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Docket Dividends: Growth in Shareholder Litigation Leads to Refinements in Chancery Procedures

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Docket Dividends: Growth in Shareholder Litigation Leads to Refinements in Chancery Procedures

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I. Introduction

Every year or so, the caseload of the Delaware Court of Chancery tends to gravitate toward one or more timely topics in the law of corporations. In the mid-2000s—after a booming economy but a triad of corporate scandals at Enron, Worldcom, and Tyco—the topic was backdating of stock options. That issue culminated in the Court's decision in *Ryan v. Gifford*.[1] From that case, and a handful of others involving similar issues,[2] a fairly cohesive body of law developed around 2007 regarding potential improprieties in the issuance of stock options. After the subprime mortgage crisis, the issue of the relationship between directors' duty of oversight and risk management came to the fore. In *In re American International Group, Inc. Consolidated Derivative Litigation* (*AIG*),[3] the Court of Chancery held that corporate insiders could be personally liable for failing to implement and monitor effective internal reporting controls against fraudulent

1. Ryan v. Gifford, 918 A.2d 341, 358 (Del. Ch. 2007) (holding that the intentional violation of a shareholder-approved stock option plan is disloyal to the corporation and constitutes bad faith conduct).

2. *See, e.g.*, MBKS Co. v. Reddy, 924 A.2d 965, 967 (Del. Ch. 2007) (regarding grant of common stock for inadequate consideration), *aff'd sub nom*. Reddy v. MBKS Co., 945 A.2d 1080 (Del. 2008); *In re* Tyson Foods, Inc., 919 A.2d 563, 592–93 (Del. Ch. 2007) (regarding "spring-loaded" options). Another important line of cases clarified how the duty of good faith functions as part of the fiduciary duties owed by corporate directors. *See, e.g.*, Stone v. Ritter, 911 A.2d 362, 369–70 (Del. 2006). After much speculation about whether the duty of good faith was a third fiduciary duty, the Delaware Supreme Court defined the duty of good faith as "a subsidiary element, *i.e.*, a condition, of the fundamental duty of loyalty" and not as a discrete fiduciary duty. *Id.* at 370 (internal quotation marks omitted).

3. *In re* Am. Int'l Grp., Inc. Consol. Derivative Litig., 965 A.2d 763 (Del. Ch. 2009), *aff'd sub nom*. Teachers' Ret. Sys. of La. v. PricewaterhouseCoopers LLP, No. 454, 2011 WL 13545 (Del. Jan. 3, 2011).

financial transactions.[4] Shortly after the *AIG* decision, the Court again addressed directors' duties of oversight, but this time as they related to business risks as opposed to compliance risks. The Court of Chancery held in *In re Citigroup Inc. Shareholder Derivative Litigation*[5] that "the mere fact that a company takes on business risk and suffers losses—even catastrophic losses—does not evidence misconduct, and without more, is not a basis for personal director liability."[6] And just two years ago, as the economy showed tepid signs of improvement and a handful of corporate acquirers went bargain hunting, the poison pill made a curtain call. In four successive cases, *Selectica, Inc. v. Versata Enterprises, Inc.*,[7] *Yucaipa American Alliance Fund II, L.P. v. Riggio*,[8] *eBay Domestic Holdings., Inc. v. Newmark*,[9] and, most prominently, *Air Products & Chemicals, Inc. v. Airgas, Inc.*,[10] the Court of Chancery and the Delaware Supreme Court examined the use of the poison pill in a wide variety of factual scenarios. Collectively, these cases provided new clarity on when and how directors can make use of this defensive measure.

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4. *Id.* at 776–78, 799.

5. *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106 (Del. Ch. 2009).

6. *Id.* at 130. As the court further expounded,

> [t]here are significant differences between failing to oversee employee fraudulent or criminal conduct [as allegedly occurred in *AIG*] and failing to recognize the extent of a Company's business risk. . . . While it may be tempting to say that directors have the same duties to monitor and oversee business risk, . . . [t]o impose oversight liability on directors for failure to monitor 'excessive' risk would involve courts in conducting hindsight evaluations of decisions at the heart of the business judgment of directors. Oversight duties under Delaware law are not designed to subject directors, even expert directors, to personal liability for failure to predict the future and to properly evaluate business risk.

Id. at 131.

7. Selectica, Inc. v. Versata Enters., Inc., C.A. No. 4241-VCN, 2010 WL 703062 (Del. Ch. Feb. 26, 2010), *aff'd sub nom*. Versata Enters., Inc. v. Selectica, Inc., 5 A.3d 586 (Del. 2010).

8. Yucaipa Am. Alliance Fund II, L.P. v. Riggio, 1 A.3d 310 (Del. Ch. 2010), *aff'd*, 15 A.3d 218 (Del. 2011) (unpublished table decision).

9. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (Del. Ch. 2010).

10. Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48 (Del. Ch. 2011).

This phenomenon of multiple cases posing different facets of timely questions of corporate law is not the result of intelligent design or stellar forces, but the natural consequence of the Court of Chancery's role as the United States' premier business court. Delaware is home to just shy of one million business entities—more than its population—and more than 60% of the companies comprising the Fortune 500.[11] The internal affairs doctrine holds that internal disputes between a company's managers and shareholders are governed by the law of the state of incorporation.[12] And, if Delaware law applies to these disputes, it makes sense for Delaware jurists—at the trial level, the Chancellor and four Vice Chancellors of the Court of Chancery and, at the appellate level, the five Justices of the Delaware Supreme Court[13]—to be the ones to apply it.[14] Consequently, the

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11. DEL. DIV. OF CORPS. ANN. REP. 1 (2011), http://corp.delaware.gov/2011CorpAR.pdf.

12. *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89 (1987) ("No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations . . . ."); *In re* Topps Co. S'holders Litig., 924 A.2d 951, 953–54 (Del. Ch. 2007) ("[W]hen a corporation forms under the laws of a particular state, the rights of its stockholders are determined by that state's law . . . ."); RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 302–10, 313 (1971) (discussing a state's interest in regulating corporations established under its laws).

13. *See Overview of the Delaware Court System*, DEL. JUDICIARY, http://courts.delaware.gov/overview.stm (last visited Feb. 6, 2013) ("The Supreme Court is the State's appellate court which receives direct appeals from the Court of Chancery, the Superior Court, and the Family Court.") (on file with the Washington and Lee Law Review).

14. There are a number of principled justifications, from a societal perspective, for preferring the judges of the state of incorporation to adjudicate disputes concerning a corporation's internal affairs. Perhaps most obviously, doing so "promotes the consistent application of relevant doctrine . . . . That, in turn, promotes the growth of precedent to guide future transactions. Fostering that consistency and growth is the primary public interest implicated in corporate and contract cases, because consistency and predictability contribute to wealth creation." Leo E. Strine, Jr., Lawrence A. Hamermesh & Matthew C. Jennejohn, *Putting Stockholders First, Not the First-Filed Complaint*, 4 (Harvard John M. Olin Ctr. for Law, Econs. & Bus. Discussion Paper No. 740, 2013), *available at* http://ssrn.com/abstract=2200499. Thus, although "judiciaries throughout the United States are staffed with competent judges capable of producing serviceable opinions applying other jurisdiction[s'] laws[,] . . . doctrinal complexity means *optimal* applications of a jurisdiction's

Delaware courts often adjudicate cases involving many of the country's major companies and issues stemming from the latest developments affecting the national economy.[15] It is not surprising, therefore, that several independent cases dealing with similar issues related to the financial headlines, especially those questions having potentially systemic ramifications, arise at any particular time.

Unlike most of the issues du jour that have arisen in recent years, the issues that arose in 2011 and early 2012 did not invoke a discrete, substantive question of corporation law. Rather, the issues recently at the forefront relate to the growth in shareholder representative litigation itself.[16] Five years ago, in 2007, less than 40% of public company merger and acquisition (M&A) deals were challenged.[17] By 2010, over 80% of those transactions gave rise to litigation, with each challenged transaction drawing an average of nearly five independently filed complaints.[18] The preliminary data for 2011 shows that such

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law will most likely be accomplished by that jurisdiction's courts, which are steeped in its traditions and nuances." *Id.* at 73.

15. DEL. DIV. OF CORPS. ANN. REP., *supra* note 11, at 1.

16. In this Article, the terms "shareholder representative litigation" or, alternatively, "shareholder representative actions" or "suits," refer to both (1) class actions brought directly by a corporation's shareholders against the board of directors or other corporate fiduciaries challenging a merger or other corporate transactions, as well as (2) derivative suits brought by shareholders on behalf of the corporation to assert claims belonging to the corporation itself, such as breaches of the board's fiduciary duties alleged to have caused a loss to the company. For further discussion of the distinction between direct and derivative actions in the corporation law context, see generally Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031 (Del. 2004); Aronson v. Lewis, 473 A.2d 805 (Del. 1984); DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 9.02[a] (2012) [hereinafter WOLFE & PITTENGER].

17. Matthew D. Cain & Steven M. Davidoff, *A Great Game: The Dynamics of State Competition and Litigation* 31 tbl.1 (Apr. 2012) (Working Paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984758.

18. *Id.* Meanwhile actual deal flow, as measured by the aggregate dollar amount of all transactions, increased by less than 20% during the same period. *See* Quentin Webb & Denny Thomas, *M&A Tops $2.2 Trillion in First Yearly Rise Since 2007*, REUTERS (Dec. 17, 2010, 7:30 AM), http://www.reuters.com/article/2010/12/17/us-deals-idUSTRE6BG00D20101217 (last visited Feb. 6, 2013) (noting that M&A deal activity grew, for the first time since 2007, by almost a fifth in 2010) (on file with the Washington and Lee Law Review).

shareholder suits are becoming even more ubiquitous: in 2011, over 90% of M&A deals over $100 million were challenged.[19] This rise in shareholder representative litigation does not pertain necessarily to any particular substantive area of corporation law. Nevertheless, it has broad implications. The plethora of cases has brought into sharper focus the civil procedure of shareholder representative actions. The results may affect how lead plaintiffs, their counsel, defense counsel, and courts in multiple jurisdictions can best handle such litigation involving Delaware companies and ensure that it effectively serves the purposes for which representative forms of shareholder litigation were created.

This Article addresses emerging issues in the civil procedure of shareholder representative litigation along two parallel tracks. First, after a brief overview of the legal basis for the Delaware Court of Chancery's subject matter specialty in shareholder representative litigation in Part II, Part III summarizes the effect that the growth in shareholder representative actions has had on four areas of Delaware law: (1) awards of attorneys' fees to plaintiffs' counsel; (2) certification and removal of lead plaintiffs; (3) motions to stay or dismiss because of concurrent litigation in another jurisdiction; and (4) the interaction of pleading rules, forum shopping, and statutory books and records actions under Delaware General Corporation Law (DGCL) Section 220.[20] Second, the Article attempts to demonstrate how Delaware's volume of corporate and alternative business entity cases and the responsiveness of its courts, its legislature, and the legal marketplace generally accelerate the development of refined doctrine, measured balance, and valuable predictability. In short, with repeat experience comes ready expertise and real efficiency.[21]

19. CORNERSTONE RESEARCH, RECENT DEVELOPMENTS IN SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS 3 tbl.2 (2012), http://www.cornerstone.com/files/News/d7e418ea-eb2c-4a17-8eae-de2510d9d1ba/Presentation/NewsAttachment/8b664075-ebfb-4cce-aa76-8a050befad03/Cornerstone_Research_Shareholder_MandA_Litigation.pdf.

20. DEL. CODE ANN. tit. 8, § 220 (2010).

21. *See, e.g.*, William Savitt, *The Genius of the Modern Chancery System*, 2012 COLUM. BUS. L. REV. 570, 585–86 (describing the Court of Chancery "as an

II. The Importance of Shareholder Representative Litigation to the Substantive Law of Corporations, or a Brief History of Why the Court of Chancery Hears Shareholder Cases

To apprehend the importance of the Delaware Court of Chancery's procedural rules to Delaware's substantive law of corporations, some brief background on the origins of equity practice may be useful. Though only an archaic concept for most common law jurisdictions, the distinction between "law" and "equity" is the historical source of the Delaware Court of Chancery's jurisdiction to hear most corporation cases. Except where enlarged by statute, the Court of Chancery exercises the subject matter jurisdiction that the English High Court of Chancery possessed as of 1776.[22] Legal historians often characterize English common law before the nineteenth century as insufferably rigid.[23] The writ system developed inflexible rules of pleading and evidence that were designed poorly in the first place and, thereafter, rarely modified, despite the recognized hardships they caused.[24] A stock example comes from the "use,"

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unusual and remarkably effective regulatory machine" over "a broad field of economic activity"). Because the Court of Chancery "sees and has the power to regulate a vast amount of M&A activity, its perspective is not episodic or narrow, but constant and, if not complete, very substantially representative." *Id.* at 586.

22. *See, e.g.*, DuPont v. DuPont, 85 A.2d 724, 727 (Del. 1951) ("[T]he general equity jurisdiction of the Court of Chancery . . . is defined as all the general equity jurisdiction of the High Court of Chancery of Great Britain as it existed prior to the separation of the colonies . . . ."); Glanding v. Indus. Trust Co., 45 A.2d 553, 558–59 (Del. 1945) ("[T]he Court of Chancery shall . . . exercise that complete system of equity jurisdiction [that the High Court of Chancery possessed as of 1776] in all respects *until the Legislature of this State shall provide otherwise*." (emphasis added)).

23. *See, e.g.*, J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 53 (4th ed. 2002) ("[T]he formulae through which justice was centralised and administered by the king's courts in the twelfth and thirteenth centuries were frozen as part of the 'due process of law' guaranteed by charters of liberties, and gave rise to a formalistic legal culture which affected legal thought at every turn."). Baker further notes that "[t]he possibilities of technical failure [under the common law writ system] were legion. And the growing strength of the substantive law could also work injustice, because the judges preferred to suffer hardship in individual cases than to make exceptions to clear rules." *Id.* at 102.

24. *See id.* at 97 ("Although the jurisdictions were adjusted, and the procedures were developed, distorted or evaded in different periods, the

the prototype of our modern trust. In a use, *A* gave legal title of property to *B* for the use of *C*. The evidentiary rules of the common law, however, treated *B*'s legal title as any other form of absolute ownership.[25] Thus, if *B* absconded with, or otherwise interfered with *C*'s use of, the property, the courts of law could not provide a remedy.[26] Over time, the sovereign's oath to provide "equal and right justice" came to recognize a royal duty to furnish a remedy whenever the law courts' exercise of the crown's judicial powers proved deficient.[27] For that reason, the Lord High Chancellor, essentially a political appointee to an administrative department, was empowered to disregard the formalism of the law, including the requirement of trial by juries,[28] and compel

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essential premises and outward forms of the common-law system went almost unchanged between the thirteenth and the nineteenth centuries."); *id.* at 102–03 (noting that the common law favored "strict rules of evidence, rules which might exclude the merits of the case from consideration but which could not be relaxed without destroying certainty or condoning carelessness").

25. *See id.* at 248–49 (describing the historical evolution of the "use").

26. *Id.* at 102. Another example comes from the law of debtor-creditor relations. English evidentiary rules treated a sealed bond as incontrovertible proof of the existence of an outstanding debt. *Id.* Hence, if the debtor repaid the amount borrowed but failed to request back or otherwise destroy the bond issued to the creditor, the creditor could proffer the bond to a court of law and force the debtor to pay on it again. *Id.*

27. *Id.* at 98 (quoting the coronation oath of Edward II in the early fourteenth century).

