



The Delaware Court of Chancery Endorses One Forum Motions as a Solution to Multi-Jurisdictional Litigation

By: *C. Barr Flinn and Kathaleen St. J. McCormick*¹

It's . . . well-known that Delaware courts have responded to the filing of poorer-quality [shareholder] suits by cutting fees and criticizing the filing, the rapid filing, of these poor-quality, nonmeritorious suits. It's not surprising that . . . entrepreneurial plaintiffs' lawyers, rationally responded to that by increasing the frequency with which they file elsewhere.

-Vice Chancellor J. Travis Laster, *Scully v. Nighthawk Radiology Holdings, Inc.*, Del. Ch., C.A. No. 5890-VCL, Trans. at 18-19 (Dec. 17, 2010).

M&A practitioners have experienced a trend toward multi-jurisdictional litigation – the filing of multiple shareholder suits challenging the same deal in different states, including the state of the target entity's formation (usually Delaware) and the state of the entity's principal place of business. Multi-jurisdictional litigation is problematic: it wastes judicial resources, increases costs for defendants, increases the likelihood that defendants might be subject to inconsistent deadlines or conflicting orders, raises the suspicion of collusive settlements, proliferates objections to settlements, and creates fee-splitting issues among plaintiffs' counsel.

In recent years, the Delaware Court of Chancery has endorsed a solution to the problem of multi-jurisdictional litigation: the One Forum Motion, which takes the pragmatic approach of asking, at the outset of multi-jurisdictional litigation, judges in each jurisdiction to confer and collectively determine in which jurisdiction the litigation should proceed. One Forum Motions have become more common, and the Delaware Court of Chancery has identified relevant factors to consider in responding to a One Forum Motion. The Court has also suggested that plaintiffs' counsel who chooses to file a suit elsewhere may nevertheless be included in the plaintiffs' counsel leadership structure if they come to Delaware in response to a One Forum Motion.

Form of One Forum Motions

A One Forum Motion involves simultaneous filing of substantially identical motions in the two (or more) competing jurisdictions. The formal title most frequently ascribed to this motion is: "Motion to Proceed in One Jurisdiction, Dismiss or Stay Litigation in the Other Jurisdiction, and Organize Counsel for the Putative Class."² On its face, a typical One Forum Motion does not favor proceeding in one jurisdiction over the other. Rather, the motion in its most common form describes the substantive similarities and procedural postures of the parallel litigations and requests that each Court confer with the other to determine where the litigation should proceed.

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Prevalence of One Forum Motions

To date, at least sixteen One Forum Motions have been filed in the Delaware Court of Chancery. See, e.g., *In re Wyeth S'holders Litig.*, Del. Ch., Cons. C.A. No. 4329-VCN (motion filed March 25, 2009); *In re ACS S'holders Litig.*, Del. Ch., C.A. No. 4940-VCP (motion filed October 26, 2009); *In re Burlington Northern Santa Fe S'holders Litig.*, Del. Ch., Cons. C.A. No. 5043-VCL (motion filed December 1, 2009); *In re California Micro Devices Corp. S'holders Litig.*, Del. Ch., Cons. C.A. No. 5159-VCP (motion filed January 12, 2010); *N.J. Carpenters Annuity Fund v. Smith Int'l, Inc.*, Del. Ch., C.A. No. 5292-VCL (motion filed March 17, 2010); *In re Newalliance Bancshares Inc.*, Del. Ch., Cons. C.A. No. 5785-VCP (motion filed October 18, 2010); *In re R A E Sys., Inc. S'holders Litig.*, Del. Ch., Cons. C.A. No. 5848-VCS (motion filed October 29, 2010); *In re Atlas Energy, Inc. S'holders Litig.*, Del. Ch., Cons. C.A. No. 5990-VCL (motion filed November 23, 2010); *In re Smurfit-Stone Container Corp.*, Del. Ch., Cons. C.A. No. 6164-VCP (motion filed February 22, 2011); *In re NYSE Euronext S'holder Litig.*, Del. Ch., Cons. C.A. No. 6220-CS (motion filed March 10, 2011); *In re Drugstore.com, Inc. S'holder Litig.*, Del. Ch., Cons. C.A. No. 6315-VCP (motion filed April 15, 2011); *In re optionsXpress Holdings, Inc. S'holders Litig.*, Del. Ch., Cons. C.A. No. 6314-VCL (motion filed April 27, 2011); *Berlinberg v. Bronco Drilling Co., Inc.*, Del. Ch., C.A. No. 6398-VCP (motion filed May 4, 2011); *In re Int'l Coal Gr., Inc. S'holders Litig.*, Del. Ch., Cons. C.A. No. 6464-VCP (motion filed May 13, 2011); *In re CKx, Inc.*, Del. Ch., Cons. C.A. No. 5545-CS (motion filed May 25, 2011); *Kahn v. Chell*, Del. Ch., C.A. No. 6511-VCL (motion filed June 3, 2011).

