Table IX attorneys' fee and settlement residuals and the state court response for (1) the entire sample; (2) Delaware; and (3) states with active business courts during the sample period.[120] The key independent

119. *See* David Marcus, *Did Chancery Fee Rulings Chase Away Plaintiffs Lawyers?*, DEL. L. WKLY. (Nov. 29, 2006); Sumpter, *supra* note 85, at 675; Daniel Fisher, *Plaintiff Lawyers Seek Their Cut on Virtually All Big Mergers, Study Shows*, FORBES (Feb. 28, 2013, 12:01 AM), http://www.forbes.com/sites/danielfisher/2013/02/28/plaintiff-lawyers-seek-their-cut-on-virtually-all-big-mergers-study-shows/ (claiming that "an increasing number [of cases] are being filed in other states where judges may be less experienced").

120. Business court states are California, Connecticut, Delaware, Florida, Georgia, Illinois, Maine, Maryland, Massachusetts, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, and Rhode Island. We only code these states for years in which their business courts were active (data available upon request).

variable is "State Winning %," which is the percentage of cases that a given state has retained relative to other states for prior litigation (prior cases involving targets headquartered in a state other than its incorporation state). This is a rolling average of all suits in months prior to the month of a given case filing.[121] The indicator variable Multi-State equals one if the state of target headquarters differs from its incorporation state and zero otherwise.

Table IX. State Competition for Litigation[122]

Panel A: OLS of fee residuals			
	Full Sample	**Delaware**	**Business Courts**
	(1)	**(2)**	**(3)**
Multi-State	538.583**	-145.877	645.815*
	(0.044)	(0.823)	(0.051)
State Winning %	-1509.55**	4466.07	-1448.51**
	(0.034)	(0.523)	(0.047)
N	237	103	213
Panel B: OLS of settlement residuals			
	(4)	**(5)**	**(6)**
Multi-State	-0.239	1.357***	-0.451**
	(0.265)	(0.000)	(0.020)
State Winning %	-0.270	-1.719**	-0.228
	(0.366)	(0.042)	(0.385)
N	448	164	361

In Column 1 for the full sample, the State Winning % variable is negative and significant, indicating that overall, states tend to increase their fee awards on current cases when they have been losing prior cases to other jurisdictions. This provides stronger evidence for the state court side of the competition. In Column 2, the Delaware court subsample does not provide statistically significant evidence of competition, though Delaware tends to award higher fees on cases that could potentially file in multiple jurisdictions, which is still consistent with competition for cases among state courts. In Column 3 for Business Courts, the State Winning % is negative and significant. Business Courts, in general, appear to respond to losing or winning prior cases by increasing or lowering current attorneys' fees.

121. We require that a state has competed for at least five prior lawsuits in order to avoid large swings in the winning percentage on states with only several case filings.

122. The sample is defined in Part III.A. P-values from robust standard errors are reported in parentheses with ***, **, and * representing significance at the 1%, 5%, and 10% levels, respectively.

Columns 4 through 6 examine settlement residuals. We find no statistically significant evidence in Column 4 that courts respond to prior case winning percentages by adjusting their settlement rates. However, in Column 5 for Delaware, the coefficient is negative and significant at the 5% level, indicating that Delaware responds to losing cases by raising its settlement rates. In addition, Delaware appears less likely to dismiss cases if there is a potential for forum shopping. The results on Business Court states in Column 6 do not provide evidence of competition through settlement/dismissal rates.

Overall, Table IX provides support for state competition in litigation. Different states pursue different strategies—some responding to attorney forum shopping through attorneys' fee awards and others, like Delaware, competing primarily through settlement or dismissal rates. In addition, we note the findings in Table VIII that attorneys tend to respond more to dismissal rates, rather than attorneys' fees.[123] It may be that states awarding higher attorneys' fees are doing so for motives other than competition, such as a way to preserve relationships with the local bar. Taken collectively though, the findings provide some support for a two-sided competition: state courts compete for litigation and attorneys respond rationally to the incentives provided by settlements (which ultimately affect fees as well), and to a lesser extent fee awards themselves. As theorized, we also find evidence that Delaware, in particular, is engaging in this competition.