28. Although the absence of juries commonly is considered one of the distinctive features of chancery practice, there is historical evidence that chancellors frequently submitted questions of fact to juries, albeit by use of legal fictions. Blackstone, himself a chancellor, wrote that:

> [T]his court is so sensible of the deficiency of trial by written depositions [alone], that it . . . usually directs the matter to be tried by jury. . . . But, as no jury can be summoned to attend this court, the fact is usually directed to [a court of law] upon a *feigned issue*.

3 WILLIAM BLACKSTONE, COMMENTARIES *452. According to Blackstone, the "feigned issue" might take the form of an action at law for payment on a fictitious bet that, if the contested fact were true, one party owed the other a nominal sum; the parties would concede the existence and validity of the bet and contest only the decisive fact. *Id.* "[T]hereupon that issue is joined, which is directed out of chancery to be tried: and thus the verdict of the jurors at law determines the fact in the court of equity." *Id.*

Even today, the Delaware Court of Chancery possesses statutory authority to submit questions of fact to a jury. *See* DEL. CODE ANN. tit. 10, § 369 (2012). The Court of Chancery has interpreted this authority, however, to be "wholly

that which, in good conscience, ought to be done—in the above example, remedy *B*'s breach of an extralegal duty to *C*.[29] That led to the recognition, and to the enforcement, of *fiduciary* duties, i.e., extralegal obligations "to act with the highest degree of honesty and loyalty toward another person."[30]

Because fiduciary duties are "extralegal," their enforcement historically became the exclusive province of courts of chancery, in which chancellors administered equity instead of law.[31] Although most common law jurisdictions long ago merged law and equity in a single court,[32] Delaware has not.[33] Therefore, any action against a corporate director for breach of fiduciary duty

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discretionary"—with "the jury's decision [as] merely advisory"—and "has opined that the procedure 'is now probably outmoded.'" WOLFE & PITTENGER, *supra* note 16, § 1.08 (quoting Getty Ref. & Mktg. Co. v. Park Oil, Inc., 385 A.2d 147, 151 (Del. Ch. 1978)).

29. *See* BAKER, *supra* note 23, at 103 ("The Chancery worked differently. The chancellor was free from the rigid procedures under which such injustices sheltered. His court was a court of conscience, in which defendants could be coerced into doing whatever conscience required in the full circumstances of the case.").

30. BLACK'S LAW DICTIONARY 581 (9th ed. 2009).

31. Chancery practice also invented procedures and remedies to redress other hardships tolerated by the courts of law, such as the class action mechanism itself (to remedy the inequity of piecemeal adjudication when joinder of numerous interested parties was otherwise impractical) and the equitable remedy of cancellation of a bond (to relieve the burdens discussed *supra* note 26). *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997) (noting that Rule 23 "stems from equity practice" (citing Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 375–400 (1967))); DAN B. DOBBS, DOBBS HORNBOOK ON REMEDIES § 2.1 (1993) (discussing orders for the cancellation of instruments as among the remedies invented in equity practice).

32. New York was the first to do so upon enacting a new state constitution in 1846. N.Y. CONST. of 1846, art. XIV, §§ 5–6, *available at* http://www.nycourts.gov/history/pdf/Library/1846_constitution.pdf. Great Britain merged law and equity in 1875 for the superior courts via the Supreme Court of Judicature Act 1873. BAKER, *supra* note 23, at 114. The United States federal courts did not merge law and equity until promulgation of the Federal Rules of Civil Procedure in 1938. *See* Rules Enabling Act, ch. 651, § 2, 48 Stat. 1064, 1064 (1934) (current version at 28 U.S.C. § 2072 (1990)) (authorizing the merger of law and equity); FED. R. CIV. P. 2 (1938) (amended 2007) (combining actions at law and equity into "one form of action to be known as 'civil action'").

33. *See* DEL. CODE ANN. tit. 10, § 341 (1953) ("The Court of Chancery shall have jurisdiction to hear and determine all matters and causes in equity.").

brought in a Delaware state court must be brought in the Court of Chancery rather than the Delaware Superior Court, Chancery's sister court of law.[34]

As a substantive matter, the law of corporations is designed in large part to remedy collective-action problems in commerce.[35] Capital markets permit efficient allocation of inexpensive capital to worthy enterprises, but also produce risks problematic for decentralized governance. If an enterprise has many thousands of dispersed owners, only a few possess the economic incentive to inform themselves fully of all material information before participating in daily business decisions.[36] Corporation law addresses this risk by vesting control over the company's day-to-day affairs in a group of professional managers, who act as the agents of their shareholder-principals.[37] Thus, for example, the DGCL provides that "[t]he business and affairs of every corporation . . . *shall* be managed by or under the direction of a board of directors."[38] Because the board's function is to generate wealth by taking reasonable, good faith risk in deploying the

34. The Delaware Court of Chancery's general equitable subject matter jurisdiction, though often characterized as engendering a specialization in corporate governance matters, means that the Chancery is actually not exclusively a business court. *See generally* WOLFE & PITTENGER, *supra* note 16, § 2.03 (noting the Court's jurisdiction extends to all matters involving equitable rights—e.g., trusts, estates, and guardianships—as well as all requests for equitable relief—e.g., injunctions, specific performance, and cancellation of bonds).

35. *See* Jennifer Arlen & Eric Talley, *Unregulable Defenses and the Perils Shareholder Choice*, 152 U. PA. L. REV. 577, 589 n.32 (2003) ("[T]he very reason publically held corporations exist is to exploit the advantages of vesting control of the firm in professional managers who do not own the firm." (citing CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 158 (3d ed. 1999))).

36. *See id.* at 589 ("Even sophisticated shareholders generally are not sufficiently informed to manage the firms they own because they own a relatively modest fraction of any one company and thus have neither the incentives to acquire nor the capacity to analyze the information needed to make prudent, everyday business decisions.").

37. *See id.* at 588–90 & n.32 ("In addition to being specifically trained for the task and better informed about the firm, managers can make informed decisions free from the costly collective action problems that plague decentralized governance.").

38. DEL. CODE ANN. tit. 8, § 141(a) (2010) (emphasis added).

corporation's capital, the business judgment rule insulates directors when they make what, in hindsight, turn out to be poor business decisions.[39] Nothing in the DGCL, however, gives directors license to breach the trust they have been given. When a rogue director breaches his or her fiduciary duty, the Court of Chancery has the authority to enforce shareholders' rights.[40] And, in part because of the sheer number of corporations formed under Delaware law, the Court of Chancery's docket often has been dominated by such breach of fiduciary duty cases.

With repeat experience comes ready expertise. As Chief Justice Rehnquist remarked at the celebration of its 200th anniversary, the Court of Chancery

> has handed down thousands of opinions interpreting virtually every provision of Delaware's corporate law statute. No other state court can make such a claim . . . . The process of decision in the litigated cases has so refined the law that business planners may usually order their affairs to avoid law suits. This recognition confers on the Court of Chancery one of the highest forms of praise the judiciary can receive.[41]

As surely as Rome was built brick-by-brick, so too has Delaware developed its corporate jurisprudence case-by-case. Indeed, the volume of cases that it hears contributes importantly to this

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39. *See* 1 DENNIS J. BLOCK, NANCY E. BARTON & STEPHEN A. RADIN, THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS 12–18 (5th ed. 1998) (discussing the various rationales of the business judgment rule).

40. *See* Williams v. Geier, 671 A.2d 1368, 1378 (Del. 1996) ("Only by demonstrating that the Board breached its fiduciary duties may the presumption of the business judgment rule be rebutted . . . ."); McMahon v. New Castle Assocs., 532 A.2d 601, 604 (Del. Ch. 1987) (describing fiduciary relationships as among "the most ancient headings under which Chancery's jurisdiction falls").

41. William H. Rehnquist, Chief Justice, United States Supreme Court, The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice, Address at the Bicentennial Celebration of the Delaware Court of Chancery (Sept. 18, 1992), *in* 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 (Nov. 1992); *see also* Savitt, *supra* note 21, at 585 ("[T]he five Chancery judges are appointed on the basis of their expertise in Delaware corporate law and cannot help but become even more expert by virtue of their deep and continuous exposure to that law and their obligation to interpret and expound it daily and at length.").

valuable predictability, even in a dynamic economic and capital marketplace.[42]

To give just one small example of the organic nature of this process, in December 2011, Vice Chancellor Laster issued an opinion in *In re Compellent Technologies*.[43] In dicta, he questioned the wording of a provision of a merger agreement requiring the target company's board to give notice to the acquirer if any subsequent, superior offers arose.[44] The Vice Chancellor did not question the general validity of this relatively common information rights provision, just the particular verbiage used to express it in the merger agreement at issue in that case.[45] Less than two months later, another case—*In re Micromet*[46]—challenged a merger agreement containing a nearly identical provision, except for a revision in the language the court had questioned in *Compellent*.[47] The court in *Micromet* found the revised provision unobjectionable.[48] More important than the outcomes of those two cases, however, is what one reasonably can infer from their facts and sequence. Apparently, within a matter of weeks, transactional attorneys had read the *Compellent* opinion and advised their clients accordingly in connection with a later transaction that, when challenged, survived judicial scrutiny.[49] This is a real world example of the predictability Chief

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42. Regrettably, as expanded upon below, that does not always lead to the avoidance of lawsuits, especially in the M&A arena. *See infra* Part III.A.

43. *In re* Compellent Techs., Inc. S'holder Litig., C.A. No. 6084–VCL, 2011 WL 6382523 (Del. Ch. Dec. 9, 2011).

44. *Id.* at *7 ("The [agreement] required the Board to knowingly breach its fiduciary duties . . . by first requiring the Board to determine that failing to act constituted a breach of its fiduciary obligations and then forbidding the Board to act until subsequent contractual conditions were met.").

45. *See id.* ("This last problem could have been avoided by using a pure Superior Offer clause, rather than a hybrid with a Superior Offer trigger and a fiduciary duty determination.").

46. *In re* Micromet, Inc. S'holders Litig., C.A. No. 7197–VCP, 2012 WL 681785 (Del. Ch. Feb. 29, 2012).

47. *See id.* at *8 (describing the notice provision).

48. *Id.* at *9 ("[U]nlike *Compellent,* the recommendation provision here does not restrict the Board's ability to fulfill known fiduciary duties in a timely fashion. Therefore, the potential problems identified in *Compellent* do not exist here.").

49. *Cf.* Myron T. Steele & J.W. Verret, *Delaware's Guidance: Ensuring*

Justice Rehnquist praised and the speed with which the Court of Chancery provides it.[50]

Similar examples of responsiveness can be seen in the Delaware legislature's occasional passage of legislation to modify or clarify Delaware corporate or alternative entity law as reflected in a relatively recent decision of the Delaware Court of Chancery or the Delaware Supreme Court. One such instance relates to the corporation's power to indemnify, and to advance legal fees incurred by, an individual as a result of legal proceedings related to that individual's service as a director of the company.[51] In the 2008 case of *Schoon v. Troy Corp.*,[52] Vice Chancellor Lamb allowed a corporation to amend its bylaws and revoke a former director's right to advancement even though the bylaws that were in place during his service stated that the right to advancement would continue after his tenure on the board ended.[53] In early 2009, the General Assembly amended DGCL Section 145(f) to abrogate the holding in *Schoon* by precluding a

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Equity for the Modern Witenagemot, 2 VA. L. & BUS. REV. 189, 207 (2007) ("The Delaware judges have frequently crafted dicta to give valuable guidance to deal lawyers on unanswered questions."). The Delaware courts "recognize the need to wait for a live controversy to resolve an issue definitively, but fortunately they also recognize that this does not mean that they cannot, or should not, use the attention paid to a published opinion to offer guidance on uncertain but vital areas of corporate law." *Id. Cf. also* Savitt, *supra* note 21, at 588–89 ("[T]he Court of Chancery often announces in dictum—frank dictum, not dictum disguised as holding—new rules intended to influence the conduct of future transactions. . . . [R]ulings on important questions that provid[e] clear guidance to transactional lawyers on the proper way to structure corporate transactions.").

50. *See supra* note 41 and accompanying text; *see also* Savitt, *supra* note 21, at 583–84 ("The [Court of Chancery]'s willingness to expedite review of any colorable claim of inadequate disclosure, coupled with the recent massive expansion in deal litigation, has produced a new phenomenon: the systematic real-time testing of merger proxies for material deficiencies by court-supervised plaintiffs' attorneys.").

51. *See* DEL. CODE ANN. tit. 8, § 145 (2011).

52. Schoon v. Troy Corp., 948 A.2d 1157 (Del. Ch. 2008), *aff'd sub nom.* Bohnen v. Troy Corp., 962 A.2d 916 (Del. 2009) (unpublished table decision).

53. *See id.* at 1165–66 (ruling that a director's advancement rights are determined by the relevant provisions in the corporation's governing instruments as of the filing of the action triggering the advancement obligations, and not as of the dates that the director took office or the alleged wrongdoing occurred).

corporation from impairing a director's right to indemnification or advancement after the occurrence of the conduct that is the subject of the indemnification or advancement claim, *unless* the corporation's charter or bylaws in effect at the time of the challenged conduct expressly authorized retroactive elimination or impairment.[54]

Ironically, shareholder litigation also lends itself to the same collective-action governance problems that inhere in the substantive law of corporations it seeks to enforce.[55] Two important ameliorating mechanisms are class actions on behalf of all affected shareholders and the derivative action, in which a shareholder sues not on her own behalf personally, but on behalf of the corporation.[56] In either case, contingent fees provide incentives for specialized plaintiffs' firms "to pursue monitoring activities that are wealth increasing for the collectivity (the corporation or the body of its shareholders)."[57]

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54. 77 Del. Laws ch. 14, § 3 (2009) (amending DEL. CODE ANN. tit. 8, § 145(f) (1997)).

55. As Chancellor Allen explained,

> [a] fundamental condition of the corporate form when stockholders are widely dispersed . . . is that individual shareholders have little incentive to bear the costs associated with activities that monitor board of director (or management) performance . . . . While the conditions that allow investors to be rationally passive are a primary source of utility, they can also lead to inefficiency to the extent centralized management may have incentives that are not perfectly aligned with those of the residual owners of the firm, which is inevitably the case . . . . For that reason *some* expenditures for shareholder monitoring would be efficient. Such monitoring is, of course, more or less costly to the shareholder who engages in it. In a public company with widely distributed shares any particular shareholder has very little incentive to incur those costs himself in pursuit of a collective good, since unless there is some method to force a sharing of costs, he will bear all of the costs and only a (small) pro rata share of any gains that the monitoring yields.

Bird v. Lida, Inc., 681 A.2d 399, 402–03 (Del. Ch. 1996) (footnote omitted).

56. *See id.* at 403 (explaining that the derivative lawsuit is "[o]ne way the corporation law deals with this conundrum . . . through the . . . recognized practice of awarding to successful shareholder champions and their attorney's risk-adjusted reimbursement payments (*i.e.,* contingency based attorneys fees)").