In these sixteen cases, One Forum Motions were filed in eleven different parallel jurisdictions, in addition to Delaware: California (C.A. Nos. 5848-VCS, 5159-VCP), Connecticut (C.A. No. 5785-VCP), Georgia (C.A. No. 6511-VCL), Illinois (C.A. Nos. 6164-VCP, 6314-VCL), New Jersey (C.A. No. 4329-VCN), New York (C.A. Nos. 6220-CS, 5545-CC), Oklahoma (C.A. No. 6398-VCP), Pennsylvania (C.A. No. 5990-VCL), Texas (C.A. Nos. 4940-VCP, 5043-VCL, 5259-VCL), Washington (C.A. No. 6315-VCP) and West Virginia (C.A. No. 6464-VCP).

Endorsement of the One Forum Motion Approach

The One Forum Motion approach was explicitly endorsed by former Chancellor William B. Chandler III, before his retirement from the bench, in *In re Allion Healthcare Inc. Shareholder Litigation* (C.A. No. 5022-CC).

Allion involved competing Delaware and New York shareholder litigations challenging a merger between Allion Healthcare, Inc. and H.I.G. Capital. Defendants were unsuccessful in staying the New York action and the case proceeded in both jurisdictions. Ultimately the Delaware parties reached a settlement, which the Chancellor approved over objection by the New York plaintiffs. In a decision determining fee-splitting issues between the Delaware and New York plaintiffs' counsel, the Chancellor observed with respect to multi-jurisdictional litigation:

My personal preferred approach, for what it's worth, is for defense counsel to file motions in both (or however many) jurisdictions where plaintiffs have filed suit, explicitly asking the judges in each jurisdiction to confer with one another and agree upon where the case should go forward. In other words . . . my preference would be for defendants to "go into all the Courts in which the matters are pending and file a common motion that would be in front of all of the judges that are implicated, asking those judges to please confer and agree upon, in the interest of comity and judicial efficiency, if nothing else, what jurisdiction is going to proceed and go forward and which jurisdictions are going to stand down and allow one jurisdiction to handle the matter." Of course, . . . judges in different jurisdictions might not always find common ground on how to move the litigation forward. Nevertheless, this would be, I think, one (if not the most) efficient and pragmatic method to deal with this increasing problem. It is a method that has worked for me in every instance when it was tried.

In re Allion Healthcare Inc. S'holder Litig., Del. Ch., C.A. No. 5022-CC, Slip op. at 10 n.12 (Mar. 29, 2011) (internal citation omitted).

Of the five current members of the Court of Chancery bench, all but the newest member of the bench, Vice Chancellor Sam Glasscock III, have considered One Forum Motions. Chancellor Leo E. Strine, Jr. and Vice Chancellor J. Travis Laster have each "granted" the motions, in the sense

partner-ships, and limited liability companies) issues, and every other manner of corporate and alternative entity dispute in the Delaware courts. Some of the higher profile matters in which our attorneys have played an active role include those that produced the landmark *Revlon*, *Time/Warner*, *QVC*, *Omnicare* and *Disney* decisions of the Delaware Supreme Court.