These tables thus show evidence that states compete for litigation and that attorneys respond to these incentives. This implies that states can win case filings away from other states more so by increasing their settlement rates and on a second order basis by granting higher attorneys' fees. This finding is consistent with the entrepreneurial model of plaintiffs' lawyers, suggesting that they manage a diversified portfolio of cases, preferring a large number of successes at a lower amount than winning fewer cases on the merits.[124]

V. IMPLICATIONS AND POLICY CONCLUSIONS

A. IMPLICATIONS FOR COMPETITION AND CORPORATE LITIGATION

Our findings are of import for a number of reasons. First, our study provides a multi-faceted picture of merger litigation. We document evidence of state competition for merger litigation, which proceeds as an iterative game between plaintiffs' attorneys and state judges. Attorneys dynamically react to dismissals and the loss of attorneys' fee awards by shifting future case filings towards jurisdictions which make "better" awards. States react to these shifts by either reducing dismissal rates or increasing attorneys' fees.

We also show that the state with the largest incentives to draw corporate litigation, Delaware, competes to attract cases necessary to maintain its

123. *See supra* Table VIII.

124. Coffee, *supra* note 23, at 677; *see also* Weiss & White, *supra* note 75, at 1875 (discussing this model in the context of merger-related class actions in Delaware).

corporate law. Delaware does not appear to react to attorney forum shopping by increasing attorneys' fees, but instead responds by lowering its dismissal rate—a factor which we find is more reflective of plaintiffs' attorneys' decisions of where to file. Delaware also appears to compensate for a higher overall rate of dismissals by paying more in attorneys' fees on average. Delaware's actions show how courts can utilize a balance of these two measures to respond to attorney forum shopping.

To the extent that states, or at least Delaware, can and do compete for litigation, generally there are widespread implications. The competition for state litigation cases can mean that laws are affected in a pro-plaintiff manner in consumer class actions and areas outside of corporate chartering. To the extent attorneys respond to dismissal rates and competition is based on this aspect, then this competition may also be beneficial to shareholders generally.

Our findings also provide a roadmap for a state to become more attractive to parties seeking litigation. We show how states can build a reputation for attracting and maintaining complex corporate law cases. They can either make their law more attractive to plaintiffs' attorneys and/or increase attorneys' fees. *In re Southern Peru Copper* and its $300 million award suggests that Delaware may participate in this dynamic by increasing the attorneys' fees it awards. This approach preserves the quality of state law and a state's standing with its core corporate constituencies by allowing Delaware to compensate attorneys' by means other than allowing poorer quality cases to proceed.

However, there are two caveats to our findings. First, it is possible that attorneys prefer certain states for reasons that we fail to capture in our models. If this is so, then these states have no need or incentive to compete along the settlement and fee dimensions. For example, it may be that these attorneys simply prefer Delaware as a place to pursue their better cases, and Delaware therefore does not need to compete. Our results must thus be viewed with this caveat, as it is difficult to fully control for endogeneity in the competition arena.[125] Second, while we document evidence of competition among states for litigation, it is not necessarily the case that all states are motivated in the same manner to compete and attract cases. Delaware, for example, may compete to draw cases in order to maintain its preeminent position as the place for state chartering. Other states, however, may attempt to attract litigation for reasons unrelated to the state competition for corporate charters, such as a simple desire for more litigation business and the revenue it provides. In addition, we acknowledge that certain courts may be attracting litigation for unexplained reasons, while other courts decide not to compete. What drives the reasons for competition is thus a topic for further study.

125. *See, e.g.*, Xavier Giroud & Holger M. Mueller, *Does Corporate Governance Matter in Competitive Industries?*, 95 J. FIN. ECON. 312, 319 (2010) (designing a control variable to "mitigate[] potential endogeneity concerns").

Ultimately, our general findings provide a foundational basis to further study jurisdictional competition and the multiple playing fields on which states compete to provide corporate law and litigation services.

B. POLICY IMPLICATIONS FOR MERGER LITIGATION

The policy implications of our findings for the merger litigation boom are dependent upon the view one adopts as to the utility of merger litigation. At a minimum, the competition that we document is one that appears to be affecting Delaware law in terms of dismissal rates. In other words, there appears to be jurisdictional pressure to allow cases to go to settlement instead of dismissal. Delaware also awards higher attorneys' fees, perhaps to compensate for a higher dismissal rate. The competition that merger litigation may therefore create in Delaware directly implicates the race to the bottom/race to the top debate in corporate chartering.[126] Litigation in this context may serve as a countervailing balance to any pro-management bend in Delaware, adding another dimension to this debate.

We realize that this is in some sense a simplistic analysis and that the effect of merger litigation on Delaware law may be that of only one influence among many. But we do think that the rise of merger litigation has brought Delaware more actively back into takeover jurisprudence after a period of quiescence after the 1980s takeover boom.[127] The competition element may be one driver of this increased engagement, as it has the potential to influence the tenor of rulings and ultimately the law of Delaware.