57. *Id.*

The Court of Chancery has broad jurisdiction over disputes concerning the internal affairs of Delaware corporations, and that includes hearing class and derivative actions regarding alleged breaches of fiduciary duties by a company's directors.[58] Consequently, Delaware has a strong interest in ensuring that shareholder representative suits function properly and effectively.[59] Among other things, this interest means that, unlike their Westminster antecedents, the Court of Chancery and the Delaware Supreme Court cannot blind themselves to the complex market dynamics that often engender and affect the shareholder litigation presented to them. This historical and thematic background leads to four specific examples, taken from cases decided within the last two years, of how the Court of Chancery advances the proper and effective functioning of shareholder representative litigation apace of market developments.

III. Recent Issues in Chancery Procedure

The foregoing is intended to introduce two propositions that prompted, and now frame, this Article: (1) the Delaware Court of Chancery's ability to respond rapidly and reliably to market dynamics; and (2) the Court's institutional interest in the proper and effective functioning of shareholder representative litigation. We next examine the juridical interaction between those two propositions, focusing on four specific procedural issues as

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58. *See* DEL. CODE ANN. tit. 8, § 111 (2010) (expressly granting the Court of Chancery subject matter jurisdiction to interpret, apply, enforce, or determine a number of corporate instruments as well as the provisions of the DGCL itself, all of which is in addition to the Court's traditional equitable jurisdiction over claims of breach of fiduciary duty).

59. For example, Chancellor Chandler once articulated this interest as follows:

> It is important for shareholders to bring derivative suits because these suits, filed after the alleged wrongdoing, operate as an *ex post* check on corporate behavior. . . . When shareholder plaintiffs bring meritorious lawsuits, they deter improper behavior by similarly situated directors and managers, who want to avoid the expense of being sued and the sometimes larger reputational expense of losing in court.

Seinfeld v. Coker, 847 A.2d 330, 333 (Del. Ch. 2000).

examples: (1) awards of attorneys' fees to plaintiffs' counsel; (2) certification and removal of lead plaintiffs; (3) motions to stay or dismiss because of concurrent litigation in another jurisdiction; and (4) the relationship between pleading rules, forum shopping, and statutory books and records actions under DGCL Section 220. These issues evidence collectively a broader theme: the Court's development of procedural mechanisms that promote effective but fair use by shareholders of representative litigation.[60] Those mechanisms should provide the optimal incentives for shareholders to avoid collective-action problems on the front-end without providing a windfall to plaintiffs' firms on the back-end by enforcing rules that encourage and support the filing of meritorious suits. In turn, those rules should respect a plaintiff's choice of forum while maintaining Delaware's legitimate interest in regulating the internal affairs of entities created under its laws and without causing an arbitrary race to the courthouse.

A. Corporate Benefit on a Contingency Basis: Calculating Attorneys' Fees

As previously indicated, U.S. capital markets appear to have generated increased litigation in recent years, especially

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60. These four examples are not intended to exhaust the ways in which the court's recent decisions may impact the effective and efficient operation of representative litigation in the corporate context. For example, in *Forsythe v. ESC Fund Mgmt. Co.*, the court recently took a novel, efficiency-promoting approach in approving a proposed derivative action settlement. *See* Forsythe v. ESC Fund Mgmt. Co., C.A. No. 1091-VCL, 2012 WL 1655538, at *1 (Del. Ch. May 9, 2012). There, the court concluded that the settlement of $13.25 million in cash and other concessions fell "within a range of fairness, albeit at the low end," but certain objectors asserted that they could recover significantly more if permitted to continue prosecuting the case to trial. *Id.* Because the proposed settlement was already fair, and because "[p]assing on the current settlement to seek more at trial carries substantial risk," the court decided to "approve the settlement unless the objectors make the equivalent of a topping bid [by] . . . post[ing] a secured bond or letter of credit for the benefit of [the company on whose behalf the claims were brought] for the full settlement consideration of $13.25 million," thus permitting the objectors to continue litigating the case for a greater recovery while protecting the company from the risk of recovering nothing after a full trial on the merits. *Id.*

shareholder representative suits challenging M&A transactions. Preliminary data for 2011 reveals that over 90% of M&A deals over $100 million were challenged in court, up from less than 40% only five years ago in 2007.[61] Some evidence suggests that this rise in M&A litigation can be attributed to the Private Securities Litigation Reform Act[62] and Securities Litigation Uniform Standards Act,[63] both of which were intended to curb strike suits by entrepreneurial plaintiffs' firms[64] but inadvertently may have induced plaintiffs' firms to bring cases predicated on state fiduciary duty law instead of federal securities law.[65] Whatever the cause of this rise in M&A litigation, however, there is no evidence, as yet, that credibly proves that only one out of every ten boards that approved a merger in 2011 managed to do so without breaching their fiduciary duties.[66] Unsurprisingly, therefore, most of these cases—approximately 70% of them—settle.[67] Moreover, in almost 90% of the cases, the reported settlement consideration that the defendant directors gave in exchange for the release of the shareholders' claims was a so-called therapeutic benefit, consisting of either supplemental

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61. *See supra* notes 16–19 and accompanying text.

62. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in various sections of 15 U.S.C.).

63. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended in various sections of 15 U.S.C.).

64. *See* Jennifer J. Johnson, *Securities Class Actions in State Court*, 80 U. CIN. L. REV. 349, 349–50 (2012) ("The PSLRA . . . was motivated by concerns that plaintiffs' counsel were untrustworthy and filed frivolous lawsuits primarily for their own advantage . . . . [The] SLUSA . . . ensures that class counsel cannot avoid the PSLRA[] . . . by filing in state court.").

65. *See* Brian Cheffins et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar,* 2012 COLUM. BUS. L. REV. 427, 467 ("Various firms that were pushed out of securities class actions . . . responded by gravitating to corporate suits."); Johnson, *supra* note 64, at 384 ("M&A objection class actions have replaced traditional stock drop cases as the lawsuit of choice for plaintiffs' securities lawyers.").

66. Indeed, "the rise of supermajorities of independent directors on boards, the decline in structural takeover defenses, and the improvement in disclosures [during this period] all suggest that litigation over M&A transactions should have become rarer, not more frequent." Strine, Hamermesh & Jennejohn, *supra* note 14, at 16 n.46.

67. Cain & Davidoff, *supra* note 17, at 33 tbl.2.

disclosures or changes to the nonmonetary deal terms, but not an increase to the deal price offered to the shareholders.[68]

We next turn from the current state of the markets to the state of the law. Court of Chancery Rules 23(e)[69] and 23.1(c),[70] like their federal counterparts,[71] require court approval before a class action or derivative suit may be dismissed voluntarily or compromised.[72] These Rules are "intended to guard against surreptitious buy-outs of representative plaintiffs, leaving other class members without recourse" when the settlement, by design, releases their claims.[73] In that approval process, the reviewing court performs at least three separate functions. It decides: (1) whether and how to certify the class; (2) whether, in the court's independent business judgment, the settlement is in the best interest of the class; and (3) what would be a reasonable award of attorneys' fees and expenses for the plaintiffs' counsel.[74] What follows addresses only the third of those tasks.

Where a class or derivative action settlement confers a benefit on the plaintiffs, either monetary or therapeutic, Delaware law authorizes an award of attorneys' fees for counsel's efforts in creating the benefit.[75] "A court's goal in setting a fee

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68. *Id.* By contrast, from "1999 to 2000, 52% of suits filed on behalf of shareholders produced a financial benefit for the class, and only 10% of settlements were 'disclosure-only.'" Strine, Hamermesh & Jennejohn, *supra* note 14, at 10.

69. DEL. CT. CH. R. 23(e).

70. *Id.* R. 23.1(c).

71. FED. R. CIV. P. 23(e); *id.* R. 23.1(c).

72. *See* DEL. CT. CH. R. 23(e) ("[A] class action shall not be dismissed or compromised without the approval of the Court . . . ."); *id.* R. 23.1(c) (same with regard to derivative actions); FED. R. CIV. P. 23(e) (same); *id.* R. 23.1(c) (same).

73. Wied v. Valhi, Inc., 466 A.2d 9, 15 (Del. 1983).

74. *See, e.g.*, *In re* Celera Corp. S'holder Litig., C.A. No. 6304–VCP, 2012 WL 1020471, at *8 (Del. Ch. Mar. 23, 2012) (detailing the various steps the court must take in the approval process), *aff'd in part and rev'd in part*, No. 212, 2012 WL 6707736 (Del. Dec. 27, 2012).

75. Tandycrafts, Inc. v. Initio Partners, 562 A.2d 1162, 1164–65 (Del. 1989). This approach to assessing attorneys' fees in representative shareholder actions proceeds from a framework of analysis identified in a case referred to as *Sugarland* and involves consideration of several different factors:

> (i) the amount of time and effort applied to the case by counsel for the plaintiffs; (ii) the relative complexities of the litigation; (iii) the standing and ability of petitioning counsel; (iv) the contingent nature

award should be to avoid windfalls to counsel while encouraging future meritorious lawsuits,"[76] but various problems emerge if the benefit is only therapeutic. First, pricing the value conferred by a nonmonetary settlement is an almost metaphysical exercise.[77] What is the dollar value of furnishing more information about the deal decision-making process? Or of the increased chance that relaxing a deal protection term—e.g., reducing a termination fee from $35 million to $30 million—will result in a superior bid? Not the increased value of the topping bid itself (indeed, in many cases there is no topping bid), but rather the therapeutic value of the increased likelihood that, because of counsel's efforts, another bidder might emerge? To answer these questions, the court draws on its experience.[78]

In *In re Sauer-Danfoss*,[79] decided in early 2011, the court cataloged the fees awarded in numerous disclosure-only cases, and sorted them by the qualitative importance of the disclosures obtained.[80] Its results revealed

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> of the litigation; (v) the stage at which the litigation ended; (vi) whether the plaintiff can rightly receive all the credit for the benefit conferred or only a portion thereof; and (vii) the size of the benefit conferred.

In re Plains Res. Inc. S'holders Litig., C.A. No. 071-N, 2005 WL 332811, at *3 (Del. Ch. Feb. 4, 2005) (citing Sugarland Indus., Inc. v. Thomas, 420 A.2d 142, 149–50 (Del. 1980)). By far, the most important of the *Sugarland* factors is the benefit conferred by the settlement. *Id.*

76. *In re* Cox Radio, Inc. S'holders Litig., C.A. No. 4461-VCP, 2010 WL 1806616, at *20 (Del. Ch. May 6, 2010), *aff'd*, 9 A.3d 475 (Del. 2010) (unpublished table decision); *but see* Ams. Mining Corp. v. Theriault (*Southern Peru II*), 51 A.3d 1213, 1263 (Del. 2012) (Berger, J., dissenting) ("The trial court['s fee analysis] focused on the perceived need to incentivize plaintiffs' lawyers to take cases to trial. . . . The trial court opined that a declining percentage for 'mega' cases would not create a healthy incentive system. . . . That is not a decision based on *Sugarland*.").

77. *See* Dias v. Purches, C.A. No. 7199-VCG, 2012 WL 4503174, at *6 (Del. Ch. Oct. 1, 2012) ("The size of the benefit conferred by a [nonmonetary benefit] is inherently incapable of direct calculation . . . .").

78. *See, e.g.*, *id.* ("In light of this problem, [the Delaware Court of Chancery] attempts to at least achieve consistency, looking at prior decisions to guide future ones.").

79. *In re* Sauer-Danfoss Inc. S'holders Litig., C.A. No. 5162–VCL, 2011 WL 2519210 (Del. Ch. Apr. 29, 2011).

80. *Id.* at apps. A–C.

> a range of discretionary awards with concentrations at certain levels. This Court has often awarded fees of approximately $400,000 to $500,000 for one or two meaningful disclosures, such as previously withheld projections or undisclosed conflicts faced by fiduciaries or their advisors. Disclosures of questionable quality have yielded much lower awards [in the range of $75,000 to $200,000]. Higher awards have been reserved for plaintiffs who obtained particularly significant or exceptional disclosures.[81]

This is not to say the Court of Chancery applies "a strict formula" in these types of cases.[82] Rather, *Sauer-Danfoss* attempts to streamline the Court's efforts to "promote[] fairness by treating like cases alike and rewarding similarly situated plaintiffs equally."[83] In that regard, *Sauer-Danfoss* exemplifies how valuable extensive serial cases involving similar issues really are: both the courts and litigants involved in the review of disclosure-only settlements now often begin with the three "levels" identified in *Sauer-Danfoss* and then ratchet up or down the ultimate award given (by the courts) or argued for (by the parties) depending on the quality of the disclosures obtained in the particular case. Thus, without aspiring to mathematical precision, taking advantage of the wealth of Chancery precedent can help "anchor this Court's discretionary fee determinations to something more objective than the boldness of the plaintiffs' ask and the vigor or passivity of the defendants' response."[84]

Finally, and more by way of a "reality check," the reviewing court compares the size of the fee award to the number of hours the attorneys actually worked, derives an effective hourly rate based on the fee arrived at by the court, and compares that to the amount that would have resulted from the normal hourly rate of the plaintiffs' counsel, sometimes referred to as the "lodestar."[85]

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81. *Id.* at *18, apps. A–C. *Sauer-Danfoss* is one of the only opinions the Court of Chancery has issued with appendixes of empirical analysis.

82. Chancellor Allen actually advised against such an approach. *In re* Maxxam Grp., Inc. S'holders Litig., No. 8636, 1987 WL 10016, at *11 (Del. Ch. Apr. 16, 1987).

83. *In re Sauer-Danfoss*, 2011 WL 2519210, at *17.

84. *In re* Compellent Techs., Inc. S'holder Litig., C.A. No. 6084–VCL, 2011 WL 6382523, at *20 (Del. Ch. Dec. 9, 2011).

85. *In re* Sauer-Danfoss Inc. S'holders Litig., C.A. No. 5162–VCL, 2011 WL

In determining an appropriate fee, the lodestar is of only secondary importance, at best.[86] Still, the reason for considering it is the generally contingent nature of the plaintiffs' counsel's involvement—the need to provide appropriate incentives to take meritorious cases that recognize risk and avoid windfalls.[87]

The fact that plaintiffs' firms usually take their cases on a contingency basis presents another challenge in determining the appropriate amount of attorneys' fees in settlement of representative shareholder litigation. In contingent fee cases, it serves the shareholders' interest for the Court of Chancery to provide the right incentives to prosecute meritorious claims.[88] Hence, when parties settle early, courts tend to award attorneys a lower percentage of the benefit conferred than in cases where settlement occurs later in the process, usually in the range of

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2519210, at *20 (Del. Ch. Apr. 29, 2011) ("The time and effort expended by counsel serves a cross-check on the reasonableness of a fee award." (citing Brinckerhoff v. Tex. E. Prods. Pipeline Co., 986 A.2d 370, 396 (Del. Ch. 2010)).

86. *See id.* ("The time (*i.e.*, hours) that counsel claim to have worked is of secondary importance."); *accord Southern Peru II*, 51 A.3d 1213, 1254 (Del. 2012) ("Delaware courts are not required to award fees based on hourly rates that may not be commensurate with the value of the common fund created by the attorneys' efforts.").

87. As noted in one Chancery opinion,

> Fee awards should encourage future meritorious lawsuits by compensating the plaintiffs' attorneys for their lost opportunity cost (typically their hourly rate), the risks associated with the litigation, and a premium. The fee award, however, can reach a point where it no longer operates as an incentive, and rather morphs into a "socially unwholesome windfall."

