

## Delaware's Business Courts: Litigation Leadership

Randy J. Holland\*

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### I. INTRODUCTION

Many corporations have come to view courts as unwieldy, unpredictable purveyors of justice in the field of business litigation. But a mass exodus from the courts is not the answer; it is counter-productive for long-term business interests. The courts are uniquely equipped to address corporate concerns, and Delaware's court system provides a model that largely addresses modern corporate worries about courtroom litigation. Delaware's courts offer litigants a forum with an extensive and well-developed jurisprudence that creates predictability and expediency in adjudication, allowing for efficient business planning. Delaware's independent judiciary is essential to securing these values, and its practice of appointing judges and maintaining a balance of power between political

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\* Randy J. Holland serves as a Justice on the Supreme Court of Delaware. This paper was presented at the Sandra Day O'Connor Project on the State of the Judiciary Annual Conference, entitled "Our Courts and Corporate Citizenship," at the Georgetown University Law Center on October 2, 2008.

parties on its high court has yielded dividends in both the expertise and independence of its judiciary. Delaware's continued preeminence in corporate law is contingent on not only the perception but the reality that the Delaware judiciary is engaged in principled decisionmaking. Corporations should not turn away from courts as dispute-resolution mechanisms, and Delaware provides a blueprint for how to succeed in bringing corporations back to the courts.

Within the corporate community, there has been an increased interest in arbitration and other forms of alternative dispute resolution due to ongoing concerns about negative experiences in the adjudication of business cases in some state courts. In seeking alternatives to litigation in state courts, corporations are looking for efficiency and economy from an impartial decisionmaker with expertise in business matters. Delaware's business courts not only provide all of those qualities, but their decisions are predictable and authoritative.

In 2008, for the seventh consecutive year, Delaware's judicial system ranked first among state courts for creating a fair and reasonable litigation environment by the State Liability Systems Ranking Study of the United States Chamber of Commerce Institute for Legal Reform.<sup>1</sup> The results can be attributed to Delaware's three business courts: its Supreme Court and two major trial courts, the Superior Court and the Court of Chancery. The history of those trial courts was recently summarized in *Business Law Today* by two eminent Delaware jurists from each of those tribunals.<sup>2</sup> A history of the Supreme Court was published in 2001 to commemorate its Golden Anniversary.<sup>3</sup>

## II. INCORPORATION PREEMINENCE

Delaware is known as the "Corporate Capital of the World."<sup>4</sup> It is the state of incorporation for more than 60% of the Fortune 500 companies and for more than half of all companies whose stock is traded on the New York Stock Exchange and NASDAQ.<sup>5</sup> Delaware's preeminence in the market for corporate charters has lasted for nearly 100 years and "Delaware shows no sign of relinquishing its dominance."<sup>6</sup> Jeffrey Golden, Chair of the American Bar Association Section of International Law, recently wrote that "[t]he success of the State of Delaware in becoming the 'go-to' choice for companies as a place to incorporate in the United States turns in no small measure on the fact that its laws are watched over by a sophisticated bench and, through judicial precedents, are particularly well understood."<sup>7</sup>

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1. U.S. CHAMBER INST. FOR LEGAL REFORM, 2008 U.S. CHAMBER OF COMMERCE STATE LIABILITY SYSTEMS RANKING STUDY 10 (2008) [hereinafter CHAMBER OF COMMERCE], available at [http://courts.delaware.gov/Courts/Superior%20Court/pdf/?harris\\_2008.pdf](http://courts.delaware.gov/Courts/Superior%20Court/pdf/?harris_2008.pdf).

2. Donald F. Parsons, Jr. & Joseph R. Slights III, *The History of Delaware's Business Courts: Their Rise to Preeminence*, BUS. L. TODAY, Mar.-Apr. 2008, at 21.

3. DELAWARE SUPREME COURT: GOLDEN ANNIVERSARY 1951-2001 (Randy J. Holland & Helen L. Winslow eds., 2001).

4. John L. Reed, *United States*, in MERGERS & ACQUISITIONS: A PRACTICAL GLOBAL GUIDE 400 (2007).

5. Omari Scott Simmons, *Branding the Small Wonder: Delaware's Dominance and the Market for Corporate Law*, 42 U. RICH. L. REV. 1129, 1131 n.12 (2008).

6. *Id.* at 1131.

7. Jeffrey B. Golden, *Do We Need a World Court for the Financial Markets?*, in THE HAGUE LEGAL CAPITAL? 255, 259-60 (David Vriesendorp, Frans A. Nelissen & Michail Wladimiroff eds., 2008).

## III. DELAWARE'S COURT STRUCTURE

The structure of Delaware's business courts provides for efficiency and expertise. At the trial level, the Delaware Constitution preserves the historic divide between law, in the Superior Court, and equity, in the Court of Chancery. Only two other states continue that distinct separation of jurisdiction.<sup>8</sup> Appeals from both the Superior Court and the Court of Chancery are heard directly by the Delaware Supreme Court.