The assessment of the effect of this competition thus drives one's assessment of multi-jurisdictional merger litigation and any policy prescriptions. If one concludes that competition for merger litigation influences Delaware law in a positive manner, perhaps by providing a shareholder-friendly bent, then any attempts to reduce this litigation may not be worthwhile. This would be a determination that the beneficial effects of this litigation in driving Delaware law outweigh the detrimental economic effects of this wide-spread litigation. If the value judgment is to the contrary, that competition produces less than optimal Delaware law or otherwise allows merger litigation to continue at social welfare destroying rates, then the scale for more substantive reforms to address multi-jurisdictional litigation appears more appropriate.

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126. *See generally* Steven M. Davidoff, *The SEC and the Failure of Federal Takeover Regulation*, 34 FLA. ST. U. L. REV. 211 (2007) (arguing for reform of the federal takeover code and increased SEC presence in regulating takeovers).

127. The last decade has brought a boom in merger litigation opinions, as the bulk of the court's docket is taken up with these cases. *See* Steven Davidoff Solomon, *Debating the Merits of the Boom in Merger Lawsuits*, N.Y. TIMES DEALBOOK (Mar. 8, 2013, 3:50 PM), http://dealbook.nytimes.com/2013/03/08/debating-the-merits-of-the-boom-in-merger-lawsuits/?_php=true&_type=blogs&_php=true&_type=blogs&_r=1 ("[W]ithout merger litigation, their dockets would be cut by more than half.").

In particular, our findings give impetus to those in Delaware who advocate that companies adopt forum selection clauses. A company adopting a forum selection by-law or charter amendment sites all litigation in a single jurisdiction, typically Delaware.[128] The purpose of such a clause is to deal with the problem of multi-jurisdictional litigation and its perceived negative effects.[129] In this regard, the basis for these clauses is to prevent the type of competition and its effects we document in this Article. To the extent that forum selection clauses continue to be adopted, their justification is further supported by our findings of case competition to the extent that adopters conclude that this competition has negative effects on corporate law.[130]

We thus believe that the primary contribution of this Article to the merger litigation debate is to reframe the benefit in a multi-dimensional manner. Multi-jurisdictional merger litigation may have ancillary benefits or detriments that have heretofore been unrecognized in shaping corporate law. Any proposed reforms to stem this type of litigation should take into account this benefit or detriment.

VI. CONCLUSION

We analyze 1117 large public takeover transactions announced and completed between 2005 and 2011. About 56% of transactions experience shareholder litigation, and litigation rates trend upward over time to 92% by the time of the sample time-period's end. We find that attorneys respond to incentives by selecting states which have previously made more favorable decisions.[131] We further find that certain states with an interest in attracting business litigation respond to this jurisdictional forum shopping by rewarding higher attorneys' fees and more favorable outcomes when these states have

128. The Delaware Chancery Court has recently validated the placement of forum-selection clauses in by-laws, by action of the board without shareholder approval. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 942, 963 (Del. Ch. 2013). In a case before a California federal district court, the defendants recently requested the court to certify to the Delaware Supreme Court the question of whether a forum-selection by-law was properly enforceable. *See* Defendants' Notice of Motion, Motion, and Memorandum in Support of Motion to Certify Question of State Law to Delaware Supreme Court at 1, Bushansky v. Armacost, No. 12-CV-01597-JST, 2014 WL 2905143 (N.D. Cal. June 25, 2014). Whether non-Delaware courts will defer to these by-law amendments is uncertain, and the one court to consider the issue answered partially in the negative. Unfortunately, the extent to which non-Delaware courts will defer to forum selection by-laws remains unclear. *See* Galaviz v. Berg, 763 F. Supp. 2d 1170 (N.D. Cal. 2011). *See generally* Joseph A. Grundfest & Kristen Savelle, *The Brouhaha over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325 (2013); Verity Winship, *Bargaining for Exclusive State Court Jurisdiction*, 1 STAN. J. COMPLEX LITIG. 51 (2012).

129. *See generally* Grundfest & Savelle, *supra* note 128 (examining the effectiveness and validity of adopting intra-corporate forums).

130. The debate over the adoption of arbitration clauses in merger agreements and organizational documents is also implicated by our analysis, and arbitration can be seen as yet another level of competition. *See generally* Brian JM Quinn, *Arbitration and the Future of Delaware's Corporate Law Franchise*, 14 CARDOZO J. CONFLICT RESOL. 829 (2013).

131. Thomas & Thompson, *supra* note 6, at 1785.

seen cases migrating towards other jurisdictions. This conduct is evidence of competition for litigation among these states, though they may be acting to attract this litigation for divergent rationales or, alternatively, attracting litigation for reasons other than a competition motive. The competition is the game.