Franklin Balance Sheet Inv. Fund v. Crowley, C.A. No. 888-VCP, 2007 WL 2495018, at *12 (Del. Ch. Aug. 30, 2007) (footnotes omitted) (quoting Seinfeld v. Coker, 847 A.2d 330, 334 (Del. Ch. 2000)). In this context, "risk" means "the risk of losing the case outright, something that every plaintiff must bear. Risk reflects the contingent nature of the work, the financing costs incurred with delaying the attorneys' compensation until the case is concluded, the inability to diversify away particular risks, as well as other contingencies." *Seinfeld*, 847 A.2d at 334 n.11.

88. *In re* Cox Radio, Inc. S'holders Litig., C.A. No. 4461-VCP, 2010 WL 1806616, at *20 (Del. Ch. May 6, 2010), *aff'd*, 9 A.3d 475 (Del. 2010) (unpublished table decision); *cf. also Seinfeld*, 847 A.2d at 333–34 ("It is equally important, however, for plaintiffs to prosecute these lawsuits efficiently. . . . Attorneys should not be encouraged to churn when they can receive a substantial premium in return for a successful result at an early stage of the litigation.").

10%–15% of the settlement value for early settlements compared to as much as 35% of a post-trial judgment.[89] Thus, if the benefit is big, so too is the proportional fee award, especially when the plaintiffs' counsel have vigorously pursued the plaintiffs' claim. Chancellor Strine recently made this unmistakably clear in *In re Southern Peru Copper Corp*.[90] In October 2011, he issued a post-trial opinion ruling that the shareholder class was entitled to recover damages, including prejudgment interest, of about $2 billion.[91] In December 2011, he awarded plaintiffs' counsel's attorneys' fees equal to 15% of the over $2 billion judgment, or over $300 million, equating to an effective rate in the range of $35,000 per hour.[92] On appeal, the Delaware Supreme Court affirmed that fee, reiterating that the benefit achieved by the litigation is the "first and most important" factor for a court to consider in determining a discretionary fee award.[93] The Delaware Supreme Court recognized that, although a trial court has discretion to decrease the applicable percentage as the size of the benefit increases, "the use of a declining percentage . . . is not required *per se*."[94] Recent precedents like *Southern Peru* make clear that there is enormous upside potential to zealous advocacy of shareholders' rights—assuming, of course, that the plaintiffs'

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89. *In re* Emerson Radio S'holder Derivative Litig., C.A. No. 3392–VCL, 2011 WL 1135006, at *3–4 ("Awarding increasing percentages helps offset representative counsel's natural incentive to shirk.").

90. *In re* S. Peru Copper Corp. S'holder Derivative Litig., 30 A.3d 60 (Del. Ch. 2011), *aff'd*, *Southern Peru II*, 51 A.3d 1213.

91. *In re* S. Peru Copper Corp. S'holder Derivative Litig., C.A. No. 961-CS, 2011 WL 6382006, at *1 (Del. Ch. Dec. 20, 2011), *aff'd*, *Southern Peru II*, 51 A.3d 1213.

92. *Id.* (awarding $304,742,604.45 in attorneys' fees). Plaintiffs' counsel represented that they had worked a total of 8,597 hours on the case. Plaintiff's Petition for Attorneys' Fees and Expenses at 9, *In re S. Peru Copper Corp*., 2011 WL 6382006 (C.A. No. 961), 2011 WL 5240160. Based on those two figures, the implied hourly rate of the fee award is $35,477.55.

93. *Southern Peru II*, 51 A.3d 1213, 1255 (Del. 2012).

94. *Id.* at 1258; *see also id.* at 1261 ("[W]e decline to impose either a cap or the mandatory use of any particular range of percentages for determining attorneys' fees in megafund cases."). Of course, to say that a declining balance "is not required *per se*" in megafund cases still permits reasonable minds to disagree about whether a declining percentage is appropriate, or whether counsel rightly deserves a fee in such an amount, in any particular case.

claim is meritorious and the harm caused by the defendants' misconduct is extreme, as occurred in *Southern Peru*.

What about the downside? Suppose a plaintiff challenges a deal, engages in some expedited discovery, settles early for a "low quality" supplemental disclosure, and then the plaintiff's attorneys are able to recoup their billable hours at normal rates. Such a system of unlimited upside potential with no downside risk would be unacceptable.[95] It would provide incentives for an unwholesome, surreptitious kind of claim that is inimical to the Court of Chancery's institutional interests in fostering the development and enforcement of a robust and effective body of corporation law.[96] From a cynic's perspective, that means "frequent-filers" who half-heartedly poke around in some expedited discovery, abandon their preliminary injunction motion, and grab quickly for the low-hanging fruit—e.g., a supplemental disclosure or two—still could recoup their time and hope to "hit it big" the next time.

While encouraging zealous advocacy of meritorious claims by fee awards such as in *Southern Peru*, the Court of Chancery also remains vigilant to avoid awarding improper windfalls or

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95. *See In re* Revlon, Inc. S'holders Litig., 990 A.2d 940, 959 (Del. Ch. 2010) ("[A] systemic problem emerges when entrepreneurial litigators pursue a strategy of filing a large number of actions, investing relatively little time or energy in any single case, and settling the cases early to minimize case-specific investment and maximize net profit."); ANDREW J. PINCUS, U.S. CHAMBER OF COMMERCE, THE TRIAL LAWYERS' NEW MERGER TAX: CORPORATE MERGERS AND THE MEGA MILLION-DOLLAR LITIGATION TOLL ON OUR ECONOMY 1 (2012) (characterizing awards of attorneys' fees for therapeutic-only settlements as "extortion through litigation" and a "litigation tax").

96. *See In re* Topps Co. S'holders Litig., 924 A.2d 951, 961 n.38 (Del. Ch. 2007) ("Absent the rational sifting out of non-meritorious cases, stockholders suffer as the costs of litigation exact an undue toll on the procession of transactions valuable to stockholders and cause a harmful diminution in wealth-generating risk-taking by directors."); Seinfeld v. Coker, 847 A.2d 330, 334 (Del. Ch. 2000) (noting that fee awards larger than necessary to incentivize the bringing of meritorious suits "serv[es] no other purpose than to siphon money away from stockholders and into the hands of their agents"); Strine, Hamermesh & Jennejohn, *supra* note 14, at 5 ("There is strong evidence of excess agency costs in the results of recent corporate representative litigation. Unless a consistent incentive system can be implemented that encourages representative litigation that benefits stockholders, the representative litigation system may on balance hurt investors more than it protects them." (footnote omitted)).

rewarding defendants' complacency, which have the potential to be equally problematic. Furthermore, given the volume of stockholder actions that the Court of Chancery adjudicates, it has the ability to speak as loudly in several less-publicized cases as it can in any one highly publicized case. For example, in contrast to *Southern Peru*, the transcript ruling approving a settlement and awarding attorneys' fees in *In re Inspire Pharmaceuticals*[97] attracted relatively modest attention. There, plaintiffs' counsel requested $500,000 for (as determined by the reviewing court) a handful of questionable, agreed-to supplemental disclosures.[98] The defendants, who would have to pay that fee, did not contest it,[99] apparently believing, to quote Dickens, that the "issue is only a question of costs, a mere bud on the forest tree of the parent suit."[100] But that "bud" arguably should have gone to the shareholders as deal consideration. More broadly, the costs of expected, perhaps even inevitable,[101] deal litigation against directors should not be shoehorned into a transaction intended to maximize shareholder value.[102] Therefore, consistent with its

97. *In re* Inspire Pharms. Inc. S'holders Litig., No. 6378-VCP, 2012 WL 275115 (Del. Ch. Jan. 30, 2012) (ruling based on transcript). In fact, transcript rulings are more the norm than the exception with settlement hearings.

98. Plaintiffs' Brief in Support of Final Approval of Settlement and Application for an Award of Attorneys' Fees and Reimbursement of Expenses at 10, *Inspire Pharms.*, 2012 WL 275115 (C.A. No. 6378-VCP), 2012 WL 160987, at pt. III.

99. *See* Affidavit of James P. McEvilly, III, Esquire, in Support of Final Approval of Settlement and Application for an Award of Attorneys' Fees and Reimbursement of Expenses at ¶ 42, *In re Inspire Pharms.*, 2012 WL 275115 (C.A. No. 6378-VCP), 2012 WL 160984 [hereinafter McEvilly Affidavit] (swearing that the defendant agreed not to contest the award of attorneys' fees totaling $500,000).

100. CHARLES DICKENS, BLEAK HOUSE 6 (Oxford Univ. Press 1966) (1853).

101. For a discussion of this inevitability, see *supra* notes 67–68 and accompanying text.

102. *Compare* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 183–84 (Del. 1986) (holding corporate directors' fiduciary duties when negotiating a change-of-control transaction require them to attempt in good faith to obtain the best sales price reasonably available for their shareholders), *with* Strine, Hamermesh & Jennejohn, *supra* note 14, at 20 ("[I]f the defendants believe that the transaction is good for stockholders, as they should if they are directors recommending the transaction, then settling cases that are an obstacle to the transaction in a cost-effective way is a proper fiduciary act."). In any event, regardless of whether the intentional pricing of attorneys' fees to settle

responsibilities,[103] the *Inspire Pharmaceuticals* court independently examined the therapeutic benefit achieved in light of the numerous cases in Delaware evaluating supplemental disclosures and reduced the fee from the $500,000 requested to $300,000.[104]

Inspire Pharmaceuticals, where requested attorneys' fees were reduced, is not unusual.[105] Rather, it reflects a particular instance of the procedure the Court of Chancery consistently employs. Aware of the risks of windfalls or complacent litigants, the Court also is mindful of another significant risk of any settlement of a representative action: the possibility that valuable claims will be released for materially less than they are worth.[106] Accordingly, the Court of Chancery vigilantly examines the merits of every settlement of a representative action, whether objected to or not, to determine whether, in the exercise of the reviewing court's independent business judgment, the settlement is in the shareholders' interest.[107] The court also reviews carefully

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perceived strike suits into the overall transaction price is consistent with directors' fiduciary duties, the fact remains that "the corporations involved in the merger, and therefore *their investors*, bear those costs. Thus, those costs contribute to an increase in the costs of capital, and a net negative societal impact." Strine, Hamermesh & Jennejohn, *supra* note 14, at 19.

103. *See supra* note 74 and accompanying text (discussing the reviewing court's function in the approval of settlements of class action and derivative suits).

104. *In re* Inspire Pharms. Inc. S'holders Litig., No. 6378-VCP, 2012 WL 275115, at ¶ 12 (Del. Ch. Jan. 30, 2012). Even then, however, the effective hourly rate was about $650. McEvilly Affidavit, *supra* note 99, at ¶ 47 (swearing that the plaintiffs' counsel "have expended more than 465 hours prosecuting the Action and incurred approximately $12,694.55 in expenses").

105. *See, e.g.*, Dias v. Purches, C.A. No. 7199-VCG, 2012 WL 4503174, at *6–7 (Del. Ch. Oct. 1, 2012).

106. *See* Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 YALE L. & POL'Y REV. 69, 71 (2004) ("The class attorney's egoistic incentive is to maximize his or her fees—awarded by the court if the action succeeds—with a minimized time-and-effort investment. This objective does not align with a both zealous and time-consuming prosecution of the class action, aimed at maximizing the amount of recovery . . . .").

107. *See* Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1283 (Del. 1989) ("The Court of Chancery plays a special role when asked to approve the settlement of a class or derivative action. It must balance the policy preference for settlement against the need to insure that the interests of the class have been fairly represented.").

the related applications for attorneys' fees. If plaintiffs' counsel are overcompensated for settlements in which the claimed therapeutic benefits are relatively meager, that might increase the risk that meritorious claims will be settled too cheaply.[108] Cases like *Inspire Pharmaceuticals* exemplify the Court of Chancery's continuing efforts to achieve the appropriate balance of incentives.

Contrary to views expressed in recent articles in even the popular press,[109] the argument that plaintiffs' firms face no downside risk when pursuing a shareholder representative action on a contingency is overstated. Not every transactional case is put on a fast track. To receive expedited discovery and hearings, plaintiffs must "justify imposing on the defendants and the public the extra (and sometimes substantial) costs" of expedition.[110] Increasingly, defendants are opposing motions to expedite, a fact reflected in leading treatises and empirical data alike.[111] Although Delaware courts "traditionally ha[ve] acted with a certain solicitude for plaintiffs" challenging a fast-moving deal

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108. *See* Forsythe v. ESC Fund Mgmt. Co., C.A. No. 1091-VCL, 2012 WL 1655538, at *5 (Del. Ch. May 9, 2012) ("Because of these incentives, counsel may favor (consciously or not) a bird-in-the-hand settlement over the continuing and costly quest for an uncertain outcome.").

109. *See, e.g.*, 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/ (last visited Feb. 6, 2013) (pointing out the costs of litigation for companies and shareholders and questioning "whether the rising cost of merger litigation requires legal reform") (on file with the Washington and Lee Law Review); Ann Woolner, Phil Milford & Rodney Yap, *When Merger Suits Enrich Only Lawyers*, BLOOMBERG NEWS (Feb. 16, 2012, 1:59 PM), http://www.bloomberg.com/news/2012-02-16/lawyers-cash-in-while-investor-clients-get-nothing-in-merger-lawsuit-deals.html (last visited Feb. 6, 2013) ("Of 57 . . . investor class actions settled or otherwise concluded there in 2010 and 2011, 40—or 70 percent—made money for plaintiffs' lawyers but not clients, according to data compiled by Bloomberg News.") (on file with the Washington and Lee Law Review); *see also* PINCUS, *supra* note 95.

110. Giammargo v. Snapple Beverage Corp., C.A. No. 13845, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994).

111. *See, e.g.*, WOLFE & PITTENGER, *supra* note 16, § 10.07[a] (observing that motions to expedite "ha[ve] become an early and sometimes dispositive battleground on the merits of the [preliminary injunction] application itself"); *see also infra* note 113 and accompanying text (discussing limited empirical review conducted by the authors).

and, therefore, prefer to "err[] on the side of more hearings rather than fewer," plaintiffs still must carry the burden of articulating a colorable claim and demonstrating that they are likely to suffer irreparable injury if expedited treatment is not granted.[112]

A significant number of motions to expedite have been denied in recent years.[113] Plaintiffs unable to articulate a claim that need be merely "colorable" to survive a motion to expedite later tend to face a serious risk of being unable to plead allegations entitling the plaintiffs to relief under any "conceivable" set of facts—i.e., to survive a motion to dismiss.[114] Furthermore, plaintiffs effectively lose the ability to settle their claims in exchange for therapeutic changes to the deal terms or supplemental disclosures if the challenged transaction closes before the plaintiffs can take and receive discovery and brief a preliminary injunction motion within the timeframe contemplated by the Court's usual, nonexpedited rules. In cases where a motion to expedite has been denied, therefore, it may be more difficult for the plaintiffs to achieve a meaningful settlement and reap the attendant premium attorneys' fees. Indeed, the plaintiffs may not obtain any attorneys' fees at all. Stated differently, cases that proceed with expedited discovery and briefing toward a preliminary

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112. *Giammargo*, 1994 WL 672698, at *2.

113. For example, in an admittedly small sample of all class action or derivative complaints in some way related to M&A transactions filed in the Court of Chancery between January 1, 2011 and June 30, 2012, the authors observed that the plaintiffs filed motions to expedite approximately 50% of the time. Of those motions, defendants challenged approximately 28% (i.e., there were 27 challenges of 98 total motions to expedite). While several motions subsequently were withdrawn by the parties or mooted by further case developments, the Court denied at least 14 motions to expedite, one of which was uncontested, during the observation period. That is, excluding the outlier uncontested motion just mentioned, almost half of the contested motions to expedite were denied (i.e., 13 / 27 = 0.481).