A. *The Court of Chancery*

Established in the 1792 Delaware Constitution, the Court of Chancery is the oldest business court in the United States.<sup>9</sup> The Delaware Supreme Court has held that the equity jurisdiction of the Court of Chancery "was founded upon, coextensive with, and in most respects, conformable to that of England."<sup>10</sup> Thus the Delaware Court of Chancery has the same equitable jurisdiction that was extant in England's Court of Chancery prior to the American Revolution. For more than 200 years, the Delaware Court of Chancery has demonstrated its "ability to adapt principles of equity developed centuries ago to ever-changing economic circumstances and legal relationships."<sup>11</sup>

The five members of the Court of Chancery sit without a jury and issue well-reasoned decisions at the conclusion of each judicial proceeding. The Court of Chancery initially interprets Delaware's general corporation law statute and develops the common law on corporate matters. Its opinions are "so well respected that a majority of its judgments are never challenged by an appeal."<sup>12</sup>

In 2003, the jurisdiction of the Court of Chancery was expanded by statute "to include adjudication of technology disputes that arise out of agreements involving at least one Delaware business entity, even if they concern solely claims for [money] damages."<sup>13</sup> That same year, the Court of Chancery was also authorized to establish a special docket that permits parties to mediate business disputes before a judicial officer of that court.<sup>14</sup> The synopsis to the 2003 legislative enactments explains that the General Assembly wanted to provide "additional benefits for businesses choosing to domicile in Delaware" in an effort to "keep Delaware ahead of the curve in meeting the evolving needs of businesses, thus strengthening the ability of the state to convince such businesses to incorporate and locate operations" in Delaware.<sup>15</sup>

In 1992, then United States Supreme Court Chief Justice William H. Rehnquist gave the keynote address to commemorate the Bicentennial Anniversary of the Delaware

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8. Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 903 (1990).

9. Parsons & Slights, *supra* note 2, at 21; William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792–1992*, 18 DEL. J. CORP. L. 819, 825–27 (1993).

10. *Glanding v. Indus. Trust Co.*, 45 A.2d 553, 555 (Del. 1945).

11. Quillen & Hanrahan, *supra* note 9, at 819–20.

12. Randy J. Holland, *An Introduction to Delaware Corporation Law Directors' Fiduciary Duties*, 19 CIV. & COM. L.J. 92, 93 (2008) (Taiwan).

13. Parsons & Slights, *supra* note 2, at 22–23.

14. *Id.* at 23.

15. *Id.*

Court of Chancery.<sup>16</sup> He praised the Court of Chancery as “an excellent example of how state courts are equal partners in the state-federal joint venture of providing justice.”<sup>17</sup> Chief Justice Rehnquist also remarked that, “[i]n light of its 200 year history, the Delaware Court of Chancery deserves our celebration, not only as a unique and vibrant Delaware institution, but as an important contributor to our national system of justice.”<sup>18</sup>

### *B. The Superior Court*

The Superior Court is Delaware’s major court of law. It has general jurisdiction and handles all complex tort and commercial litigation actions. The 19 judges of the Superior Court preside over jury trials in those matters. Delaware’s first place ranking for seven consecutive years as a state court system that creates a fair and reasonable litigation environment<sup>19</sup> reflects the business community’s confidence in how the Superior Court handles complex commercial matters including tort and contract claims, class action suits, and mass consolidated litigation.<sup>20</sup>

On November 1, 2007, James A. Wolfe, President of the Delaware State Chamber of Commerce, sent a letter to the Honorable James T. Vaughn, Jr., President Judge of the Delaware Superior Court, expressing the Chamber’s “concern regarding the increasingly large number of toxic-tort personal injury cases now being filed in Delaware Superior Court by out-of-state law firms on behalf of out-of-state plaintiffs whose claims have no meaningful connection to Delaware.”<sup>21</sup> Later that month, President Judge Vaughn appointed a committee of five lawyers (the Special Committee) with no special background in asbestos litigation to consider the issues raised in the Chamber’s letter.<sup>22</sup> The members examined the procedures used by the Superior Court to manage toxic tort litigation, gave the bar a chance to comment on those procedures and issues, and reported back to the President Judge.<sup>23</sup>

The Special Committee issued its report on May 9, 2008. The report noted that two of Delaware’s most distinguished corporate citizens, E.I. DuPont de Nemours and Company and AstraZeneca, “weighed in” on how Superior Court Judge Joseph R. Slights had handled the cases at issue.<sup>24</sup> Counsel for DuPont stated that the procedures for asbestos cases had “substantially improved” under Judge Slights’ direction.<sup>25</sup> “But for [the Superior] Court’s capable management of this influx of cases, the Delaware Court system might have lost its number one ranking for ‘Fairness in Litigation Climate for

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16. William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 351 (1992).

17. *Id.* at 355.

18. *Id.* at 354.

19. CHAMBER OF COMMERCE, *supra* note 1, at 10.

20. RICHARD D. KIRK ET AL., SPECIAL COMM. ON SUPERIOR COURT TOXIC TORT LITIG., REPORT AND RECOMMENDATIONS P-2 (2008), available at <http://pdfserver.amlaw.com/nlj/DelawareSpecial%20Committee Report.PDF>.

21. *Id.* at 1.

22. *Id.*

23. *Id.* at 1–2.

24. *Id.* at P-2.

25. KIRK ET AL., *supra* note 20, at P-2 (quoting Letter from John C. Phillips, Esq., to the Special Committee (Jan. 4, 2008)).