About Young Conaway Stargatt & Taylor, LLP

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that they have endorsed the approach and agreed to reach out to their judicial counterpart in the parallel litigation. See, e.g., *In re R A E Sys., Inc. S'holders Litig.*, Del. Ch., Cons. C.A. No. 5848-VCS, Trans. at 16-21 (Dec. 3, 2010) (Strine, C.) (holding that shareholder litigation should proceed "in one place," observing that multi-jurisdictional litigation cannot be justified as good for investor, granting the one forum motion, and agreeing to talk to the California judge if the parties believe it would be helpful); *New Jersey Carpenters Annuity Fund v. Smith Int'l, Inc.*, Del. Ch., C.A. No. 5259-VCL, Trans. at 6 (Mar. 19, 2010) (Laster, V.C.) (agreeing that the litigation should only proceed in "one place" and to call the Texas judge to discuss avoiding duplication of effort). Recently, however, Chancellor Strine has encouraged defendants facing multi-jurisdictional litigation to choose one of the competing jurisdictions in which to file a motion to stay. See *Se. Pa. Transp. Auth. v. S. Union Co.*, Del. Ch., C.A. No. 6615-CS, Trans. 10 (Sept. 1, 2011).

Vice Chancellor Donald F. Parsons has considered numerous One Forum Motions but has not expressly endorsed or rejected the approach. He has indicated a willingness to reach out to the judge in the corresponding jurisdiction if necessary. See, e.g., *In re New Alliance Bancshares Inc. S'holder Litig.*, Del. Ch., C.A. No. 5785-VCP, Trans. at 22 (Oct. 29, 2010) (stating a willingness to reach out to Connecticut judge in response to One Forum Motion, but noting belief that such action was premature where Connecticut judge had not yet communicated with counsel); *Shriver v. Bronco Drilling Co., Inc.*, D. Ct. of Okla. County, Okla., Case No. CJ-2011-2723, Trans. (May 10, 2011) (Oklahoma judge indicating that he had spoken with Delaware judge concerning where the litigation should proceed). He has also considered and granted (or denied) motions to expedite the pending Delaware litigation before taking action in response to a One Forum Motion. *Id.* at 18-19; *Marks v. Smurfit-Stone Container Corp.*, Del. Ch., C.A. No. 6164-VCP, Trans. at 10-18 (Mar. 4, 2011); *In re California Micro Devices Corp. S'holders Litig.*, Cons. C.A. No. 5159-VCP. In addition, he has requested that counsel not submit a One Forum Motion in lieu of a response to a motion to expedite. *In re Bronco Drilling Co., Inc. S'holders Litig.*, Del. Ch., Cons. C.A. No. 6398-VCP, Trans. at 10-11 (June 3, 2011).

Vice Chancellor John W. Noble has considered one One Forum Motion – indeed, the first such motion filed in Delaware. See *In re Wyeth S'holders Litig.*, Del. Ch., Cons. C.A. No. 4329-VCN, Trans. at 20-22 (Apr. 7, 2009). There, New Jersey plaintiffs' counsel refused to consolidate their suit with the Delaware proceedings, and defendants filed a One Forum Motion in Delaware and New Jersey. In response, Vice Chancellor Noble neither granted nor denied the motion, but rather, recognized that he lacked the power to compel action in the New Jersey litigation absent cooperation from the New Jersey judge. The Vice Chancellor thus ordered expedited proceedings to move forward in Delaware. Subsequently, the New Jersey court ordered the New Jersey plaintiffs to organize cooperatively with the Delaware plaintiffs. See *Kahn v. Wyeth*, Super. Ct. Of N.J. Ch. Div, Morris County, Docket No. MRS-C-13-09, Order (Apr. 17, 2009) (granting Defendants' Motion to Proceed in One Jurisdiction, Dismiss or Stay Litigation in the Other Litigation, and Organize Counsel for the Putative Class, staying New Jersey action in favor of Delaware action, and directing plaintiffs to organize cooperatively with plaintiffs in the Delaware action).

Outcomes of One Forum Motions

As its formal title suggests, the ambitious goal of a One Forum Motion is threefold: to move the litigation forward exclusively in one jurisdiction, stay or dismiss the competing litigation, and order the class to organize. At a minimum, however, the goal of a One Forum Motion is to move the litigation forward in one forum only and to encourage actions that achieve that result.