114. *See* Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC, 27 A.3d 531, 536 (Del. 2011) (observing that "[t]he pleading standards governing the motion to dismiss stage of a proceeding in Delaware . . . are minimal," and instructing trial courts to "deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof"). *See also, e.g.*, *In re* Alloy, Inc. S'holder Litig., C.A. No. 5626-VCP, 2011 WL 4863716, at *1, *5 (Del. Ch. Oct. 13, 2011) (granting motion to dismiss in a case where the court earlier had denied a motion to expedite for failure to articulate a colorable disclosure claim).

injunction hearing often are those that already have survived at least one, albeit not especially rigorous, substantive challenge. Hence, the motion to expedite mechanism also operates so as to subdivide shareholder representative cases into at least three general categories: (1) the wholly meritless, for which plaintiffs' counsel probably will receive no fee at all; (2) the colorable, for which counsel may receive some compensation in the form of an ordinary, hourly rate for raising issues that are readily remedied and that, perhaps with the benefit of discovery, will unearth a more substantive claim; and (3) the clearly meritorious, for which counsel have every incentive to prosecute zealously to trial, if necessary.[115] In this way, the Court of Chancery's procedural rules help screen out pure "strike suits" but still encourage plaintiffs' firms to satisfy the watchdog function on which the enforcement of corporation law often depends.[116]

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115. In arguing that the possibility of denial at the motion to expedite stage represents downside risk for plaintiffs' counsel, we are mindful that motions to expedite generally are filed relatively early in the litigation. Therefore, counsel might not yet have invested significant time or other resources in the case, and would have little at risk. Nevertheless, we also appreciate that "more than half of all merger lawsuits settled in 2010 and 2011 were resolved within two months of the filing date" and "[o]nly 15% of lawsuits lasted longer than 100 days before settlement." PINCUS, *supra* note 95, at 4 (emphasis omitted) (citing CORNERSTONE RESEARCH, *supra* note 19, at 3). Furthermore, Chancery judges generally are "willing to award substantial attorneys' fees, even after a relatively quick settlement of the case, [so] that our fee awards are not structured to reward lawyers for needlessly prolonging litigation." Seinfeld v. Coker, 847 A.2d 330, 333 (Del. Ch. 2000). In this fast-paced environment, therefore, the relatively early stage of the motion to expedite ruling is less relevant than one reasonably might suppose to estimating the investment plaintiffs' counsel has made in the case.

116. Some scholars have argued that the Court of Chancery's scrutiny of the fees requested by plaintiffs' counsel contributes, at least in part, to the growing trend of cases being filed by plaintiffs in courts outside of Delaware. *See, e.g.*, John Armour, Bernard Black & Brian Cheffins, *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1370–72 (2012). For example, although Delaware might be an attractive forum in which to bring a truly meritorious case, the Court's ability to identify weak cases relatively early arguably encourages plaintiffs' firms "to bring weak suits in which the only real goal is a quick settlement for fees elsewhere." Strine, Hamermesh & Jennejohn, *supra* note 14, at 18 n.49. Hence, the Court's "continuing efforts to achieve the appropriate balance of incentives" as to any procedural mechanism, Armour, Black & Cheffins, *supra* note 116, at 1372, necessarily is a multifaceted endeavor in that, for example, "simply cutting fees, denying motions to expedite, and motions to dismiss claims are

B. Agents v. Agents: The Fiduciary Duties of Those Who Allege Breach of Fiduciary Duty

The certification of a class and the occasional disqualification of lead plaintiffs as the class representatives is another subject that has received recent attention. Over the last several decades, the identity of lead plaintiffs in shareholder representative actions—and, indeed, the shareholder profile of corporate America[117]—has shifted away from individuals to institutions. One anecdotal example is that the Delaware cases reported from the 1980s and 1990s frequently were captioned "Kahn," "Weinberger," or another individual's last name versus the defendant company. Today (assuming the case does not receive a consolidated "In re" caption because of multiple complaints), the caption is more likely to begin with CalPERS, LAMPERS, or some other institutional investor's name. Constitutional due process requires that lead plaintiffs adequately represent the interests of the shareholder class that they purport to represent.[118] In shareholder representative actions, this requirement takes on a what's-good-for-the-goose-is-good-for-the-gander quality. That is, by filing a complaint alleging breach of fiduciary duty against the directors of a Delaware corporation,

likely to have little impact on the current [multi-jurisdictional litigation] problems" addressed *infra* Part III.C, Strine, Hamermesh & Jennejohn, *supra* note 14, at 18 n.49.

117. "By 1979, institutional investors as a group owned over 36% [of all outstanding corporate equities in the United States]. Today, institutional investors, including public and private pension and retirement funds, mutual funds, and hedge funds, control nearly 70%." Justice Jack B. Jacobs, *"Patient Capital": Can Delaware Corporate Law Help Revive It?*, 68 WASH. & LEE L. REV. 1645, 1650 (2011) (footnote omitted) (citing John Armour, Jack B. Jacobs & Curtis J. Milhaupt, *The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework*, 52 HARV. INT'L L.J. 219, 240 (2011); Leo E Strine, Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1, 10 (2010)).

118. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) ("[T]he Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members."); *see also In re* MCA, Inc. S'holders Litig., 785 A.2d 625, 635 (Del. 2001); Prezant v. De Angelis, 636 A.2d 915, 923 (Del. 1994); Leon N. Weiner & Assocs. v. Krapf, 584 A.2d 1220, 1225 (Del. 1991); Geller v. Tabas, 462 A.2d 1078, 1083 (Del. 1983).

the stockholder-plaintiff "voluntarily assumes the role of fiduciary for the class."[119]

The shift from individual to institutional shareholders, in turn, has increased the number of institutions assuming fiduciary duties on behalf of similarly situated shareholders. Because decentralized decision-making can be difficult, it may be easier for an individual to comply with fiduciary duties than for an institution. An institution acts only through its human agents. For the institution as a whole to act, or refrain from acting, in a certain way, each person in the decision-making network must participate, increasing the potential for breakdown in the lines of communication and honest mistakes. Even an honest mistake, however, can cause the institution to act in ways that may constitute inadequate representation. Accordingly, where adequacy of representation is challenged, deciding whether an institutional lead plaintiff, in fact, has breached its duties to the class requires in-depth analysis. The following two cases, issued within a few months of each other, make this point.

The first case, *Steinhardt v. Howard-Anderson*,[120] illustrates how straightforward the analysis can be where the lead plaintiffs are individuals. Steinhardt, among other plaintiffs, brought a class action on behalf of the shareholders of Occam Networks, Inc., challenging, and moving to enjoin, Occam's then-pending acquisition by Calix, Inc. In pursuing a preliminary injunction, "Steinhardt admittedly had been receiving regular written and oral updates about the litigation"[121] based on "[i]nformation gleaned from Confidential Discovery Material and counsel's [nonpublic] litigation assessments."[122] The court later enjoined the transaction for two weeks so shareholders could consider corrective disclosures.[123] With the benefit of that nonpublic information, which he received as a fiduciary for the class, Steinhardt was able "to conclude that the Merger would be

119. Steinhardt v. Howard-Anderson, C.A. No. 5878-VCL, 2012 WL 29340, at *8 (Del. Ch. Jan. 6, 2012).

120. *Id.*

121. *Id.* at *5.

122. *Id.* at *9.

123. *Id.* at *6.

consummated with no change in price."[124] To benefit himself individually,

> Steinhardt sold Calix short as a way to exit his Occam position. . . . He intended to (and later did) use the shares of Calix stock he would receive when the Merger closed to cover his short sales, even though Steinhardt and his co-plaintiffs were asking the Court to enjoin the closing of the Merger.[125]

Thus, Steinhardt "both liquidate[d] his Occam position and [took] advantage of the arbitrage spread that existed between Calix and Occam at that time."[126]

In Delaware, as elsewhere, use of confidential information by an agent for personal gain constitutes a breach of the fiduciary duty of loyalty.[127] Not surprisingly, therefore, the Court of Chancery granted the defendants' motion for sanctions against Steinhardt, stating:

> Consistent with prior rulings by this Court when confronted with representative plaintiffs who have traded while serving in a fiduciary capacity, Steinhardt and the funds [he managed] are dismissed from the case with prejudice, barred from receiving any recovery from the litigation, required to self-report to the Securities and Exchange Commission, directed to disclose their improper trading in any future application to serve as lead plaintiff, and ordered to disgorge profits in the amount of $534,071.45.[128]

Although that statement could be read to mean that trading by a lead plaintiff is a per se breach of duty, the next case we discuss interpreted *Steinhardt* to be more dependent on its facts.

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124. *Id.* at *10.

125. *Id.* at *4.

126. *Id.* (internal quotation omitted).

127. *See* RESTATEMENT (THIRD) OF AGENCY § 8.05(2) (2006) ("An agent has a duty not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party.").

128. Steinhardt v. Howard-Anderson, C.A. No. 5878-VCL, 2012 WL 29340, at *1 (Del. Ch. Jan. 6, 2012). The court ordered that the disgorged profits be distributed to the class, either immediately or "held in escrow . . . and allocated as part of any future remedy." *Id.* at *15. The court, however, expressly declined "to award the disgorged funds to Calix as a proxy for the class" because Calix's shareholder base includes investors who never held Occam stock before the challenged merger. *Id.*

In *In re Celera Corp. Shareholders Litigation*,[129] the lead plaintiff, the New Orleans Employees' Retirement System (NOERS), challenged Quest Diagnostics' takeover of Celera.[130] On the eve of the preliminary injunction hearing, NOERS settled for supplemental disclosures and modifications to the merger agreement's deal protection provisions.[131] As with all representative litigation, that settlement was conditioned on confirmatory discovery—if NOERS discovered evidence before the final settlement hearing that suggested its claims were stronger than NOERS had realized, it could rescind the settlement and litigate post-closing damages.[132] Importantly, because of how the deal was structured, there ultimately was a four-day period during which Quest's acquisition of Celera had become an absolute certainty, yet Celera's stock continued to trade on the secondary market at around $8.05, five cents more than the merger price.[133] "[A]fter all material information regarding the lawsuit, settlement, and transaction were disclosed to the marketplace," NOERS's investment advisor saw "a risk-free arbitrage opportunity" and sold all of its Celera shares at $8.05 before the transaction officially closed.[134] For that and other reasons, however, Celera's largest shareholder objected to the

129. *In re* Celera Corp. S'holders Litig., C.A. No. 6304-VCP, 2012 WL 1020471 (Del. Ch. Mar. 23, 2012), *aff'd in part and rev'd in part*, No. 212, 2012 WL 6707736 (Del. Dec. 27, 2012).

130. *Id.* at *1.

131. *Id.* at *6–7.

132. *Id.* at *7.

133. *Id.* Specifically, the deal "was structured in two tiers of, first, a tender offer by Quest for any and all Celera shares at $8.00 per share and, second, a back-end squeeze-out merger at the same price . . . ." *Id.* at *1. Moreover, Celera had granted Quest a so-called top-up option, effectively permitting the back-end squeeze-out merger to close quickly and without a shareholder vote pursuant to DGCL Section 253. *Id.*; *see also* DEL. CODE ANN. tit. 8, § 253 (2010) (allowing mergers without a shareholder vote if the other merging entity owns at least 90% of the corporation's outstanding stock entitled to vote). The four-day window mentioned above reflected the time between when Quest publicly announced the success of the front-end tender offer and its intent to exercise the top-up option and when it had taken all the necessary formalities to exercise the top-up option and effect a short-form merger under Section 253. *In re Celera*, 2012 WL 1020471, at *1. For more on top-up options, see Olson v. EV$_3$, Inc., C.A. No. 5583–VCL, 2011 WL 704409, at *1–3 (Del. Ch. Feb. 21, 2011).

134. *In re Celera*, 2012 WL 1020471, at *15 (footnote omitted).

settlement, claiming that NOERS no longer had standing to recover monetary damages, therefore lacked any incentive to perform adequate confirmatory discovery, and essentially had abandoned the class in breach of its fiduciary duties.[135] Moreover, between the settlement hearing and the date the opinion was issued, the objector advised the court of no less than three other cases involving similar issues where institutional investors had served as lead plaintiffs.[136]

The *Celera* court drew on a wealth of precedent—including cases from the 2000s, 1990s, and even the 1930s—in identifying why certain conduct is or is not consistent with a lead plaintiff's fiduciary duties to the class.[137] After discussing those precedents, the court concluded that NOERS's decision to sell all of its Celera stock arguably was "careless and cavalier" because of "the significant waste of the Court's and the parties' resources caused by th[e] unnecessary side issue."[138] Nonetheless, the court concluded that NOERS's decision was neither analogous to *Steinhardt* nor indicative of insider trading or obvious disloyalty: "notwithstanding its questionable conduct, NOERS still satisfies, if only barely, the requirement for an appropriate class representative," the court wrote.[139] On that basis, the court certified the class with NOERS as the lead plaintiff,[140] a finding that the Supreme Court upheld on appeal.[141] In its opinion in *Celera*, however, the Court of Chancery underscored that

> the frequency with which Delaware courts have had to address the conduct of lead plaintiffs in recent months is troubling.

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135. *Id.* at *1.

136. *See id.* at *15 (noting that the objecting shareholder cited three recently-decided cases to support its arguments).

137. *See id.* at *9–16 (citing a variety of cases in analyzing adequacy and typicality under Court of Chancery Rule 23(a)).

138. *Id.* at *1.

139. *Id.* at *16; *see also id.* at *15–16 (distinguishing the three cases cited by the objector).

140. *Id.* at *20 (certifying the class with NOERS as the lead plaintiff).

141. *In re* Celera Corp. S'holder Litig., No. 212, 2012 WL 6707736, at *7-10 (Del. Dec. 27, 2012). The Supreme Court reversed, however, on a narrower issue, ruling that individual class members deserved the right to opt out of the settlement if they wished because of "due process concerns" stemming from, among other things, NOERS's bare adequacy to represent the class. *Id.* at *13.

> When a class representative purports to object on behalf of itself and all others similarly situated only to decide later that the objected-to conduct may not have been all that bad, that representative is prone to appear more concerned about its own interests than those of the class. That appearance undermines the trust shareholders place in lead plaintiffs and, in turn, effaces courts' confidence in the adequacy of the representation that a lead plaintiff is capable of providing. . . . Lead plaintiffs must remain committed to fulfilling their obligations to those they represent throughout the litigation. Among other things, that should include thinking about more than the technical permissibility of their conduct, but also how their conduct is likely to be perceived. Here, NOERS engendered a host of legitimate criticisms to its commitment to this case by choosing to take advantage of a "risk-free arbitrage" opportunity. Technically permissible or not, that choice failed to reflect an appropriate level of regard and respect for NOERS's position as a fiduciary for the class.[142]

Suffice it to say that Delaware courts expect representative or lead plaintiffs to take seriously their fiduciary responsibilities to the class of shareholders or company (in a derivative action) they represent and to exercise appropriate care to meet those obligations. Those same requirements apply equally to institutional investors that undertake to represent a class or company.