Business in the United States.”<sup>26</sup> AstraZeneca’s Vice President and General Counsel stated that the Superior Court has “effectively managed the Delaware cases using existing local Court rules and practices and state statutes.”<sup>27</sup> He said, “The Delaware judiciary continues to deserve the national acclaim it routinely receives.”<sup>28</sup> The Special Committee noted:

These two companies have had extensive experience with our Superior Court, and, along with the vast majority of the other defendants in the case have voiced the opinion that they are not only satisfied with how the [Superior] Court has been handling these cases but have spoken of a system that worked well when there were two thousand asbestos cases several years ago and is working efficiently now to handle the much fewer cases that it currently has on its docket.<sup>29</sup>

The Superior Court has also been a national leader in litigation innovation. In 1991, the Superior Court’s Complex Litigation Automated Docket (CLAD) was the first electronic docketing and filing system for civil cases in the United States.<sup>30</sup> In 2000, the Superior Court was the first Delaware Court to permit parties to file briefs on CD-ROM.<sup>31</sup> More recently, the Superior Court led the way for all Delaware courts in developing an e-filing system in civil actions.<sup>32</sup>

Six judges of the Superior Court now constitute a panel that handles Summary Proceedings for Commercial Disputes.<sup>33</sup> These jurists are assigned cases individually and manage expedited discovery and motion practices.<sup>34</sup> The panel is designed to complement the expertise of the Court of Chancery in business matters by “providing learned judges who will facilitate expeditious resolutions of commercial disputes.”<sup>35</sup> A recently formed Complex Business Litigation Committee is studying the possibility of creating a separate business docket within the Superior Court.<sup>36</sup> The Committee’s findings and recommendations are expected in 2009.

### *C. The Supreme Court*

Appeals from the Court of Chancery and the Superior Court go directly to the Delaware Supreme Court. Delaware does not have an intermediate court of appeals. Moreover, parties have an absolute right of appeal from final judgments entered in either the Court of Chancery or the Superior Court. Because the Supreme Court may not choose which cases to accept, the sole focus in every appeal is on how to decide the case before it.<sup>37</sup> The case-specific focus of the Delaware Supreme Court’s mandatory jurisdiction

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26. *Id.* (quoting Letter from John C. Phillips, Esq., *supra* note 25).

27. *Id.* (quoting Letter from Glenn M. Engelmann, Esq., to the Special Committee (Jan. 17, 2008)).

28. *Id.* (quoting Letter from Glenn M. Engelmann, Esq., *supra* note 28).

29. *Id.*

30. Parsons & Slights, *supra* note 2, at 25.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. Parsons & Slights, *supra* note 2, at 25.

36. *Id.*

37. Randy J. Holland & David A. Skeel, Jr., *Deciding Cases Without Controversy*, in DELAWARE

means that “the law develops in an incremental minimalist way in the context of finding the highest common denominators for deciding the issues presented in each case.”<sup>38</sup>

Delaware’s five justices usually speak with one voice, even on deeply controversial issues, such as death penalty cases.<sup>39</sup> In the last 55 years, the Delaware Supreme Court justices have written separately in less than one percent of the cases on the Court’s docket.<sup>40</sup> The Supreme Court’s tradition of issuing unanimous opinions is known as Delaware’s “unanimity norm.”<sup>41</sup> That practice differs markedly from the decisionmaking patterns in the highest courts of other states, which issue a “significant number of separate opinions.”<sup>42</sup> The “unanimity norm” provides stability and predictability that is particularly important to the national business community because the Supreme Court is the final arbiter of Delaware’s corporation law.

#### IV. IMPARTIALITY AND EXPERTISE

##### *A. Delaware’s Judicial Selection Process*

Omari Scott Simmons, professor of law at Wake Forest University, has explained that principled judicial decisionmaking is indispensable to Delaware’s preeminence in corporate law matters.<sup>43</sup> According to Professor Simmons, “[p]rincipled lawmaking occurs when Delaware judges analyze the complex cases before them, acknowledge precedent, and balance competing values, such as efficiency, equity, authority, and accountability. This process is apolitical and earnest.”<sup>44</sup> Professor Simmons also made an observation that is understood by all three branches of Delaware’s government: Delaware’s continued preeminence in the area of corporate law is contingent on not only the perception but the reality that the Delaware judiciary is engaged in principled decisionmaking.<sup>45</sup>

Delaware’s judicial selection process promotes expertise and impartiality. The judges in most other state courts are either elected or retained by popular vote.<sup>46</sup> The Framers of the 1897 Delaware Constitution decided that it was less political and, therefore, preferable to have an appointed judiciary. Consequently, the 1897 Delaware Constitution established the judicial selection system that remains today. The governor appoints judges for twelve-year terms, subject to Senate confirmation.<sup>47</sup>

A unique provision in the Delaware Constitution requires political balance within the Delaware judiciary.<sup>48</sup> The requirement also originated from the debates at the 1897

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SUPREME COURT: GOLDEN ANNIVERSARY 1951–2001, *supra* note 3, at 39, 45–46.

38. *Id.* at 46.

39. David A. Skeel, Jr., *The Unanimity Norm in Delaware Corporate Law*, 83 VA. L. REV. 127, 129 (1997).

40. Holland & Skeel, *supra* note 37, at 41.

41. Skeel, *supra* note 39, at 130.

42. *Id.* at 131–32.

43. Simmons, *supra* note 5, at 1143.

44. *Id.* at 1142–43.

45. *Id.* at 1183.

46. Adam Liptak, *Rendering Justice, with One Eye on Re-election*, N.Y. TIMES, May 25, 2008, at A1 (noting that “39 states at least elect some of their judges”).