It is difficult to assess whether the One Forum Motion has been successful – in full or in part – in achieving this outcome, due to informal negotiations between the parties that frequently occur contemporaneously with the filing of such a motion and affect the course of litigation. Certain results, however, are measurable. For example, all but one of the sixteen Delaware cases in which a One Forum Motion has been filed have actively proceeded in a single forum after the filing of the motion. See *In re NYSE Euronext S'holder Litig.*, Del. Ch., Cons. C.A. No. 6220-CS (the only one of the sixteen cases proceeding in two litigations at once despite the filing of a one forum motion). Only once has the filing of a One Forum Motion in Delaware resulted in a judicial stay of the entire Delaware litigation. See *In re optionsXpress Holdings, Inc. Shareholder Litigation*, Del. Ch., Cons. C.A. No. 6314-VCL, Order (Apr. 28, 2011) (Laster, V.C.) (staying Delaware litigation in favor of pending Illinois litigation).

Also, the filing of a One Forum Motion has prompted public statements by members of the Court of Chancery at early hearings in the litigation that promoted agreements by plaintiffs' counsel to proceed in a single jurisdiction. See, e.g., *In re R A E Sys., Inc. S'holders Litig.*, Del. Ch., Cons. C.A. No. 5848-VCS, Trans. at 16-21 (Dec. 3, 2010) (Strine, C.). The filing of a One Forum Motion has also encouraged communications between the Delaware judges and their counterparts in the

competing jurisdictions, which aid in streamlining the litigation. See, e.g., *Shriver v. Bronco Drilling Co., Inc.*, D. Ct. of Okla. County, Okla., Case No. CJ-2011-2723, Trans. (May 10, 2011) (Oklahoma judge indicating that he had spoken with Delaware judge concerning where the litigation should proceed; deciding to stay Oklahoma litigation in favor of Delaware litigation); *Nierenberg v. CKx, Inc.*, Del. Ch., C.A. No. 5545-CC, Ltr. (May 25, 2011). Thus, on the whole, One Forum Motions have been one part of successful strategies to streamline multi-forum litigation.

Factors Considered in Deciding One Forum Motions

Although, as described above, the approach of a One Forum Motion has been endorsed by members of the Court of Chancery, the frameworks applied by members of the Court of Chancery in determining their response to a One Forum Motion have varied. The Court of Chancery has considered a multiplicity of factors in determining the appropriate response to a One Forum Motion, including, but not limited to whether (i) the case involves important issues of Delaware corporate law, (ii) one jurisdiction is more familiar with the case than the other, (iii) forum non conveniens factors counsel in favor of staying the Delaware litigation, and (iv) the procedural posture of the respective litigations places them on a collision course.

Former Chancellor Chandler observed that the paramount consideration in determining whether multi-jurisdictional litigation should proceed exclusively in Delaware is whether the case involves “important questions of Delaware corporate law.” See *Nierenberg v. CKx, Inc.*, C.A. No. 5545-CC, Ltr. at 2 (Del. Ch. May 25, 2011); see also *In re Allion Healthcare, Inc. S’holders Litig.*, C.A. No. 5022-CC, Trans. of Settlement Hearing and Ruling, at 19 (Del. Ch. Jan. 19, 2011) (empathizing with the “handstands” defense counsel had to perform in arguing to the New York court why the New York litigation should be stayed, indicating that he will “never . . . understand this for as long as [he] live[s],” and stating that “[it]’s supposed to be an internal affairs analysis”). Chancellor Strine has similarly focused on this factor, observing that if “there is a choice between two forums, the forum whose law is at stake ought to go forth,” particularly when the litigation is expedited. *R A E Sys.* Dec. 3 Trans. at 17 (granting the “motion for peace on earth,” stating belief that Delaware courts should adjudicate cases where Delaware law applies, but withholding decision of whether the action should proceed in Delaware or California to permit the parties time to resolve the matter themselves); see also *Se. Pa. Transp. Auth. v. S. Union Co.*, Del. Ch., C.A. No. 6615-CS, Trans. 13-15 (Sept. 1, 2011) (suggesting that the internal affairs and the availability of appeal to the Delaware Supreme Court are important reasons for moving cases that apply Delaware law forward in Delaware). Vice Chancellor Parsons has declined to stay Delaware litigation in response to a One Forum Motion when the case involved important issues of Delaware law. See *Smurfit-Stone* Mar. 4 Trans. at 8-9, 16-17 (observing that it would be difficult for the Court of Chancery to stay in favor of a parallel action litigation involving novel issues of Delaware law).