C. Hercules and the Hydra: The Multi-Jurisdictional Litigation Problem

Growth in deal litigation has led in turn to an increase in the number of jurisdictions where any particular transaction is challenged. For example, over half of the shareholder class actions against Delaware corporations in 2010 were filed in both Delaware and at least one other jurisdiction.[143] By comparison, multi-jurisdictional litigation occurred in only 8.6% of litigated

142. *In re* Celera Corp. S'holders Litig., C.A. No. 6304-VCP, 2012 WL 1020471, at *16 (Del. Ch. Mar. 23, 2012).

143. Johnson, *supra* note 64, at 39.

M&A transactions in 2005.[144] As even prominent plaintiffs' attorneys have commented:

> An all-too-familiar pattern emerges following the announcement of the acquisition of a Delaware corporation. Some of the plaintiffs' bar will race to file a class-action lawsuit in the Delaware Court of Chancery. Other plaintiffs' lawyers will race to a courthouse in the state of the target's headquarters. A third set of firms will file "tag-along" actions in federal court asserting the same state law claims as the other plaintiffs, but incorporating a proxy claim under Section 14A of the Securities Exchange Act as a basis for the federal court's jurisdiction. The result is parallel litigation that wastes judicial resources, burdens defendants, and, most importantly, threatens shareholders.[145]

By forcing director-defendants to combat essentially the same adversary with many heads—as Hercules did with the Hydra[146]—multi-jurisdictional shareholder litigation imposes additional burdens on, and amplifies various risks for, all parties involved. For example, "defense counsel are acutely aware [of] which plaintiffs' counsel are 'pilgrims' (i.e., early and easy settlers)."[147] Permitting defendants to negotiate global releases of all the pending cases with the most supine plaintiffs' firm harms shareholders.[148] Likewise, "[s]hareholders are also hurt when a plaintiffs' firm in one of the competing jurisdictions seeks to accelerate the procedural posture of its case by pursuing a temporary restraining order or some other form of extra-expedited relief that is not really appropriate for the facts of the

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144. Cain & Davidoff, *supra* note 17, at 13–14.

145. Mark Lebovitch, Jerry Silk & Jeremy Friedman, *Improving Multi-Jurisdictional, Merger-Related Litigation*, AM. B. ASS'N, COM. & BUS. LITIG. COMM., Feb. 14, 2011, at 1, http://www.blbglaw.com/news/publications/data/00132/_res/id=sa_File1/Lebovitch_Silk_Friedman_reprint.pdf (accessed by searching "merger-related" in news search box). Mark Lebovitch and Jerry Silk are partners and Jeremy Friedman is an associate of Bernstein Litowitz Berger & Grossmann, LLP.

146. *See* MARK P.O. MORFORD & ROBERT J. LENARDON, CLASSICAL MYTHOLOGY 567–68 (8th ed. 2007) (noting that for each head Hercules removed, the Hydra grew two more).

147. Lebovitch, Silk & Friedman, *supra* note 145, at 2.

148. *See supra* notes 67–74 and accompanying text (discussing the risks inherent in releasing claims in settlement).

case."[149] Perhaps most problematic is the possibility that two or more jurists in competing jurisdictions will refuse to stay their respective cases in favor of litigation pending in another forum, subjecting defendants to simultaneous litigation in multiple fora, wasting judicial resources, and risking inconsistent findings of fact or interpretations of law.[150] Indeed, this very risk materialized in recent years when then-Vice Chancellor Strine and New York State Supreme Court Justice Cahn proceeded forward on parallel tracks with separate actions challenging the same going-private transaction involving the Topps Company.[151]

With those risks in mind, various members of the Court of Chancery and the corporate bar have proposed several solutions with varying success. One approach relies on traditional comity between sister state courts. Where the authoritative development of Delaware law is at stake in disputes involving entities that Delaware itself has created, Delaware arguably has the strongest

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149. Lebovitch, Silk & Friedman, *supra* note 145, at 2; *see also* Strine, Hamermesh & Jennejohn, *supra* note 14, at 89 (noting the "perverse incentives" in multi-forum litgation for "a plaintiffs' law firm to 'plant a flag' in a distinct forum[,] afford[ing] that firm a degree of leverage in negotiating fee-sharing, regardless of whether initiating such litigation is beneficial to the corporation, its shareholders, or society as a whole.").

150. *See In re* Allion Healthcare Inc. S'holders Litig., C.A. No. 5022-CC, 2011 WL 1135016, at *4 (Del. Ch. Mar. 29, 2011) (noting "the possibility that two judges would apply the law differently or otherwise reach different outcomes . . . would then leave the law in a confused state and pose full faith and credit problems for all involved").

151. *In re* Topps Co. S'holders Litig., 924 A.2d 951, 953 (Del. Ch. 2007) ("[W]hen this court is clearly an efficient and convenient forum prepared to issue a timely ruling, public policy and comity indicate that this state's courts should answer the question of whether the pending Merger involving Topps should be enjoined."); *In re* Topps Co., Inc. S'holders Litig., No. 600715/07, 2007 WL 5018882, at *3–5 (N.Y. Sup. Ct. June 8, 2007) ("[T]he Chancery Court's belief that New York law requires this court to dismiss or stay this action in deference to the Delaware action is based on outdated and incorrect legal principles."). On June 13, 2007, five days after Justice Cahn denied the defendants' motion to stay the proceedings in New York, the New York Appellate Division, First Department, granted an interim stay of the litigation in New York. *In re* Topps Co., Inc. S'holders Litig., 2007 N.Y. Slip Op. 74300(U), 2007 WL 2128297, at *1 (N.Y. App. Div. July 19, 2007) (vacating the interim stay). The next day, June 14, Chancellor Strine issued an opinion preliminarily enjoining the shareholder meeting to vote on the pending transaction. *In re* Topps Co. S'holders Litig., 926 A.2d 58, 63 (Del. Ch. 2007).

interest in having its courts articulate those legal rules.[152] Consistent with the strength of that interest, Delaware provides expedited, direct appeals to its Supreme Court.[153] In addition, although Delaware courts, for comity reasons, generally "will defer to a first-filed action in another forum and will stay Delaware litigation pending adjudication of the same or similar issues in the competing forum,"[154] the Court of Chancery has held that a formulaic, "first-filed" rule should "not apply with full force" in the case of competing stockholder representative actions dispersed throughout multiple jurisdictions,[155] because "less deference [is due] to the speedy plaintiff's choice of forum."[156] Rather, "the chartering state['s] . . . powerful interest in ensuring the uniform interpretation and enforcement of its corporation law" warrants greater consideration.[157] Consequently, Delaware courts treat competing shareholder representative actions filed closely together in time as contemporaneously filed, allowing a more deliberative analysis of which of the competing courts is best positioned to adjudicate the dispute.[158] That analysis takes

152. *See* VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1112–13 (Del. 2005) ("[I]n order to prevent corporations from being subjected to inconsistent legal standards, the authority to regulate a corporation's internal affairs should not rest with multiple jurisdictions."); *In re Topps Co.*, 924 A.2d at 954–57 ("In a situation like this one, when this court is clearly an efficient and convenient forum prepared to issue a timely ruling, public policy and comity indicate that this state's courts should answer the question . . . ."); Strine, Hamermesh & Jennejohn, *supra* note 14, at 85 (arguing that the most important interest affected by shareholder representative suits "is the interest of the corporation's equity investors," who, as an otherwise dispersed group united by "the state of incorporation whose law they have chosen to govern their investment"); *see also* Edgar v. MITE Corp., 457 U.S. 624, 645–46 (1982) (holding no state has a legitimate interest "in regulating the internal affairs of foreign corporations").

153. DEL. CONST. art. 4, § 11, cl. 4.

154. WOLFE & PITTENGER, *supra* note 16, § 5.01 (citing McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co., 263 A.2d 281, 283 (Del. 1970)).

155. Biondi v. Scrushy, 820 A.2d 1148, 1150 (Del. Ch. 2003).

156. Ryan v. Gifford, 918 A.2d 341, 349 (Del. Ch. 2007).

157. *In re* Topps Co. S'holders Litig., 924 A.2d 951, 960 (Del. Ch. 2007).

158. *See In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 116–17 (Del. Ch. 2009) (treating actions filed "within the same general time frame" in New York and Delaware as "contemporaneously filed").

place under a general *forum non conveniens* rubric.[159] At the same time, the Court of Chancery has deferred to sister states where the particular circumstances of a case indicate that that state's interests are greater than Delaware's,[160] but rarely will that occur on matters concerning the application of Delaware corporation law.[161]

Another proposed solution is the so-called "One Forum Motion,"[162] where relatively early in the litigation, defendants'

159. *See* WOLFE & PITTENGER, *supra* note 16, § 5.01 ("In addition to the comity considerations articulated in *McWane*, the Court of Chancery, in assessing motions to stay Delaware litigation under the first-filed rule, frequently analyzed the same 'practicality' factors traditionally applied under the *forum non conveniens* doctrine.").

160. *See, e.g.*, TA Instruments-Waters, LLC v. Univ. of Conn., 31 A.3d 1204, 1210 (Del. Ch. 2011) ("The motion to expedite is denied out of respect for the superior interests of a sister state."); Transcript of Record at 23–27, Walton v. Apollo Global Mgmt., LLC (Del. Ch. Jan. 29, 2010) (C.A. No. 5216-VCS) (staying action involving a publicly traded Delaware LLC in favor of adjudication in Ohio because the LLC Agreement expressly provided for the application of Ohio fiduciary duty law); *see also* Diedenhofen-Lennartz v. Diedenhofen, 931 A.2d 439, 451 (Del. Ch. 2007) (noting that because of Delaware's strong interest in adjudicating its own corporation law, "Delaware has a related and equally important interest in affording comity to the courts of other jurisdictions when a dispute arises under foreign business law." (footnote omitted)).

161. That did occur, however, in March and April 2008 when shareholders of Bear Stearns commenced independent actions in Delaware and New York challenging the investment bank's eleventh-hour merger with JPMorgan, a transaction that had been brokered by the U.S. Treasury and the Federal Reserve to quarantine a severe shock to the national, and even international, financial system. *See generally In re* Bear Stearns Cos., Inc. S'holder Litig. (*Bear Stearns (Del.)*), C.A. No. 3643-VCP, 2008 WL 959992 (Del. Ch. Apr. 9, 2008); *In re* Bear Stearns Litig. (*Bear Stearns (N.Y.)*), 870 N.Y.S.2d 709 (N.Y. Sup. Ct. 2008). Because the "unusual set of facts [were] unlikely to recur," because the New York cases were first filed and the New York court was attending diligently to them, and because the "extraordinary circumstances" required a rapid response from a competent court free from distractions, the Court of Chancery stayed the Delaware actions in favor of adjudication in New York. *Bear Stearns (Del.)*, 2008 WL 959992, at *8. (Ultimately, the New York plaintiffs withdrew their motion for a preliminary injunction and sought only post-closing damages. *See Bear Stearns (N.Y.)*, 870 N.Y.S.2d at 724 (reciting the procedural history of the case).) Exigencies such as these, however, are exceptional.

162. The One Forum Motion is referred to in some circumstances as a "Savitt motion" after its apparent inventor, William D. Savitt of Wachtell Lipton Rosen & Katz. *See, e.g.*, Nierenberg v. CKx, Inc., C.A. Nos. 5545–CC, 6519–CC, 6524–CC, 2011 WL 2185614, at *1 (Del. Ch. May 27, 2011) (referring to one forum motion as a Savitt motion although neither Savitt nor his firm filed the

counsel file concurrently in all jurisdictions a single motion requesting that the judges communicate directly and confer among themselves about which of the parallel actions should proceed and which should be stayed.[163] It appears that in Delaware the Chancellor and four Vice Chancellors are receptive to such motions, in that these judges "have endorsed the approach and agreed to reach out to their judicial counterpart in the parallel litigation."[164] The effectiveness of such motions, however, remains somewhat uncertain. Under the doctrine surrounding injunctions in aid of jurisdiction, for example, the Court of Chancery "is empowered to enjoin a party . . . from removing the subject of the controversy to a foreign jurisdiction by filing a later action or proceeding in a foreign forum."[165] In contrast, some have suggested that, in concurrently filed, multi-jurisdiction cases, each court "lack[s] the power to compel action in the [foreign] litigation absent cooperation from the [foreign] judge";[166] or, as put more forcefully by some commentators, "they are unnecessary where a foreign court is predisposed to defer to

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motion or represented any party to the case); *see also* C. Barr Flinn & Kathaleen St. J. McCormick, *The Delaware Court of Chancery Endorses One Forum Motions as a Solution to Multi-Jurisdictional Litigation*, YOUNG CONAWAY STARGATT & TAYLOR, LLP, 1 n.2 (Nov. 21, 2011), http://www.youngconaway.com (accessed by searching the document title under the publications tab) (last visited Feb. 6, 2013) (noting "the first One Forum Motion in Delaware was filed [by Savitt and his co-defense counsel] in *In re Wyeth Shareholder Litigation*") (on file with the Washington and Lee Law Review).

163. *See generally* Flinn & McCormick, *supra* note 162.

164. *Id.* at 3. Indeed, Chancellor Chandler, who retired from the bench in 2011, indicated that one forum motions were his "personal preferred approach" to address multi-fora deal litigation. Allion Healthcare Inc. S'holders Litig., C.A. No. 5022-CC, 2011 WL 1135016, at *4 n.12 (Del. Ch. Mar. 29, 2011).

165. Ivanhoe Partners v. Newmont Mining Corp., C.A. Nos. 9281, 9221, 1988 WL 34526, at *3 (Del. Ch. Apr. 7, 1988).

166. Flinn & McCormick, *supra* note 162, at 3. In at least one case, for example, the court expressly "grant[ed] Defendants' motion [to proceed in one jurisdiction] to the extent of confirming that this consolidated action in Delaware shall proceed," but with the caveat that, "[a]s to whether the related actions before [the foreign judge] should be dismissed or stayed, I express no opinion." Letter from Donald F. Parsons, Jr., Vice Chancellor, Delaware Court of Chancery, to P. Bradford deLeeuw, Esq., et al., *In re* Comverge, Inc. S'holders Litig., C.A. No. 7368-VCP (Del. Ch. Apr. 13, 2012) (on file with the Washington and Lee Law Review).

the forum whose law is at stake and useless where a judge is determined to keep the case."[167] Hence, like comity, this solution ultimately may be more aspirational than actual. Nevertheless, the relatively recent invention of the One Forum Motion itself illustrates the virtually real-time engagement between the corporate bar and the Delaware courts in responding to the various dynamics affecting shareholder representative litigation specifically and the law of corporations more generally.

At least one other prospective solution might be more effective, however. Recently, Delaware companies have been amending their certificates of incorporation and corporate bylaws to include "exclusive forum selection" clauses that would require shareholders to litigate so-called "internal affairs" claims in Delaware.[168] There is nonbinding—and arguably conflicting—precedent regarding the enforceability of these forum selection clauses,[169] "and not all courts enforce forum choices even in

167. Strine, Hamermesh & Jennejohn, *supra* note 14, at 79 n.217.

168. *See generally* Frank J. Aquila & Anna M. Kripitz, *Designating Delaware: The Rise of Exclusive Forum Selection Provisions*, PRAC. L. CO. (Oct. 1, 2012), http://us.practicallaw.com/0-521-5321 (last visited Feb. 6, 2013) ("Facing duplicative and costly litigation in different courts, Delaware companies are increasingly adopting exclusive forum selection provisions that require shareholder class action and derivative lawsuits to be filed in a single court.") (on file with the Washington and Lee Law Review); Frederick H. Alexander & Daniel D. Matthews, *The Multi-Jurisdictional Stockholder Litigation Problem and the Forum Selection Solution,* CORP. COUNS. WEEKLY, May 11, 2011 (discussing, as a factual matter, recent charter and bylaw amendments to designate the Delaware Court of Chancery as the exclusive forum for shareholder suits). For a scholarly analysis on the rise of exclusive forum selection clauses in corporate charters and bylaws, see Joseph A. Grundfest, *The History & Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333 (2012).