47. DEL. CONST. art. IV, § 3.

48. *Id.*

Constitutional Convention.<sup>49</sup> The delegates wanted to eliminate political influence from the judiciary to the fullest extent possible.<sup>50</sup> To achieve that result, they placed a limitation on the number of judges appointed from a single political party.<sup>51</sup> Accordingly, since 1897, the Delaware Constitution has mandated political party balance within its judiciary.<sup>52</sup> For example, of the five justices of the Delaware Supreme Court, two must be from one political party and three from the other.

By Executive Order in 1978, Delaware enhanced its 200-year-old tradition of appointing judges by establishing a bipartisan Judicial Nominating Commission to select members of the judiciary based on merit.<sup>53</sup> Similar Executive Orders have been entered by every subsequent governor to date. The Judicial Nominating Commission screens and then submits to the governor a list of merit-qualified candidates for each judicial position. Although the governor retains the final authority to make judicial nominations, she must choose from the list of qualified candidates prepared by the Judicial Nominating Commission.

In a letter to the *New York Times*, Delaware's Governor Ruth Ann Minner extolled the continued virtue of Delaware's appointed, politically balanced, and merit-based judicial selection system.<sup>54</sup> According to Professor Robert B. Thompson of Vanderbilt University Law School, "One reason that Delaware fiduciary duty law is both coherent and adaptive in the classic common law tradition is that it is made by an informed group of judges who are repeat players on matters of corporate law."<sup>55</sup> Their "experience, both prior to and after becoming judges, gives them an unmatched expertise in the field of corporate law."<sup>56</sup>

#### V. ECONOMIC EFFICIENCY: DELAWARE'S PROMPT DECISIONS

In Delaware, the phrase "justice delayed is justice denied" is not a platitude. The Delaware judicial system decides all matters promptly. Although business litigation in the Court of Chancery and the Delaware Supreme Court is routinely disposed of in a timely manner, proceedings in both courts may be expedited to meet exigent circumstances.

The Court of Chancery is renowned for the unparalleled alacrity with which it conducts trials and decides important issues of corporate law. Former Chancellor William T. Allen has observed that "[i]t is not unusual for the validity of a hugely complex corporate decision to be determined in Chancery within 60 days."<sup>57</sup> The Delaware Supreme Court is equally adroit at routinely rendering prompt decisions. The Internal Operating Procedures of the Delaware Supreme Court require that the Court decide all cases, not just corporate matters, within 90 days after oral arguments or submission on

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49. RANDY J. HOLLAND, *THE DELAWARE CONSTITUTION: A REFERENCE GUIDE* 128 (2002).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 129.

54. HOLLAND, *supra* note 49, at 129–30.

55. Robert B. Thompson, *Piercing the Veil: Is the Common Law the Problem?*, 37 *CONN. L. REV.* 619, 626 (2005).

56. *Id.*

57. Simmons, *supra* note 5, at 1163–64 (quoting William T. Allen, *Whence the Value-Added in Delaware Incorporation?*, *CORP. EDGE* (Div. of Corp., Dover, Del.), Fall 1997, at 4).

the briefs.<sup>58</sup> In 2007, the average time from submission to a decision by the Delaware Supreme Court was 37.8 days.<sup>59</sup>

The concerted expedited operations of the Court of Chancery and the Delaware Supreme Court are illustrated by Paramount Communications' challenge to the proposed merger between Time Inc. and Warner Communications.<sup>60</sup> Chancellor Allen succinctly summarized the course of that litigation as follows:

[A]fter about six or eight weeks of feverish discovery and briefing, I had only five or six days to write what turned out to be a lengthy and complex opinion. The appeal of my decision was determined in less than a month and a multi-billion dollar transaction could move forward with much less legal risk.<sup>61</sup>

The Delaware Supreme Court orally announced its decision in the *Paramount Communications v. Time Inc.* appeal a few hours after hearing the arguments, which were broadcast live on national television. Time Inc. and Warner Communications consummated the multibillion dollar merger later that same day. The Time/Warner litigation illustrates how the Delaware Supreme Court and the Court of Chancery regularly work together to resolve expedited, complex corporate cases in an efficient and economical manner.

#### VI. PRECEDENTS BENEFIT BUSINESS PLANNING: DELAWARE'S DEVELOPED JURISPRUDENCE

Delaware enacted its first general corporation law in 1899.<sup>62</sup> For more than a century, Delaware's corporate law has evolved in a balanced and impartial manner. The Delaware Supreme Court and the Court of Chancery apply established legal principles to each new business context that is presented as the needs of a robust modern market economy change. Both courts have endeavored to provide boards of directors with clear guidance on how to act with due care, loyalty, and good faith in making business decisions in the best interests of Delaware corporations and their shareholders.<sup>63</sup>

The decisions of the Delaware Supreme Court and the Court of Chancery establish precedents that provide the predictability needed for businesses to act with confidence. Chief Justice William Rehnquist noted that since 1899 Delaware "has handed down thousands of opinions interpreting virtually every provision of Delaware's corporate law statute. No other state court [system] can make such a claim."<sup>64</sup> Chief Justice Rehnquist continued, "Perhaps more importantly, practitioners recognize that outside the takeover process . . . most Delaware corporations do not find themselves in litigation. The process

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58. DELAWARE SUPREME COURT INTERNAL OPERATING PROCEDURES ch II, § 2 (2008), available at <http://courts.delaware.gov/rules/?iops.pdf>.