Only one case has been stayed by the Court of Chancery in favor of the parallel litigation as a consequence of a One Forum Motion, and that was on the grounds that the judge of the parallel litigation was more familiar with the case than the Court of Chancery. In *In re optionsXpress Holdings, Inc. Shareholder Litigation*, Cons. C.A. No. 6314-VCL, Order (Del. Ch. Apr. 28, 2011), after conferring with the Illinois judge, Vice Chancellor Laster stayed Delaware litigation in favor of pending Illinois litigation in light of the fact that the Illinois judge had already devoted judicial resources to the case. Former Chancellor Chandler also recognized the respective judges’ familiarity with the competing cases as a relevant factor in a letter decision in *Nierenberg v. CKx, Inc.*, C.A. No. 5545-CC, Ltr. (Del. Ch. May 25, 2011). There, however, the former Chancellor Chandler distinguished the outcome of *optionsXpress* from the case before him by noting that he had already spent time familiarizing himself with the case.

Where it was premature to determine whether the competing jurisdictions would “collide” or conflict, Vice Chancellor Laster took no action in response to a One Forum Motion. See *Kahn v. Chell*, Del. Ch., C.A. No. 6511-VCL (June 7, 2011) (“Primedia”). He observed that “Because this is not something where I’m going to schedule a pre-closing preliminary injunction I see no potential for any collision with my colleagues in Georgia. And there is ample time for the parties to proceed in the ordinary course with motions to dismiss, should they believe those were warranted, or other procedures that could bring some rationality to the multi-forum problem in this case” *Id.* at 16.

In response to One Forum Motions, Vice Chancellor Parsons has expressed a willingness to confer with his counterparts in parallel proceedings. See, e.g., *ACS S’holders Litig.*, Del. Ch., C.A. No. 4940-VCP (conferring with judge in Texas to divide parallel proceedings between the jurisdictions); *Smurfit-Stone Container Corp.*, Del. Ch., Cons. C.A. No. 6164-VCP (indicating that he would confer with Illinois judge); *Rosen v. Wind River Sys., Inc.*, C.A. No. 4674-VCP, slip op.

at 8-10 (Del. Ch. June 26, 2009) (indicating that he had contacted the California judge). He has also consistently considered, as an initial matter, the propriety of a stay of the Delaware litigation under a forum non conveniens framework, noting that stays pursuant to such analysis are “granted only in the rare case.” See *Smurfit-Stone* Mar. 4 Trans. at 16; see also *Wind River Sys., Inc.*, C.A. No. 4674-VCP, slip op. at 16 (indicating that certain forum non conveniens factors “strongly favor” proceeding in Delaware); *New Alliance* Oct. 22 Trans. at 20-21 (applying forum non conveniens standard).

Effect of One Forum Motions on Class Counsel Structures

In *CKx*, the former Chancellor suggested that a logical corollary of Delaware’s endorsement of the One Forum approach is an open door policy to competing plaintiff representatives. In a May 27, 2011 letter decision determining a dispute of class counsel’s leadership structure, the former Chancellor granted the New York plaintiffs – who voluntarily joined in the Delaware action after defendants filed a One Forum Motion – the status of co-lead counsel. The Court explained that the outcome was supported by the fact that “in the interest of comity, efficiency, and the avoidance of duplicative proceedings, the New York action was stayed and [the New York plaintiff] re-filed his complaint in Delaware on the assumption and understanding that he would litigate on an equal footing with Delaware plaintiffs.” *Id.* at 4. The Court further explained that *CKx* “serves as a positive example of the process envisioned by *Allion* – that is, plaintiffs acting in a cooperative manner to consolidate duplicative cases and work together toward a resolution of their claims, while defendants are able to defend against those claims only once, in a single jurisdiction.” *Id.*

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² The authors understand that the first One Forum Motion in Delaware was filed in *In re Wyeth Shareholder Litigation*, Del. Ch., Cons. C.A. No. 4329-VCN (Mar. 24, 2009) by William D. Savitt of Wachtell Lipton Rosen & Katz and his co-defense counsel; later, in the *In re CKx, Inc.* shareholder litigation, former Chancellor William B. Chandler III referred to the One Forum Motion as the “Savitt Motion.”