169. *Compare In re* Revlon, Inc. S'holders Litig., 990 A.2d 940, 960 & n.8 (Del. Ch. 2010) (suggesting, in dictum, that a forum selection clause in a corporate charter or bylaw, because both are construed as contracts, could be enforceable), *with* Galaviz v. Berg, 763 F. Supp. 2d 1170, 1174–75 (N.D. Cal. 2011) (holding, as a matter of federal procedure, that a forum selection clause contained only in a bylaw (as opposed to a corporate charter) and adopted unilaterally by the board of directors (as opposed to with approval from shareholders) is unenforceable). The outcome of the *Galaviz* decision also might be limited by its facts: an alleged breach of fiduciary duty already had occurred when the board adopted the forum selection bylaw. *Galaviz*, 763 F. Supp. 2d at 1172. In refusing to enforce the bylaw, the court emphasized that "[p]articularly where, as here, the bylaw was adopted by the very individuals who are named

bilateral contracts."[170] In February 2012, shareholders brought suit in the Court of Chancery to challenge head-on the legality of such charter provisions and bylaws under Delaware law.[171] The cases, currently assigned to the Chancellor, have not yet been decided, but are being followed closely by scholars and the practicing bar alike.[172]

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as defendants, and after the alleged wrongdoing took place, there is no element of mutual consent" necessary to sustain the forum selection clause as a freely negotiated contractual provision. *Id.* at 1171. It is not clear whether the same result necessarily follows if the alleged misconduct occurs after the bylaw's adoption.

170. Strine, Hamermesh & Jennejohn, *supra* note 14, at 79 n.217 (citing Idacorp, Inc. v. Am. Fiber Sys., Inc., No. 1:11–cv–00654, 2012 WL 4139925 (D. Idaho Sept. 19, 2012)).

171. Frank Aquila & Anna Kripitz, *Forum-Selection Provisions in Delaware*, CORP. COUNS. (Aug. 27, 2012), http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202568858164&ForumSelection_Provisions_in_Delaware (last visited Feb. 6, 2013) (on file with the Washington and Lee Law Review). More specifically, the class actions challenged the

> validity of forum selection bylaws unilaterally adopted by the boards of 12 Delaware companies. While 10 of the complaints have since been dismissed following the repeal of the bylaws in question, the defendants in the mooted cases were unable to stay plaintiffs' fee petitions, which may be an indication of how the court will rule on the issue of validity in the two cases (against Chevron Corporation and FedEx Corporation) that are still proceeding.

Id.

172. *See, e.g.*, *id.* ("[I]t it is clear that forum-selection provisions will continue to be an important topic in corporate governance circles in 2013 and beyond."); Francis Pileggi, *Multiple New Suits Challenge Exclusive Forum Selection Bylaws in Delaware Court of Chancery*, DEL. CORP. & COM. LITIG. BLOG (Feb. 7, 2012), http://www.delawarelitigation.com/2012/02/articles/chancery-court-updates/multiple-new-suits-challenge-exclusive-forum-selection-bylaws-in-delaware-court-of-chancery/ (last visited Feb. 6, 2013) ("[T]oday we find noteworthy a bevy of new lawsuits just filed in the Delaware Court of Chancery.") (on file with the Washington and Lee Law Review).

As of October 2012, "at least 200 companies [had] designate[d] Delaware in their governing documents as the exclusive venue for intra-company disputes." Aquila & Kripitz, *supra* note 168, at 50. Only twelve public companies, however, did so by submitting a proposed charter or bylaw amendment to shareholders for a vote; the remainder implemented the provision either before an initial public offering (IPO) or as a board-approved bylaw amendment. *Id.* at 51. Moreover, both proxy advisory firms and activist shareholders have opposed forum selection provisions in governing instruments. *Id.* Therefore, outside of the IPO context, companies still might face implementation hurdles as a practical matter regardless of whether the courts uphold exclusive forum selection provisions as a legal matter.

D. 220 or Not 220: Whether 'Tis Nobler to Risk Outrageous Fortune and File Fast or to Take Up the Tools at Hand

Thus far, we have addressed issues that typically arise in "direct actions." For example, when corporate directors breach their fiduciary duty in the context of a merger, the breach generally harms shareholders directly by divesting them of their stock ownership. For that reason, the shareholders themselves have a claim that they can bring directly against the board and other corporate fiduciaries.[173] Other breaches of duty, however, harm the corporation itself. These breaches harm the shareholders only derivatively as a function of the shareholders' pro rata investment in the corporation.[174] Examples include excessive or wasteful compensation or a fiduciary's usurpation of a corporate opportunity.[175] In such cases, the corporation itself possesses, and is entitled to enforce, the claim against the wrongdoers.[176] Normally, the decision whether to initiate a lawsuit on the corporation's behalf is vested in the company's board of directors.[177] But when the alleged wrongdoers are the very same directors who must make that decision, potential conflicts of interest necessarily arise. For potential conflicts of this kind, so-called "derivative actions" provide a remedy.[178]

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173. As with any general rule, there are, of course, exceptions:

> [The test for whether a direct cause of action exists] is a two-element test: (1) who was injured and (2) who should recover . . . . [M]entioning a merger does not talismanically create a direct action. Instead, the court must look to all the facts of the complaint and determine for itself whether a direct claim exists.

Dieterich v. Harrer, 857 A.2d 1017, 1027 (Del. Ch. 2004).

174. *See* Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1036–37 (Del. 2004) (noting that a derivative suit allows shareholders to sue for harms felt by the corporation, and only indirectly by the shareholders).

175. *See, e.g.*, Schreiber v. Bryan, 396 A.2d 512, 514 (Del. Ch. 1978) (deciding a "derivative action involving allegations of waste of corporate assets and diversion of corporate opportunity").

176. *See* Schoon v. Smith, 953 A.2d 196, 208 n.45 (Del. 2008) ("Generally a cause of action belonging to a corporation can be asserted only by the corporation.").

177. *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 120 (Del. Ch. 2009).

178. *See Schoon*, 953 A.2d at 208 (noting the purpose of the derivative action

Since at least the early 1900s, the law of corporations has permitted shareholders to obtain judicial permission to litigate the rights of the corporation, but only if the shareholders first attempt to persuade the board to redress the wrong or are able to show the court why such an attempt would be futile.[179] By empowering a shareholder to enforce the company's claim against its directors, derivative actions upset the normal balance of rights and obligations between stockholders and directors that are fundamental to the law of corporations.[180] Consequently, the importance of the shareholder's pre-suit demand requirement is hard to overstate.[181] Rather than impose an ordinary "notice pleading" standard, Court of Chancery Rule 23.1 requires plaintiffs in derivative actions to plead with particularity that either: (1) a majority of the board is so interested or so lacks independence, or (2) the challenged transaction is so beyond the bounds of reasonable business judgment, that the court can infer the directors simply are incapable of deciding objectively whether to pursue or otherwise redress the corporation's claims.[182]

Pleading a claim with particularity based solely on publicly available information, however, can be difficult.[183] An important tool to make that task more manageable is DGCL Section 220.

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is to overcome conflicts of interest and, thus, injustices to the corporation).

179. WOLFE & PITTENGER, *supra* note 16, § 9.02[b][3][ii]; *see also* Baker v. Bankers' Mortg. Co., 129 A. 775, 776 (Del. Ch. 1925) ("A stockholder may under certain circumstances sue in equity in right of the corporation. Where he does so, however, he asserts the right of the corporation. This he is not permitted to do, unless the circumstances be such that the corporation will not sue.").

180. *See* Hamilton Partners, L.P. v. Englard, 11 A.3d 1180, 1202 (Del. Ch. 2010) ("[A] derivative action impinges on the managerial freedom of directors . . . .").

181. *See* Aronson v. Lewis, 473 A.2d 805, 811–12 (Del. 1984) ("[T]he demand requirement . . . exists [to give effect to] the fundamental precept that directors manage the business and affairs of corporations."), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

182. DEL. CT. CH. R. 23.1(c); *Brehm*, 746 A.2d at 253–54; Rales v. Blasband, 634 A.2d 927, 930 (Del. 1993); *Aronson*, 473 A.2d at 814.

183. *See* Kenneth B. Davis, Jr., *The Forgotten Derivative Suit*, 61 VAND. L. REV. 387, 399–400 (2008) ("[P]rospective litigants encounter a practical obstacle to mustering sufficient facts to satisfy *Aronson*'s 'particularity' requirement . . . . One Delaware judge has noted the almost impossible burden that results when the relevant facts are not a matter of public knowledge." (internal quotation marks omitted)).

That statute permits a stockholder to seek court-ordered inspection of the corporation's books and records if the stockholder has a "proper purpose . . . reasonably related to such person's interests as a stockholder."[184] Investigating corporate malfeasance to satisfy the pre-suit demand requirement qualifies as such a purpose, provided the shareholder can present a credible basis for suspecting wrongdoing.[185] As the Delaware Supreme Court recently reiterated, "Delaware courts have strongly *encouraged* stockholder-plaintiffs to utilize Section 220 *before* filing a derivative action . . . ."[186] Numerous other cases similarly exhort prospective derivative plaintiffs to employ the "tools at hand," referring to a books and records action pursuant to DGCL Section 220, before commencing a plenary action,[187]

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184. DEL. CODE ANN. tit. 8, § 220(b) (2010); *see also id.* § 220(c)(3) (affording rights of inspection by court order upon showing a proper purpose). An example of relevant "books and records" that a shareholder might seek would be the internal investigation report that a board considered before terminating an officer without cause and with a lucrative severance.

185. *See* King v. VeriFone Holdings, Inc. (*King I*), 994 A.2d 354 (Del. Ch. 2010) ("To cite one example, investigating corporate mismanagement . . . is a proper purpose for seeking a Section 220 books and records inspection."), *rev'd on other grounds*, 12 A.3d 1140, 1145 (Del. 2011).

186. King v. VeriFone Holdings, Inc. (*King II*), 12 A.3d 1140, 1145 (Del. 2011) (emphasis added); *accord* South v. Baker, C.A. No. 7294-VCL, 2012 WL 4372538, at *1 n.1 (Del. Ch. Sept. 25, 2012) ("[O]ur Supreme Court has admonished stockholders repeatedly to use Section 220 . . . before filing suit" (footnote omitted)); La. Mun. Police Emps.' Ret. Sys. v. Pyott, 46 A.3d 313, 344 & n.22 (Del. Ch. 2012) (same).

187. *See* Beam v. Stewart, 845 A.2d 1040, 1056–57 (Del. 2004) (noting that the plaintiff had failed to plead sufficient facts to "support a reasonable doubt of independence" and asserting that "had [plaintiff] first brought a Section 220 action seeking inspection of . . . books and records she might have uncovered facts that would have created a reasonable doubt"); White v. Panic, 783 A.2d 543, 556–57 (Del. 2001) ("[T]his case demonstrates the salutary effects of a rule encouraging plaintiffs to conduct a thorough investigation, using the 'tools at hand' including the use of actions under [DGCL] § 220 for books and records, before filing a complaint."); Brehm v. Eisner, 746 A.2d 244, 266–67 (Del. 2000) ("Plaintiffs may well have the 'tools at hand' to develop the necessary facts for pleading purposes. For example, plaintiffs may seek relevant books and records of the corporation under Section 220 . . . ."); Sec. First Corp. v. U.S. Die Casting & Dev. Co., 687 A.2d 563, 567 & n.3 (Del. 1997) (noting that DGCL Section 220's use to gather information is encouraged); Rales v. Blasband, 634 A.2d 927, 934 & n.10 (Del. 1993) ("[A] stockholder who has met the procedural requirements and has shown a specific proper purpose may use the summary procedure embodied in [DGCL Section 220] to investigate the possibility of corporate

because representative litigation—including derivative actions—cannot "optimally serve investors unless suits are actually filed on the basis of a real concern that wrongdoing has occurred and after a proper investigation."[188]

But where, as has become common today, multiple plaintiffs file multiple complaints in multiple jurisdictions, plaintiffs and their firms risk losing their chance to participate in the leadership structure prosecuting the derivative suit if they dutifully pursue a Section 220 action. To avoid that risk, many plaintiffs engage in a race to the courthouse and file a complaint fast on the heels of a public announcement of some suspicious event without undertaking any prior investigation.[189] Given most jurisdictions' liberal rules of civil procedure favoring dismissal with leave to amend,[190] competition for litigation arguably

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wrongdoing.").

188. *King I*, 994 A.2d at 356.

189. As one relatively recent case articulated the dilemma for plaintiffs' attorneys,

> [u]nder a first-to-file system, plaintiffs' lawyers cannot act as stockholders collectively would want because by proceeding deliberately, a law firm risks losing control of the case to competitors who file immediately. For fast-filing lawyers, the resulting action has the dynamics of a lottery ticket. In most cases, the fast-filing plaintiff will not have pled a derivative claim that can overcome Rule 23.1. But in the rare case, fate may bless the fast-filer with something implicating the board, or a court might be offended by the magnitude of the corporate trauma and allow the derivative action to proceed.

Pyott, 46 A.3d at 346.

190. *See, e.g.*, FED. R. CIV. P. 15(a)(2) ("The court should freely give leave [to amend a pleading] when justice so requires."); D.C. SUPER. CT. R. CIV. P. 15(a) ("[L]eave shall be freely given when justice so requires."). Notably, Delaware is not such a jurisdiction, at least not in the Court of Chancery. Court of Chancery Rule 15(aaa) provides, in pertinent part, that dismissal under Rule 12(b)(6) or 23.1 "*shall be with prejudice* (and in the case of complaints brought pursuant to Rules 23 or 23.1 with prejudice to the named plaintiffs only) unless the court, for good cause shown, shall find that dismissal with prejudice would not be just under all the circumstances." DEL. CT. CH. R. 15(aaa) (emphasis added). Thus, in Chancery, "when a plaintiff is confronted with a motion to dismiss under Rules 12(b)(6) or 23.1, he or she must either 'seek leave to amend [the] complaint or stand on [the] complaint and answer the motion to dismiss,'" but there typically will be no post-dismissal opportunity to buttress and refile a deficient pleading. Zucker v. Andreessen, C.A. No. 6014-VCP, 2012 WL 2366448, at *2 (Del. Ch. June 21, 2012) (alteration in original) (quoting MCG Capital Corp. v. Maginn,

transforms plaintiffs' difficult task of pleading with particularity into what some defendants view as a form of Sisyphean punishment. According to legend, the Greek gods punished King Sisyphus for his hubris by forcing him to roll a massive stone up a steep hill, only to have it roll back down again as he reached the summit, thus consigning the once-proud king to an eternity of useless effort and unending frustration.[191] Today, a plaintiff can: (1) haphazardly cobble together a complaint that fails to plead demand excusal with particularity; (2) quickly file that complaint in a jurisdiction with liberal pleading rules in an effort to ensure "lead plaintiff" status; (3) perhaps suffer dismissal under Rule 23.1, but with leave to amend; (4) then pursue a Section 220 action in Delaware; and (5) only thereafter, refile a properly researched complaint. In this environment, one could argue, defendants face the wasteful exercise of litigating repeatedly the issue of demand excusal, much like King Sisyphus and his uphill struggle.[192]

Chancellor Strine addressed this problem in *King v. VeriFone*.[193] Sympathetic to Sisyphean frustration, he wrote, "the intended end of the derivative lawsuit is not furthering the interests of fast-filing plaintiffs or their lawyers; rather, the derivative suit is one of several tools that stockholders may use to further the *corporation's* best interests."[194] To "encourage the kind of litigation conduct that is more likely to benefit investors as a class,"[195] he attempted to establish a bright-line rule: once a stockholder files a derivative action complaint, that stockholder is barred from pursuing a related books and record action thereafter.[196] That rule effectively would have forced plaintiffs to

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C.A. No. 4521-CC, 2010 WL 1782271, at *5 (Del. Ch. May 5, 2010)).

191. MORFORD & LENARDON, *supra* note 146, at 354.

192. *See* Stephen A. Radin, *The New Stage of Corporate Governance Litigation: Section 220 Demands-Reprise*, 28 CARDOZO L. REV. 1287, 1297–98 (2006) (noting that improper demand results in the waste of resources of the litigants and the Court).

193. *King I*, 994 A.2d 354, 356 (Del. Ch. 2010), *rev'd on other grounds*, 12 A.3d 1140, 1145 (Del. 2011).

194. *Id.* at 362 (emphasis added).

195. *Id.*

196. *See id.* at 356–57 ("[S]tockholders who seek books and records in order to determine whether to bring a derivative suit should do so before filing. . . .

exhaust diligently the "tools at hand" and prepare the strongest possible complaint before filing it.[197] The Delaware Supreme Court reversed.[198] While recognizing the potential abuse of Section 220 and explicitly continuing to encourage plaintiffs to employ it early, the Delaware Supreme Court held nevertheless that nothing in the statutory text supported the bright-line rule employed by the Chancellor.[199] Rather, the decisional law made clear that investigation of corporate misconduct is a proper purpose for bringing a Section 220 action so long as the plenary court has granted the shareholder-plaintiff leave to amend the complaint.[200]

The applicability of this last example to the thesis of this Article—i.e., that caseload volume involving similar issues leads to refined doctrine, valuable predictability, and measured balance—may not be immediately apparent. Nevertheless, *King* is a salient example of the unique benefits case volume provides in at least two respects. First, case volume enabled the Court of Chancery and the Delaware Supreme Court alike to recognize a problem in the first instance and address it head-on. Indeed, in

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Once a plaintiff has chosen to file a derivative suit, it has chosen its course . . . .").

197. *See id.* at 356–57 (discussing the policies supported by a bright-line rule).

198. *King II*, 12 A.3d 1140, 1151 (Del. 2011).

199. As the Supreme Court put it,

> [a]lthough we reject the result reached by the Court of Chancery, and the bright-line rule that drove it, we are sensitive to the policy concerns that animated both. . . . If relief under Section 220 is to be restricted in the manner adjudicated by the Court of Chancery, any such restriction should be imposed expressly by the General Assembly, not decreed by judicial common law decision-making.

Id. at 1150–51.

200. *See id.* at 1149–50 ("[L]ong-standing Delaware precedent . . . recognizes that it is a proper purpose under Section 220 to inspect books and records that would aid the plaintiff . . . where the earlier-filed plenary complaint was dismissed on demand futility-related grounds without prejudice and with leave to amend."); *accord* Amalgamated Bank v. NetApp, Inc., C.A. No. 6772-VCG, 2012 WL 379908, at *7 (Del. Ch. Feb. 6, 2012) ("*King* stands for the limited proposition that when a plaintiff has been *granted leave to amend* its complaint a plaintiff may have a proper purpose for demanding such records. When that leave to amend no longer exists, a plaintiff's proper purpose is extinguished." (footnote omitted)).

King, the two decisions diverge only as to the solution. In the Delaware Supreme Court's view, the Chancellor's proposal required legislative, rather than judicial, action.[201] It is questionable whether jurists in other jurisdictions who only infrequently confront motions to dismiss for failure to make pre-suit demand could have grasped the tension as readily as the Chancellor and the Justices who grappled with how to solve it in *King*. The relatively small number of jurists involved (ten) and the fact that they all routinely encounter business entity issues of this nature helps to foster the nuanced and well-informed character of Delaware's decisional law.

Second, case volume affords lower courts successive opportunities to remedy perceived problems in the law to the satisfaction of their appellate courts.[202] The recent *South v. Baker*[203] decision provides a useful example. After a series of accidents in 2011 at silver mines operated by Hecla Mining Company (Hecla), the United States Mine Safety and Health Administration ordered the company to close one of its mines for

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201. *King II*, 12 A.3d at 1151.

202. Indeed, *King* itself was a second attempt to address the fast-filing problem. In two earlier cases, the Court of Chancery "declin[ed] to infer 'the existence of other facts [not explicitly alleged in the complaint] that would have been proved or disproven by a further pre-suit investigation.'" Beam v. Stewart, 833 A.2d 961, 981 n.66, 982 (Del. Ch. 2003) (quoting White v. Panic, 793 A.2d 356, 364 (Del. Ch. 2000)), *aff'd on other grounds*, 845 A.2d 1040 (Del. 2004). That is, the *Beam* and *White* courts essentially proposed that, if a plaintiff has not pursued a books and records action, courts should draw fewer inferences in the plaintiff's favor from the allegations actually made. *See id.* at 970 ("[T]he Court accepts as true all well-pled factual allegations contained in the amended complaint, but conclusory statements—those unsupported by well-pled factual allegations—are not accepted as true."); White v. Panic, 793 A.2d 356, 363 (Del. Ch. 2000) (noting that courts need not make inferences with no support in fact). The Delaware Supreme Court reversed *White* and affirmed *Beam* on alternate grounds because

> [a] plaintiff's use of, or failure to use, a books and records inspection does not change the standard to be applied to review of the complaint. Regardless of whether the plaintiff secured any facts alleged in her complaint through a Section 220 inspection, the court must draw all reasonable inferences in the plaintiff's favor and determine whether those facts create a reasonable doubt of the directors' independence.

Beam v. Stewart, 845 A.2d 1040, 1057 n.52 (Del. 2004).

203. South v. Baker, C.A. No. 7294-VCL, 2012 WL 4372538 (Del. Ch. Sept. 25, 2012).

safety violations.[204] Consequently, Hecla issued a press release announcing that it was lowering its estimated silver production for 2012.[205] On the heels of that announcement, shareholders brought a so-called *Caremark*[206] claim. That is, the plaintiffs accused Hecla's directors of breaching their fiduciary duty by failing to monitor or heed proverbial "red flags" indicating misconduct within the company that, but for the directors' failure of oversight, could have enabled the company to take remedial measures and avoid legal liability or other corporate losses.[207] The plaintiffs, however, did not avail themselves of Section 220 before filing their complaint. The court ultimately determined that the complaint lacked the particularized allegations necessary to plead demand futility under Court of Chancery Rule 23.1.[208] Accordingly, the court dismissed the case.[209]

In so doing, the court expressly held that the putative lead plaintiffs provided inadequate representation for failing to utilize Section 220.[210] Specifically, the court observed that, "[i]n a representative action, a trial court has an independent and continuing duty to scrutinize the representative plaintiff to see if

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204. *Id.* at *3–6.

205. *Id.* at *1.

206. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

207. *South*, 2012 WL 4372538, at *1; *see also In re Caremark*, 698 A.2d at 971 ("[A] sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability.").

208. *South*, 2012 WL 4372538, at *11.

209. *Id.* at *13.

210. *Id.* at *7. Although the *South* court could have dismissed the complaint under Rule 23.1 alone, it felt compelled to engage in this extra analysis because (1) "good faith disagreements exist about whether other stockholders of the corporation are in privity with the named plaintiff such that the with-prejudice dismissal has preclusive effect on other derivative actions," but (2) even the precedents "that give preclusive effect to a Rule 23.1 dismissal universally recognize that another stockholder still can sue if the first plaintiff provided inadequate representation." *Id.* Thus, the court's judicial finding that the Souths provided inadequate representation preserves the ability of "other stockholders to bring suit, including those stockholders who *have* attempted to use Section 220." *Id.* at *14 (emphasis added).

she is providing adequate representation,"[211] and that (as the Delaware Supreme Court suggested in *King v. Verifone*) "'[o]ne possible remedy for a prematurely-filed derivative action might be for the plenary court to deny the plaintiff lead plaintiff status in such a situation.'"[212] Employing that suggestion, the *South* court ruled that a plaintiff who hastily files *Caremark* claims without first conducting an adequate investigation aided by a corporate books and records inspection under Section 220

> behaves contrary to the interests of the corporation but consistent with the desires of the filing law firm to gain control of (or a role in) the litigation. The natural and logical inference from this recurring scenario is that the plaintiff is serving the interests of the law firm, rather than those of the corporation on whose behalf the plaintiff ostensibly seeks to litigate.[213]

That is, the "recurring scenario supports a presumption that the plaintiff has acted disloyally and is not an adequate fiduciary for the corporation."[214]

In both developing and applying this presumption of inadequate representation for not utilizing Section 220, the court was careful to note two important qualifications. First, the court explicitly differentiated a *Caremark* claim—for which "the connection to the board is neither readily apparent nor reasonably inferable from the occurrence of the corporate trauma" and "there usually will not be any need to rush when filing . . . [because t]he claim typically seeks to obtain damages" for a discrete harm that already has occurred—"from other types of derivative actions in which a plaintiff challenges a specific and identifiable board decision."[215]

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211. *Id.* at *15.

212. *Id.* at *13 (quoting *King II*, 12 A.3d 1140, 1151 (Del. 2011)).

213. *Id.* at *17.

214. *Id.*

215. *Id.* Unlike a *Caremark* claim, a plaintiff challenging specific and identifiable board decisions

> may well be able to plead particularized allegations without using Section 220 that are sufficient to survive a Rule 23.1 motion to dismiss, for example by pleading that a majority of the directors were not independent and disinterested (as when directors vote on their own compensation) or that the decision was not entitled to the protections of the business judgment rule (as when a transaction

Second, the court stressed that, under Delaware Rule of Evidence 301, presumptions are rebuttable, meaning that a plaintiff can show that, in fact, he or she *did* conduct a reasonable investigation or that there *was* a need to act with celerity in the circumstances of the particular case, i.e., "that acting speedily *benefited the corporation* and not just the plaintiffs' law firm."[216] Despite these express qualifications, the presumption of inadequate representation very well might undermine the incentive to race to file in the first instance in future cases—assuming, of course, the Delaware Supreme Court condones its use.

Another solution, proposed by Chancellor Strine in February 2012, is when determining which complaint was first-filed for purposes of consolidation or appointment of lead counsel, the relevant filing date should relate back to the earlier Section 220 action, if one was filed.[217] That approach would put the plaintiff's counsel who first pursue a statutory books and records action before filing their complaint on an equal footing with the "fast filers," thereby undercutting the incentive to file quickly. Courts that are asked to appoint lead plaintiffs and counsel from several competing parties and firms generally will consider, among other things, the quality of the pleadings as an indicator of the type of representation the putative lead plaintiffs and their counsel likely will provide.[218] Although the Chancellor's "relation back" approach is an intriguing notion, it may face its own multi-jurisdictional issues. That is, even if the determination of lead counsel in Delaware requires relating back to the filing date of the Section 220 action, would judges in other jurisdictions

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meets the onerous standard for waste).

Id. (footnote omitted).

216. *Id.* (citing DEL. R. EVID. 301).

217. *See* Transcript of Record at 34–36, La. Mun. Police Emps.' Ret. Sys. v. Page (Del. Ch. Feb. 6, 2012) (C.A. No. 7041-CS) ("Perhaps we should start thinking about a diligent books and records demand about wrongdoing as having somewhat of the same dignity as a first-filed complaint but done by people who are doing it the right way.").

218. Hirt v. U.S. Timberlands Serv. Co., C.A. Nos. 19575, 19578, 19592, 19608, 19613, 19632, 2002 WL 1558342, at *2 (Del. Ch. July 9, 2002).

confronting whom to designate as lead counsel in representative litigation in their own courts be persuaded to do the same?

Lastly, there is the possibility that someone will embrace the Supreme Court's suggestion in *King*. If nothing in the statutory text of Section 220 supports the Chancellor's rebuffed bright-line rule from *King*, the Delaware Corporate Law Council could urge the Delaware General Assembly to amend the statute. As alluded to earlier, in a small state like Delaware, amending a statute is considerably easier than one might think. The corporate bar regularly engages with both the courts and the legislature because all of them have an important shared interest in maintaining a General Corporation Law that is appropriately balanced, fair, and effective for each legal issue that may arise in contemporary and dynamic capital markets.

IV. Conclusion

The overarching theme of this Article has been that Delaware's volume of corporate and alternative business entity cases, the fact that those cases are litigated before the relatively small, but expert, Delaware Court of Chancery and Supreme Court, and the responsiveness of its courts, its legislature, and the marketplace generally accelerate the development of refined doctrine, measured balance, and valuable predictability. This Article, of course, is hardly the first to recognize or to describe that theme,[219] but the matters reviewed here demonstrate that

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219. *See, e.g.*, Savitt, *supra* note 21, 585–86 (describing the Court of Chancery "as an unusual and remarkably effective regulatory machine" in part because of the "vast amount of M&A activity" it sees); Aquila & Kripitz, *supra* note 168, at 50 ("Delaware is known as the premier forum for resolving . . . internal [corporate] disputes . . . ."); Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1080–81 (2000) ("Delaware courts aggressively adopt and modify corporate law doctrine, exhibiting a degree of activism that more closely resembles the legislative process[,] . . . driven by policy considerations, including an effort to respond on an ongoing basis to developments in the business world."); Rehnquist, *supra* note 41, at 354; Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 588–89 (1990) (arguing that Delaware's prominence as a state of incorporation is due to the expertise of its judiciary).

the Court of Chancery's unique characteristics facilitate its ability to respond to challenging new issues of substantive and procedural law alike. Indeed, institutional success for the Court of Chancery, because of its de facto specialization in a substantive field that lends itself to collective-action problems, depends on refined doctrine and measured balance as to the procedural mechanisms that are central to the development of Delaware commercial law. This overarching theme also demonstrates the relatively common phenomenon in Delaware that at any one time multiple disputes pertaining to some particular area of corporation law will be before the Court at once. In 2011 and 2012, one of the areas that came more directly under the judicial microscope encompassed important aspects of representative shareholder actions. Although not all of the issues in that area have achieved the level of predictability, efficiency, or stasis to which the law aspires, the special nature of the Court of Chancery and its docket enabled it to accomplish quite a lot in a short time span. The result is greater clarity regarding important aspects of representative litigation and, we hope, more effective representation of shareholders' interests in the future. If recent history provides an accurate barometer, many of the legal issues we have addressed will be almost passé by the time this Article is published because they will have been replaced by clusters of new cases presenting various manifestations of the different issues du jour for 2013 and beyond. Whatever the future issues may be, we are confident that, for the reasons discussed in this Article, the Delaware courts and the Court of Chancery, in particular, together with the Delaware legislature and bar, will remain adept in meeting the inevitable challenges and innovations the marketplace brings before them.