59. DEL. ADMINISTRATIVE OFFICE OF THE COURTS, FIRST STATE JUDICIARY, 2007 ANNUAL REPORT AND STATISTICAL INFORMATION 1 (2007).

60. *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1989).

61. *Simmons*, *supra* note 5, at 1164 n.156 (alteration in original) (quoting Allen, *supra* note 57, at 4).

62. Alva, *supra* note 8, at 896.

63. *See Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998) ("This Court has endeavored to provide the directors with clear signal beacons and brightly lined-channel markers as they navigate with due care, good faith, and loyalty on behalf of a Delaware corporation and its shareholders.").

64. Rehnquist, *supra* note 16, at 354.

of decisionmaking in the litigated cases has so refined the [Delaware] law that business planners may usually order their affairs to avoid law suits.”<sup>65</sup> Chief Justice Rehnquist concluded that this is “one of the highest forms of praise the judiciary can receive.”<sup>66</sup>

#### *A. The Business Judgment Rule*

The business judgment rule is probably the best example of the Delaware judiciary’s well-established corporate jurisprudence. Shareholder lawsuits often seek monetary damages for financial harm allegedly caused by the directors’ actions.<sup>67</sup> Frequently, corporate litigation involves shareholder challenges to the business decisions made by a board of directors.<sup>68</sup> “Delaware courts are aware that shareholder investments will only be maximized if disinterested directors carefully act in good faith to assess the relative risks and rewards of business matters.”<sup>69</sup> Nevertheless, not all business decisions will result in financial success, even though the directors properly discharged their fiduciary duties. Delaware courts are cognizant that “boards of directors would never pursue a rational but risky business strategy, in an effort to increase shareholder wealth, if financial failure would automatically result in their own personal monetary liability.”<sup>70</sup>

One of the “fundamental tenets of Delaware corporate law” provides for a separation of ownership and control.<sup>71</sup> A cardinal precept of the Delaware General Corporation Law’s statutory scheme is that “directors, rather than shareholders, manage the business and affairs of the corporation.”<sup>72</sup> The directors’ exercise of this statutory power to manage the corporation carries with it certain concomitant fiduciary obligations to the corporation and its shareholders.<sup>73</sup> The separation of legal control from beneficial ownership provides an “underlying premise for the imposition of fiduciary duties.”<sup>74</sup> Equitable principles act to protect the stockholder owners who are not in a position to directly manage the corporation for themselves.

The business judgment rule is a logical common law corollary to the fundamental statutory principle, codified in section 141(a) of the Delaware General Corporation Law,<sup>75</sup> that the business and affairs of a corporation are managed by its board of directors.<sup>76</sup> The business judgment rule “is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company” and its shareholders.<sup>77</sup> Professor Franklin A. Gevurtz of the University of the Pacific McGeorge School of Law summarized the rationale underlying the business judgment rule as

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65. *Id.*

66. *Id.*

67. Holland, *supra* note 12, at 97.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Malone v. Brincat*, 722 A.2d 5, 9 (Del. 1998).

72. *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984).

73. *Id.*

74. *Malone*, 722 A.2d at 9.

75. DEL. CODE ANN. tit. 8, § 141(a) (2008).

76. *Aronson*, 473 A.2d at 812; *Zapata Corp. v. Maldonado*, 430 A.2d 779, 782 (Del. 1981).

77. *Aronson*, 473 A.2d at 812.

follows: “[C]ourts should exercise restraint in holding directors liable for (or otherwise second guessing) business decisions which produce poor results or with which reasonable minds might disagree. This seems to be a sensible notion. After all, business decisions typically involve taking calculated risks.”<sup>78</sup>

As a presumption, the business judgment rule is a procedural guide for conducting litigation between shareholders and directors.<sup>79</sup> As a substantive common law precept, the business judgment rule protects the full and free exercise of the managerial power granted directors.<sup>80</sup>

At the same time, the Delaware courts’ expert and expeditious application of the business judgment rule, in reviewing challenges to exercises of directors’ fiduciary duties, provides protection for the legitimate expectations of shareholder investors. In fact, some studies have shown that firms incorporated in Delaware are worth more to shareholders than non-Delaware entities.<sup>81</sup> The effect of Delaware’s impartial application of corporate law principles in a fair and balanced manner was summarized by former Chancellor William T. Allen:

My speculation is that the entrepreneurs and venture capitalists that choose Delaware have it right. The IPO market and the secondary market trust the system of the Delaware corporation law to be systematically fair. That, of course, doesn’t mean that all market participants will approve each element of the system—or each court ruling or statutory amendment. Any particular decision may generate disagreement, disapproval or dissent, but year upon year the system taken as a whole plausibly balances deference to management’s need for broad discretion in deploying the firm’s capital with protection of shareholder basic interest. . . . In doing so, Delaware law provides an outstanding public service to the nation.<sup>82</sup>

#### VII. FINALITY FROM FEDERALISM: DELAWARE DECISIONS AUTHORITATIVE

“The United States Constitution creates a system that divides sovereign powers between the fifty states and the national federal government.”<sup>83</sup> Generally, the federal government and federal law regulate the issuance and trading of securities on the national markets. Issues of corporate governance, however, are regulated by the law of the

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78. FRANKLIN A. GEVURTZ, *CORPORATION LAW* 278–79 (2000).

79. *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1162 (Del. 1995) (citing *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993)); see *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1374 (Del. 1995).

80. *Zapata*, 430 A.2d at 782.

81. See Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525 (2001) (presenting evidence supporting the theory that Delaware corporate law increases firm value and facilitates public sale); Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 FORDHAM L. REV. 843, 848 (1993) (citing several studies that found positive price impacts for companies that reincorporated in Delaware); see also Guhan Subramanian, *The Disappearing Delaware Effect*, 20 J.L. ECON. & ORG. 32, 33 (2004) (analyzing the “Delaware effect”).

82. Simmons, *supra* note 5, at 1130 n.3 (quoting Allen, *supra* note 57, at 3); see also Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. Rev. 1559 (2002) (analyzing how firms choose to incorporate in either Delaware or their home state).

83. Holland, *supra* note 12, at 92.

incorporating state because state law controls the formation of corporations.<sup>84</sup> According to Yale Law School Professor Roberta Romano:

The genius of American corporate law is in its federalist organization. In the United States, corporate law, which concerns the relation between a firm's shareholders and managers, is largely a matter for the states. Firms choose their state of incorporation, a statutory domicile that is independent of physical presence and that can be changed with shareholder approval. The legislative approach is, in the main, enabling. Corporation codes supply standard contract terms for corporate governance.<sup>85</sup>

The decisions of the Delaware courts are final and authoritative on almost all matters of corporate law because of the internal affairs doctrine. "The internal affairs doctrine is a [venerable] choice of law principle which recognizes that only one state should have the authority to regulate a corporation's internal affairs—the state of incorporation."<sup>86</sup> The internal affairs doctrine protects corporations from being subjected to inconsistent legal standards. It is premised on an important public policy that the "authority to regulate a corporation's internal affairs should not rest with multiple jurisdictions."<sup>87</sup>

The United States Supreme Court has held that the internal affairs doctrine is much more than a conflict of laws principle.<sup>88</sup> Pursuant to the Due Process Clause in the Fourteenth Amendment of the United States Constitution, directors and officers of corporations "have a significant right . . . to know what law will be applied to their actions"<sup>89</sup> and "[s]tockholders . . . have a right to know by what standards of accountability they may hold those managing the corporation's business and affairs."<sup>90</sup> Therefore, an "application of the internal affairs doctrine is mandated by constitutional principles, except in 'the rarest situations.'"<sup>91</sup> For example, when "the law of the state of incorporation is inconsistent with a national policy on foreign or interstate commerce,"<sup>92</sup> federal law prevails.

The internal affairs doctrine applies to matters that arise from the relationship between the corporation and its officers, directors, and shareholders.<sup>93</sup> In *CTS Corp. v. Dynamics Corp. of America*,<sup>94</sup> the United States Supreme Court recognized that "[a] State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an

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84. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89–90 (1987).

85. ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 1 (1993).

86. *VantagePoint Venture Partners v. Examen, Inc.*, 871 A.2d 1108, 1112 (Del. 2005).

87. *Id.*

88. *See CTS Corp.*, 481 U.S. at 91 (noting that it "is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares").

89. *McDermott Inc. v. Lewis*, 531 A.2d 206, 216 (Del. 1987).

90. *Id.* at 217.

91. *Id.* (quoting *CTS Corp.*, 481 U.S. at 90).

92. *VantagePoint Venture Partners*, 871 A.2d at 1113 (quoting *McDermott Inc.*, 531 A.2d at 217).

93. Holland, *supra* note 12, at 95.

94. *CTS Corp.*, 481 U.S. 69.

effective voice in corporate affairs.”<sup>95</sup> Accordingly, the Court held that it is “an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares.”<sup>96</sup>

In *Kamen v. Kemper Financial Services*,<sup>97</sup> the United States Supreme Court reaffirmed the Due Process protection of the internal affairs doctrine and the stability it affords.<sup>98</sup> The issue in *Kamen* was whether the federal courts could superimpose a universal demand rule on the corporate doctrine of all states.<sup>99</sup> The Court held that a universal demand rule in federal courts would cause disruption to the internal affairs of corporations and that its holding in *Burks*<sup>100</sup> had counseled “against establishing competing federal—and state—law principles on the allocation of managerial prerogatives within [a] corporation.”<sup>101</sup> In *Kamen*, the Court relied almost exclusively on Delaware Supreme Court opinions that analyzed the demand rule as a substantive principle of law, even though the United States Supreme Court had a Maryland corporation before it.<sup>102</sup>

#### VIII. FEDERAL SECURITIES STATUTES: DELAWARE’S CONTINUING JURISDICTION

When directors of publicly traded Delaware corporations disseminate information, they must comply with obligations imposed by Delaware law, federal statutes, and United States Securities and Exchange Commission (SEC) regulations.<sup>103</sup> Federal law regulates disclosures by corporate directors into the general investment market.<sup>104</sup> In deference to the federal protections available to investors in connection with the purchase or sale of securities of Delaware corporations, the Delaware Supreme Court has not recognized a state law cause of action against the directors of Delaware corporations for “fraud on the market.”<sup>105</sup> The Delaware Supreme Court has explained that there is “no legitimate basis to create a new cause of action which would replicate, by state decisional law, the provisions of . . . the [Securities Exchange Act of 1934].”<sup>106</sup>

Conversely, Congress has continuously recognized that the historic roles played by Delaware and federal law in regulating securities litigation have been compatible and complementary.<sup>107</sup> What has been described by law professors Marcel Kahan and

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95. *Id.* at 91.

96. *Id.* See generally *Kamen v. Kemper Fin. Serv.*, 500 U.S. 90 (1991).

97. *Kamen*, 500 U.S. 90.

98. *Id.* at 108–09.

99. *Id.* at 98–101.

100. *Burks v. Lasker*, 441 U.S. 471 (1979).

101. *Kamen*, 500 U.S. at 106.

102. *Id.* at 101–02 (citing *Spiegel v. Buntrock*, 571 A.2d 767 (Del. 1990); *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984); *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981)).

103. See generally Securities Act of 1933, 15 U.S.C. §§ 77a–77m (2006); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–77m (2006); Roger J. Dennis & Patrick J. Ryan, *State Corporate and Federal Securities Law: Dual Regulation in a Federal System*, 22 PUBLIUS 21 (1992).

104. *Malone v. Brincat*, 722 A.2d 5, 12 (Del. 1998).

105. *Id.* at 13 (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 241–42 (1988) (discussing the theory of fraud on the market); *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 474–75 (Del. 1992)).

106. *Arnold v. Soc’y for Sav. Bancorp, Inc.*, 678 A.2d 533, 539 (Del. 1996).

107. *Malone*, 722 A.2d at 13 (discussing state corporation law and the purpose of disclosure in federal

Edward Rock as “symbiotic federalism”<sup>108</sup> was perpetuated in the Securities Litigation Uniform Standards Act of 1998.<sup>109</sup> The federal act requires securities class actions that involve the purchase or sale of nationally traded securities and are based on false or misleading statements to be brought exclusively in federal court under federal law.

Although Congress could have preempted Delaware law in that area by invoking its Commerce Clause power, it did not do so.<sup>110</sup> Instead, the 1998 Act contains two important exceptions. The first provides that “an exclusively derivative action brought by one or more shareholders on behalf of a corporation is not preempted.”<sup>111</sup> The second “preserves the availability of state court class actions, where state law already provides that corporate directors have fiduciary disclosure obligations to shareholders.”<sup>112</sup> Those exceptions are known as the “Delaware carve-outs.”<sup>113</sup> The Senate Committee Report on the Act explains:

The Committee is keenly aware of the importance of state corporate law, specifically those states that have laws that establish a fiduciary duty of disclosure. It is not the intent of the Committee in adopting this legislation to interfere with state law regarding the duties and performance of an issuer's directors or officers in connection with a purchase or sale of securities by the issuer or an affiliate from current shareholders or communicating with existing shareholders with respect to voting their shares, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.<sup>114</sup>

The significance of Delaware's continuing jurisdiction in matters related to federal securities litigation is demonstrated by the interpretation of the Full Faith and Credit Act in *Matsushita Electrical Industrial Co. v. Epstein*.<sup>115</sup> The Delaware Court of Chancery approved and the Delaware Supreme Court affirmed a settlement in the class action brought by the shareholders against the corporation and its directors. The United States Supreme Court also affirmed the settlement, holding that the Delaware final judgment was entitled to full faith and credit in a federal court under the Full Faith and Credit Act—notwithstanding that the Delaware judgment released claims under the Securities Exchange Act of 1934 that were in the exclusive jurisdiction of the federal courts—where the judgment at issue would be given preclusive effect in a subsequent Delaware

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securities law) (citing *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 474–80 (1977)).

108. Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573 (2005); see also Renee M. Jones, *Does Federalism Matter? Its Perplexing Role in the Corporate Governance Debate*, 41 WAKE FOREST L. REV. 879 (2006) (examining how federalism concepts have impacted corporate governance debates).

109. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998).

110. Alan R. Palmiter, *The CTS Gambit: Stanching the Federalization of Corporate Law*, 69 WASH. U. L.Q. 445, 510 (1991).

111. Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 78bb(f)(5)(c) (2006).

112. *Malone*, 722 A.2d at 13; see also *Zirn v. VLI Corp.*, 681 A.2d 1050, 1060–61 (1996); Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273, 308 (1998) (presenting evidence that a majority of state court cases involve cases alleging breaches of fiduciary duties).

113. *Malone*, 722 A.2d at 13

114. *Id.* at 13 n.42 (quoting S. REP. NO. 105-182, at 11–12 (1998)).

115. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996).

proceeding.<sup>116</sup>

The United States Supreme Court discussed at length the Delaware Supreme Court's decision and analysis in *Nottingham Partners v. Dana*,<sup>117</sup> which affirmed a class action settlement by the Court of Chancery that released claims that were pending in federal court.<sup>118</sup> In *Matsushita*, the United States Supreme Court concluded:

Congress' intent to provide an exclusive federal forum for adjudication of suits to enforce the Exchange Act is clear enough. But we can find no suggestion in § 27 that Congress meant to override the "principles of comity and repose embodied in § 1738" by allowing plaintiffs with Exchange Act claims to release those claims in state court and then litigate them in federal court.<sup>119</sup>

Accordingly, any final judgment that settles a shareholder class action in the Delaware Court of Chancery will be given preclusive effect in a pending or subsequent federal action, if the Delaware judgment was intended to apply to claims otherwise exclusively within the jurisdiction of federal courts.<sup>120</sup> These principles were at issue earlier this year when the Delaware Supreme Court affirmed a settlement judgment by the Court of Chancery in *In re Philadelphia Stock Exchange, Inc.* while litigation was still pending in federal court.<sup>121</sup>

#### IX. DELAWARE'S NATIONAL FORUM: CERTIFICATION PROCEDURE PROVIDES CERTAINTY

The Delaware Constitution vests the State's Supreme Court with the power to accept and decide certified questions of law.<sup>122</sup> This constitutional provision "permits the certifying court to receive an authoritative answer to an otherwise unresolved legal issue rather than having to predict what the Delaware Supreme Court would decide."<sup>123</sup> It also promotes stability for the business community by having the Supreme Court speak first and authoritatively on emerging issues of Delaware corporate law.

In 1983, the jurisdiction of the Supreme Court of Delaware to answer certified questions of law from the Delaware state trial courts was expanded to include certifications from the United States District Court for the District of Delaware.<sup>124</sup> Ten years later, the Delaware Constitution was amended to permit the Delaware Supreme Court to hear and determine certified questions from all federal courts, including the United States Supreme Court, as well as from the highest appellate court of any other state.<sup>125</sup> In 2007, the Delaware Constitution was further amended to authorize the SEC to certify questions of law to the Delaware Supreme Court.<sup>126</sup>

SEC General Counsel Brian G. Cartwright was pleased with the new constitutional

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116. *Id.* at 386–87.

117. *Nottingham Partners v. Dana*, 564 A.2d 1089 (Del. 1989).

118. *Matsushita*, 516 U.S. at 367–78.

119. *Id.* at 386.

120. *Id.*

121. *In re Phila. Stock Exch., Inc.*, 945 A.2d 1123 (Del. 2008).

122. DEL. CONST. art. IV, § 11(8).

123. HOLLAND, *supra* note 49, at 141.

124. *Id.*

125. *Id.*

126. DEL. CONST. art. IV, § 11(8).

amendment:

In our constitutional system, federal and state law coexist side-by-side, each with its distinctive role. As a result, the administration of the federal securities laws often requires interpretation of state law. I am delighted that the SEC now has this new ability to obtain definitive answers to important questions of Delaware law.<sup>127</sup>

Professor Jeffrey D. Bauman of the Georgetown University Law Center, an expert in the corporate law field, described “Delaware’s Constitutional amendment [a]s an innovative approach to questions of federalism and corporate law.”<sup>128</sup>

In 2008, the SEC certified questions of law for the first time to the Delaware Supreme Court in *CA, Inc. v. AFSCME Employees Pension Plan*<sup>129</sup> and received an expedited response. In a speech before the United States Chamber of Commerce on July 22, 2008, SEC Commissioner Paul S. Atkins described the background for the *CA, Inc. v. AFSCME Employees Pension Plan* opinion and praised the Delaware Supreme Court for the role it played:

The SEC staff received conflicting opinions from two well-known law firms who practice Delaware corporate law. So rather than, as we have done in years past, acceding to the proponent’s position—to use a baseball analogy—with “tie goes to the runner” approach, this year we used our new ability to certify questions to the Delaware Supreme Court and it accepted.

Perhaps it is only in Delaware that the judicial system can provide a final decision in such a timely manner. To give you an idea of the speed in which this matter moved, the SEC certified its questions on Friday, June 27. The Delaware Supreme Court accepted the matter on Tuesday, July 1. Briefs were due on Monday, July 7, and oral argument was held on Wednesday, July 9. Eight days later, on July 17, the Delaware Supreme Court issued its opinion, finding that although the proposal was a proper matter for shareholder action, the lack of a “fiduciary out” in the proposed bylaw violates Delaware law. Thus, having the guidance of the Delaware decision, the SEC staff notified CA on the evening of July 17 that the proposal could be excluded on the basis of Rule 14a-8(i)(2).

This speed shows the seriousness with which the Delaware Supreme Court takes the issue of federalism and its role in guiding the federal government in its application of state law. I salute the court in helping us define our respective roles.<sup>130</sup>

In an August speech to the ABA Committee on Federal Regulation of Securities,

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127. Press Release, Del. Admin. Office of the Courts, Delaware Constitutional Amendment Enacted Allowing the Securities and Exchange Commission to Bring Questions of Law Directly to the Delaware Supreme Court (May 15, 2007) (on file with author).

128. *Id.*

129. *CA Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227 (Del. 2008).

130. Paul S. Atkins, Comm’r, Sec. & Exch. Comm’n, Speech: Shareholder Rights, the 2008 Proxy Season, and the Impact of Shareholder Activism (July 22, 2008), available at <http://www.sec.gov/news/speech/2008/spch072208psa.htm>.

John W. White, director of the SEC Division of Corporation Finance, also spoke favorably about the SEC's recent Delaware certification experience:

As you can imagine, this is a very useful tool to have available to the [Corporate Finance] staff as we review the hundreds of no-action requests we receive each year on shareholder proposals. . . . If the staff receives dueling opinions of counsel on state law, we have traditionally deferred to the proponent, but we can now, in appropriate circumstances, go to the source—Delaware—for the answer. . . . We're very excited to have this tool at our disposal, and look forward to using it further, as appropriate, in coming years.<sup>131</sup>

#### X. GLOBALIZATION OF BUSINESS: DELAWARE'S PERSUASIVE AUTHORITY

In his article, *Globalizing Corporate Governance: The Convergence of Form or Function*, Stanford Law School Professor Ronald J. Gilson concludes "the aggregated choices of a majority of publicly traded U.S. corporations have resulted in a convergence on the Delaware General Corporation Law as a de facto national corporate law."<sup>132</sup> