ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

COORDINATING RELATED SECURITIES LITIGATION: A POSITION PAPER

Committee on Securities Litigation

I. Introduction

In the United States, policymakers at the highest levels have increasingly focused attention on challenges to the country's historical position as the world's leading financial services center.[1] An area of concern identified by these policymakers is the high cost of securities litigation in the United States relative to other competing financial centers. In this report, we recommend measures to eliminate one unnecessary source of expense in securities litigation: the cost to shareholders from having to defend, and the cost to courts from having to preside over, duplicative or overlapping actions in multiple jurisdictions.

This problem arises from the fragmented nature of our legal system. The legal system in the United States is comprised of separate state court systems and a federal system. Most, if not all, of these systems have mechanisms (whether statutory or judicially crafted) for consolidating duplicative or overlapping litigations within their system – such as the provisions for change of venue, transfer, and multidistrict litigation in the federal system. However, there is no such mechanism for requiring consolidation of duplicative or overlapping litigations across court systems. In other words, while California state courts may be able to consolidate duplicative actions filed in Los Angeles and San Francisco, there is no mechanism that would allow for mandatory consolidation of duplicative actions filed in New York state court in Manhattan and New Jersey state court in Jersey City, or even between actions filed in state court in Manhattan and in the federal court across the street.

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[1] See, e.g., Interim Report of the Committee on Capital Markets Regulation (released November 30, 2006).

As a result of the absence of any such mechanism, publicly listed companies are often forced to spend resources trying to coordinate and manage duplicative or overlapping securities litigations (with the brunt being borne by current shareholders), while judicial resources are unnecessarily consumed.

Duplicative or overlapping securities-related litigations frequently arise in two circumstances. First, in the context of shareholder litigation challenging proposed changes in corporate control or defensive actions designed to prevent a change in control. Putative class actions are often filed in the state where the target company is incorporated as well as the state where it is headquartered. Second, duplicative litigation arises in the context of claims filed in state court under the Securities Act of 1933. The jurisdictional provision of the Securities Act provides for concurrent state and federal jurisdiction with no right of removal. As a result, litigation involving the same offering – even raising the identical challenges – can be forced to proceed in state and federal courts (that are next door to one another or on opposite coasts) with no means of consolidation.

In the following sections, we discuss each of these scenarios in greater detail and recommend potential changes designed to remedy the problem.

II. Shareholder Litigation Concerning Proposed Changes In Corporate Control

"Deal litigation" – a term we use here to encompass shareholder litigation filed under state law in response to (1) a publicly listed company's agreement to merge with or be acquired by another company; or (2) defensive actions taken by a publicly listed company to prevent a proposed acquisition or takeover – is an area in which the problem of duplicative or overlapping litigation filed in multiple jurisdictions is rife. It is now common to find virtually identical actions seeking injunctive relief and damages for alleged breaches of fiduciary duty filed in multiple jurisdictions, including (a) the state court where the target company is incorporated, (b) the state court where the target company's headquarters are located, (c) other state courts where a director defendant or perhaps even the potential acquirer is located, and (d) the federal courts of any of those states.

By way of example, we list but a sampling of recent deal litigations where putative class actions seeking injunctive relief barring proposed mergers were filed in multiple jurisdictions:

- Alltel Corporation: putative class actions filed in Delaware state court (where Alltel is incorporated) and Arkansas state court (where Alltel is headquartered) on the same day;

- Bausch & Lomb Inc.: putative class actions filed in both state court and federal court in New York (where Bausch & Lomb Inc. is incorporated and headquartered) on the same day;

- Topps Company: putative class actions filed in New York state court (where Topps is headquartered) and Delaware state court (where Topps is incorporated) beginning the next day;

- Biomet, Inc.: putative class actions filed in Indiana state court (where Biomet is incorporated and headquartered) and New York state court (where the prospective acquirers and certain of Biomet's advisors and counsel were located, and where negotiations relating to the transaction were alleged to have been conducted) a few weeks later;

- Harrah's Entertainment, Inc.: putative class actions filed in Nevada state court (where Harrah's is headquartered) and Delaware state court (where Harrah's is incorporated) beginning two days later;[2]

- LaFarge North America, Inc.: putative class actions filed in Maryland state court (where LaFarge is incorporated) and Virginia state court (where LaFarge is headquartered) two weeks later.

Deal litigation is often characterized by a race to the courthouse upon the announcement of a proposed change in corporate control, with each firm seeking to file its action first. Delaware Vice Chancellor Strine has recently referred to this as "an unseemly filing Olympiad … with the view that speedy filing establishes a better seat at the table for the plaintiffs' firms involved."[3] The "view that speedy filing establishes a better seat at the table for the plaintiffs' firms involved" has some merit in the context of actions filed in multiple jurisdictions. Courts considering whether to grant a stay or dismissal of shareholder litigation in their jurisdiction in favor of duplicative shareholder litigation filed in another jurisdiction often consider when each action was filed. In recent shareholder derivative litigation involving the Topps Company, the date of filing proved determinative in a New York court's decision to deny the defendants' motion to stay or dismiss the New York action in favor of a virtually identical action underway in Delaware, despite the fact that only one day separated the filing of the New York and Delaware actions.[4]

The absence of a consolidation mechanism can lead to extra-judicial "self-help." Plaintiffs – and defendants – are tempted to strike private arrangements favoring the jurisdiction

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[2] Nine of the eleven Nevada-based purported class actions were consolidated and removed to federal court. Later, after the consolidated actions had been removed to federal court, two additional purported class actions were filed. These actions asserted state law breach of fiduciary duty and aiding and abetting breach of fiduciary claims only. As a consequence, these actions could not be removed to federal court to be consolidated with the other Nevada actions.

[3] In re: The Topps Co. S'holders Litig., 924 A.2d 951, 957 (Del. Ch. 2007) ("Del. Topps").

[4] In re: The Topps Co. S'holder Litig., No. 0600715/2007, 2007 WL 2175575 (N.Y. Sup. June 8, 2007) ("N.Y. Topps").

perceived to be most helpful to them. Settlement factors – like the receptivity of a particular forum to forms of relief, or the liberality with respect to requests for fee awards – rather than the merits of the dispute can animate these arrangements.

In the absence of any mechanism permitting consolidation or coordination across different court systems, publicly listed companies seeking to avoid the costs of duplicative litigation must seek a stay or dismissal of the duplicative litigation on grounds of comity, judicial economy and the avoidance of oppression or waste. While such motions are frequently successful, there are significant transaction costs attendant to this process. And they are not always successful.

The Topps Company shareholder derivative litigation is a clear and recent example. On March 6, 2007, Topps – a Delaware corporation with its executive offices in New York – announced that it had entered into an agreement to be acquired by certain private equity buyers. The following day, March 7, a putative class action was filed in New York state court. The next day, March 8, a putative class action was filed in Delaware state court. By the end of the next week, seven more class actions (four in Delaware and three in New York) had been filed. Each of these actions alleged breaches of fiduciary duty by Topps' directors in agreeing to the proposed acquisition. The parties to the Delaware actions moved swiftly to consolidate the Delaware actions and by late March, a discovery schedule had been established and a date scheduled for a preliminary injunction hearing. It does not appear that any meaningful progress had been made in the New York cases as of that date. In April, a conference was held in the New York cases at which the defendants sought leave to present a motion to dismiss or stay the actions in light of the pending Delaware actions. The New York court declined this request,

reasoning that because the first action challenging the proposed transaction had been filed in New York, the case should proceed there.[5]

Faced with the prospect of litigating the same matter in two different jurisdictions with significant discovery costs and potentially inconsistent results, the defendants returned to the Delaware state court expressing concern. After attempts to persuade the New York plaintiffs to litigate jointly the action in Delaware with the Delaware plaintiffs proved unsuccessful, the defendants moved the Delaware court to refrain from hearing the preliminary injunction motion in favor of the New York action.[6] The Delaware court, like the New York court before it, refused to do so, opining that Delaware's interest in resolving emerging issues in its corporate law concerning private equity buyers and "how to address potential conflicts of interest and how to balance deal certainty against obtaining price competition in a very different market dynamic" outweighed any interest New York had in the case being heard there.[7]

Following the Delaware court's decision, the defendants filed a motion to stay or dismiss the New York actions. This motion was also denied.[8] Both cases therefore proceeded through discovery with all of its attendant costs. On June 11, the Delaware court heard argument on the preliminary injunction motion. The next day, June 12, the defendants filed a motion in the Supreme Court of the State of New York, Appellate Division, First Department for an interim stay and a stay pending their appeal of the denial of the motion to dismiss. On June 13, just five days before argument on the preliminary injunction motion was to be heard in New York, the

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[5] Del. Topps, 924 A.2d at 955.
[6] Id. at 955-56
[7] Id. at 960.
[8] N.Y. Topps, 2007 WL 2175575.

