



JONES DAY  
**COMMENTARY**

## DELAWARE UPDATE: CHANCELLOR STRINE PROPOSES NEW APPROACH TO MULTIJURISDICTIONAL SHAREHOLDER LITIGATION

In a January 22, 2013 article, Chancellor Leo E. Strine, Jr. of the Delaware Court of Chancery (along with his coauthors) argues that place of incorporation should receive prominence in deciding where multijurisdictional shareholder litigation should proceed. Leo E. Strine, Jr., Lawrence A. Hamermesh, & Matthew C. Jennejohn, *Putting Stockholders First, Not the First-Filed Complaint*, Discussion Paper No. 740, Harvard Law School, available at <http://ssrn.com/abstract=2200499>. Although this proposal comes in the form of an academic paper, the article is consistent with a recent trend in Delaware decisions favoring the litigation of Delaware corporation shareholder cases in that state.

### THE STRINE PROPOSAL

The Strine article proposes that “where lawsuits are filed contemporaneously in parallel forums, the courts should give effect to the parties’ expressed

choice of the law that is to govern their relationship—in the corporate context, the law of the chosen state of incorporation—by applying a rebuttable presumption that the litigation should proceed in the courts of that state.” This new presumption would come in the form of three doctrinal changes. First, the rule prioritizing the first-filed complaint would be jettisoned. Second, the doctrine of forum non conveniens would be modified to give presumptive weight to the place of incorporation when determining whether a given forum is appropriate. Third, the Restatement rule that a court will exercise jurisdiction over the internal affairs of a foreign corporation (unless inconvenient or inappropriate to do so) would not apply where there is a contemporaneously filed parallel action in the forum of incorporation.

Chancellor Strine notes that the current rules for sorting out competing forum claims do not adequately account for the particular nature of representative

litigation. In particular, the paper argues that the vast majority of shareholder challenges to corporate transactions result in settlements that yield no monetary benefit to the plaintiffs. However, there are strong incentives for plaintiffs' firms to use forum-shopping to jockey for a seat at the table when attorneys' fees are to be awarded. Moreover, the uncertainty regarding the proper forum creates large inefficiencies for the parties and the courts.

The Strine article concludes that the best way to fix these problems is to favor the courts of the state of incorporation, assuming that the laws of that state govern the claims at issue. In support of this proposal, the authors rely on several arguments:

- Allowing the state of incorporation to apply its own laws aids consistent application of the relevant doctrine and provides greater certainty by creating definitive precedent for future transactions;
- There is no basis for deference to the choice of forum of a single plaintiff purporting to represent a class of shareholders from all over the country; and
- In most shareholder litigation, the interests at stake are unrelated to certain "minimal contacts" factors, such as the physical location of the corporation's business activities.

Although Chancellor Strine's proposal has not been expressly adopted in the Delaware courts, its principles seem to inform decisions there. As noted in Chancellor Strine's paper, Delaware courts do not mechanically rely on the first-filed rule to stay proceedings in favor of

a representative action that was filed earlier in another jurisdiction. For instance, in *Louisiana Municipal Police Employees' Retirement System v. Pyott*, 46 A.3d 313 (Del. Ch. 2012), Vice Chancellor Laster held that a derivative claim could proceed in Delaware even though a California court had dismissed with prejudice a derivative complaint against the company. The decision reflects Delaware courts' reluctance to reward the winner of a "race to the courthouse" where others are deemed to be better prepared to pursue the shareholder litigation. See *Jones Day Commentary*, "Delaware Court Resuscitates a Derivative Lawsuit Despite Dismissal with Prejudice in Another Forum" (June 2012), available at [www.jonesday.com/delaware\\_court\\_resuscitates/](http://www.jonesday.com/delaware_court_resuscitates/). Although the article's focus is on representative litigation, certain of its proposed doctrinal changes might be applied by Delaware courts to shareholder disputes outside of the derivative and class action context.

## CONCLUSION

Chancellor Strine identifies a number of perceived deficiencies of conventional "first-filed" and forum non conveniens analyses when applied to shareholder litigation. The Strine article presents a considered doctrinal basis for favoring the adjudication of Delaware shareholder claims in that state, even where other courts would traditionally have priority. While these arguments can be expected to carry weight in cases filed in Delaware, courts in other jurisdictions may continue to assert their competence and ability to adjudicate cases involving the internal affairs of Delaware corporations. It remains to be seen, therefore, whether Chancellor Strine's views will affect outcomes in cases filed outside Delaware.

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