First Department issued an interim stay pending its decision on a motion to stay pending appeal.[9] On June 14, the Delaware court issued its ruling enjoining the proposed transaction.[10]

The Topps Company and the other defendants incurred significant additional expense as a result of the duplicative proceedings in New York and Delaware. They also faced the prospect of inconsistent, and perhaps, conflicting results. For example, the New York court could have concluded that there had been no breach of fiduciary duty under Delaware law while the Delaware court found that there had been such a breach. Or, even if both courts had found a breach, each could have prescribed different, and conflicting, remedies for the breach.

The costs attendant to duplicative deal litigations, whether they be the transaction costs associated with successful motions to stay or dismiss duplicative actions or the far greater costs associated with duplicative litigations proceeding in multiple jurisdictions, should be reduced or eliminated. Two principles are paramount in the resolution of this problem. First, the 'internal affairs doctrine' – the well-established conflict of laws rule that recognizes that the state of incorporation is the only state with the authority to regulate a corporation's internal affairs, including disputes between shareholders and the corporation or its current officers and directors. See, e.g., Edgar v. MITE Corp., 457 U.S. 624, 645 (1982). Second, the recognition that the only effective way to reduce the costs associated with duplicative deal litigation is to have clear and unambiguous provisions concerning where deal litigation may properly be brought and/or a mechanism for coordinating litigation when competing cases are filed in multiple jurisdictions.[11]

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[9] The Topps Company, Inc. Form 10-Q dated July 17, 2007 at 14.
[10] Del. Topps, 926 A.2d at 93.
[11] While the proposed measures will enable courts and parties to more efficiently address state law claims, they will not impact claims brought under Congressional statutes over which federal courts have exclusive jurisdiction, such as those under Section 10(b) of the Securities Exchange Act of 1934.

Consistent with these principles, the Committee recommends consideration of the following remedial measures:

(1) Permitting Public Companies To Contract With Their Investors To Limit Venue For Deal Litigation To The State Of Incorporation

The notion of permitting publicly listed companies to contract with investors to arbitrate shareholder litigation has recently been promoted by policymakers reviewing the competitiveness of the United States as a financial center. In its Interim Report dated November 30, 2006, the Committee on Capital Markets took the position that "the SEC should permit public companies to contract with their investors to provide for alternative procedures in securities litigations, including providing for arbitration (with or without class action procedures) or non-jury trials."[12] Similarly, a report commissioned by Senator Schumer and Mayor Bloomberg recommended that the SEC "revers[e] its historical opposition to the arbitration of disputes between investors and publicly traded companies" and allow companies to include in their charter (prior to an initial public offering) provisions providing for arbitration of disputes or to seek to amend their charter upon shareholder vote to provide for arbitration of shareholder litigation.[13] These policymakers note that arbitration of claims would have the effect of reducing the cost (in large part by limiting discovery) and speeding resolution of securities litigations. There has been some resistance to the prospect of arbitration, however, with concerns about arbitration's limited discovery, limited appeal rights, the ability of the corporate charter to bind shareholders, and SEC acquiescence having been raised. See, e.g., http://dandodiary.blogspot.com/2007/04/arbitrating-shareholder-claims-coming.html.

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[12] Interim Report of the Committee on Capital Markets at 110 (released November 30, 2006).
[13] Sustaining New York's and the US' Global Financial Services Leadership at 103.

For purposes of this report, we recommend a variation of this proposal targeted to deal litigation: permitting publicly traded companies to contract with their investors to limit venue for shareholder litigation filed under state law concerning proposed changes in corporate control to the courts of the state of incorporation. Notably, this proposal would not raise the same concerns arbitration opponents raise: disputes would still be heard by courts, with all attendant rights of discovery and appeal. On the other hand, pre-selecting a forum – whose underlying law will govern the dispute – avoids the costs and gamesmanship that the current system engenders. It will also conserve judicial resources and increase the uniformity and consistency of decisions concerning proposed changes in corporate control by leaving those decisions to those judges (both at the trial and appellate level) with the greatest familiarity with the relevant state law.

(2) Enactment Of Federal Legislation Requiring Shareholder Litigation Concerning Proposed Changes in Corporate Control To Be Brought In the State Of Incorporation

Another potential way to eliminate the costs of duplicative litigation would be to enact federal legislation requiring all deal litigation to be brought in the state of incorporation. We believe that constitutional authority for such legislation is found in the Commerce Clause of the U.S. Constitution (Article I, Section 8). Shares of stock in publicly listed corporations are bought and sold nationally and are held by investors all across the country, thereby satisfying the requirement that the regulated activity substantially affect interstate commerce. Cf. 15 U.S.C. §§ 78l(i), 78m(d)-(e), 78n(d)-(f) (the Williams Act).

Such a statute might look something like this:

> Notwithstanding any statute or rule to the contrary, any action brought under state law against a publicly listed company challenging either (i) the company's decision to merge with or be acquired by another entity, or (ii) the company's decision to take

action to prevent a change in control of the company, shall only be brought in the courts of the state of the company's incorporation.

III. Duplicative Or Overlapping Securities Act Litigation

Litigation brought under the Securities Act of 1933 – which requires publicly listed companies to disclose material information (financial and otherwise) concerning securities being offered for public sale and prohibits deceit, misrepresentations and other fraud in the public offering of securities – is another area in which the problem of duplicative or overlapping litigation occurs. This is a result of the Act's concurrent federal and state jurisdiction over certain actions and its express bar against removal to federal court of actions filed in state court. See 15 U.S.C. § 77v.

The Securities Act's grant of concurrent state and federal jurisdiction with a bar against removal has been part of the Act since its inception. Interestingly, the Senate and House bills that became the Securities Act did not agree on this jurisdictional provision. The bill that the Senate passed provided for exclusive federal court jurisdiction of claims brought under the Securities Act, while the House bill provided for concurrent state and federal jurisdiction with no right of removal. Compare 77 Cong. Rec. S2999 (daily ed. May 8, 1933) (Senate bill) with H.R. 5480, 73d Cong. §21(a) (1933). When the competing bills were sent to conference, the House bill was used as the base bill and its provisions concerning jurisdiction and removal were adopted. See H.R. Rep. No. 73-152, at 14, 27 (1933). Though the Conference report explains the rationale for many of the changes made to the bills, it makes no mention of the rationale for choosing the House bill's jurisdictional provision.[14]

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[14] Some insight into Congress' rationale for the Securities Act's jurisdictional provision may be gleaned from the debates surrounding the enactment of the Securities Exchange Act the following year (1934). During the debates over the Exchange Act (where Congress decided to provide for exclusive federal court jurisdiction), an amendment was offered to the Securities Act to change its jurisdictional provision to provide for exclusive federal jurisdiction. This amendment was opposed by the Federal Trade Commission ("FTC"), the body then charged with enforcement

For much of its history, this jurisdictional choice was not significant; Securities Act claims were primarily litigated in federal court.[15] This changed in 1995 with Congress' enactment of the Private Securities Litigation Reform Act of 1995. In enacting the PSLRA, Congress sought to curb "abusive and meritless suits."[16] It attempted to do so by requiring heightened pleading standards, an automatic stay of discovery pending a motion to dismiss, creating a safe harbor provision for forward looking statements, and providing requirements for selection of lead counsel.

In response to the enactment of the PSLRA, many plaintiffs began to file securities class actions in state court rather than federal court, resulting in (among other things) an increase in the filing of duplicative or overlapping litigations. A major reason for this shift was "an apparent attempt to avoid some of the procedures imposed by the [PSLRA], particularly the stay of discovery pending a motion to dismiss."[17] In 1998, Congress responded by enacting the Securities Litigation Uniform Securities Act ("SLUSA"). SLUSA was designed to "make[] Federal court the exclusive venue for most securities class action lawsuits."[18] In relevant part,

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of the Securities Act. (The Securities Exchange Act created the Securities and Exchange Commission.) Speaking on behalf of the FTC, Commissioner Landis argued against the proposed jurisdictional amendment on the grounds that "[t]he frequent inaccessibility, burdensome procedure, and added expense of Federal court proceedings, as against State court proceedings, make this change undesirable." 78 Cong. Rec. S8717 (daily ed. May 12, 1934). Few today would endorse this rationale as a justification for constraining federal court jurisdiction over Securities Act claims.

[15] See H.R. Rep. No. 105-803 (1998) (Conf. Rep.), 1998 WL 703964 at *14 ("Prior to the passage of the [Private Securities Litigation Reform Act of 1995], there was essentially no significant securities class action litigation brought in State court.")

[16] H.R. Rep. No. 104-369 (1995) (Conf. Rep.), 1995 WL 709276 at *31. Congress detailed the "significant evidence of abuse in private securities lawsuits" as including "the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action," "the targeting of deep pocket defendants … without regard to their actual culpability," and "the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle."

[17] SEC, Report to the President and the Congress on the First Year of Practice Under the Private Securities Litigation Reform Act of 1995 at 2 (1997) (http://www.sec.gov/news/studies/lreform.txt).

[18] H.R. Rep. No. 105-803 (1998) (Conf. Rep.), 1998 WL 703964 at *13.

SLUSA amended the Securities Act by depriving state courts of jurisdiction to hear covered class actions[19] asserting Securities Act claims.[20]

While SLUSA's enactment reduced the number of class actions being filed in state court, it did not preclude the filing of individual actions asserting claims under the Securities Act, and those individual actions are – generally[21] – immune from removal, even when actions challenging the same offering and asserting the identical violations of the Securities Act are pending in federal court. As a result, the potential remains for duplicative or overlapping litigation in state and federal court (or in multiple state courts) based upon identical claims arising from the same securities offering.

By way of example, in the first half of 2002, numerous class actions were filed in federal court against WorldCom, certain of its former officers and directors, the underwriters of its May 2000 and May 2001 bond offerings, its former auditor (Arthur Andersen), and its chief outside analyst and his employers, in response to admissions by the company that it had previously issued false and misleading financial statements.[22] These class actions asserted claims under Sections 11, 12(a)(2) and 15 of the Securities Act and Sections 10(b) and 20(a) of the Securities Exchange Act.

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[19] Covered class actions include "actions brought on behalf of more than 50 persons, actions brought on behalf of one or more unnamed parties, and so-called 'mass actions,' in which a group of lawsuits filed in the same court are joined or otherwise proceed as a single action" excepting "(1) certain actions that are based upon the law of the State in which the issuer is incorporated, (2) actions brought by States and political subdivisions, and State pension plans, so long as the plaintiffs are named and have authorized participation in the action; and (3) actions by a party to a contractual agreement (such as an indenture trustee) seeking to enforce provisions of the indenture." In addition, certain shareholder derivative actions are exempted from the definition of "class action." H.R. Rep. No. 105-803 (1998) (Conf. Rep.), 1998 WL 703964 at *13-14.

[20] Rovner v. Vonage Holdings Corp., (Civ. No. 07-178 (FLW), 2007 WL 446658 (D.N.J. Feb. 7, 2007).

[21] Pursuant to 28 U.S.C. § 1452(a), otherwise non-removable Securities Act cases or claims can be removed to federal court if they are related to a pending bankruptcy. In addition, pursuant to 28 U.S.C. § 1441(c), otherwise non-removable Securities Act claims can be removed when independent federal question jurisdiction exists over other claims in the complaint.

[22] In re WorldCom Sec. Litig., 496 F.3d 245, 247-48 (2d Cir. 2007).

During that same period, many plaintiffs filed individual state court actions asserting claims only under the Securities Act. (One plaintiffs' firm filed such individual state court actions on behalf of over 120 public and private pension funds.)[23] Because these state court cases were not class actions, they were not covered by SLUSA and, thus, could be filed in state court. And because the Securities Act prohibits removal of actions from state to federal court, it appears that these actions could not be removed.[24]

The only thing that prevented each of these cases from proceeding in state court was WorldCom's July 2002 bankruptcy, which provided a basis for consolidating these actions in federal court based on the broad "related to" a pending bankruptcy grant of federal jurisdiction.[25] Defendants in state court actions removed these cases to federal court and the majority of them were consolidated by the Judicial Panel on Multidistrict Litigation before Judge Cote in the Southern District of New York.[26] As fortune would have it, certain state court actions filed in Alabama, Florida, Illinois and Pennsylvania that had been removed to federal court were remanded by the district courts prior to the Multidistrict Litigation Panel's transfer of them to Judge Cote. These actions continued to proceed in state court, causing additional cost and disturbance to the affected defendants.[27]

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[23] In re WorldCom Sec. Litig., 496 F.3d at 248. Such actions are often filed by plaintiffs firms that have failed to be appointed as lead counsel in the consolidated class action in federal court.

[24] As one district court has remarked, the filing of non-class actions in state court asserting Securities Act claims "was apparently intended to prevent removal of the state-court actions to federal court." In re WorldCom Sec. Litig., 496 F.3d at 248.

[25] In re WorldCom Sec. Litig., 496 F.3d at 248.

[26] Actions filed in Washington D.C. and 28 states (Alabama, Alaska, California, Florida, Georgia, Idaho, Illinois, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Vermont, Washington, West Virginia and Wisconsin) were removed to federal court for purposes of consolidation.

[27] Though the judges in the state court actions largely agreed to coordinate discovery efforts with those underway in the federal court proceeding, the Alabama court ultimately declined to coordinate with the federal court on the scheduling of a trial date. The federal court, in turn, issued an injunction under the All Writs Act barring the Alabama court from proceeding with the trial until after the trial in federal court had concluded. See In re Worldcom, Inc. Sec. Litig., 315 F. Supp. 2d 527 (S.D.N.Y. 2004). This order was reversed by the Second Circuit

The costs attendant to duplicative Securities Act litigation (or overlapping federal securities law litigation based on the same nucleus of facts) should be reduced or eliminated. The simplest way to effect this change would be to repeal the Securities Act's bar against removal. Allowing Securities Act cases to be removed to federal court would spare publicly traded companies from the significant costs associated with duplicative or overlapping securities litigation. It would also provide the clear benefit, as expressed by federal legislation such as PSLRA, of having consistent and uniform interpretation and application of the federal securities laws (including principal appellate review by the Circuit Courts). While federal judges (both at the trial and appellate levels) are frequently called upon to consider claims arising under the federal securities laws, state court judges are rarely called upon to do so. Moreover, the federal Circuit Courts – the primary appellate courts hearing cases arising under the Securities Act – have no jurisdiction to hear rulings by state trial or appellate courts. The only federal recourse for such rulings is the Supreme Court. Accordingly, allowing Securities Act claims to be removed to federal court would help realize Congress' intent to have consistent and uniform interpretation and application of the federal securities laws.

A repeal of Securities Act's bar against removal could be effected by amending Section 22 of the Securities Act (15 U.S.C § 77v) in the following manner:

> The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in

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Court of Appeals, see Ret. Sys. of Ala. v. J. P. Morgan Chase & Co., 386 F.3d 419 (2d Cir. 2004), and the Alabama case proceeded ahead of the federal case. Notably, had the state court judges declined to coordinate discovery efforts with those underway in federal court, the result could have been discovery, motions and trial proceeding at different paces in multiple cases. This could happen even where discovery in the class action has been stayed under the mandatory provisions of the PSLRA.

> equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28.~~ Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.~~ No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

Another solution to this problem would be to eliminate the concurrent state and federal jurisdiction provided by the Securities Act in favor of exclusive federal jurisdiction. This change could be implemented by amending Section 22 of the Securities Act to add the term "exclusive" to the description of federal court jurisdiction (addition noted below in bold) and striking the language providing for concurrent state court jurisdiction:

> The district courts of the United States and the United States courts of any Territory shall have **exclusive** jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and~~, concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions,~~ of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28.~~ Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.~~ No costs shall be assessed for or against the

> Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

IV. Conclusion

The Committee believes that adoption of the above resolutions is important to eliminate the unnecessary expense faced by publicly listed companies, shareholders, and the courts from duplicative or overlapping securities litigation.

Dated: April 17, 2008

<u>The Committee On Securities Litigation</u>

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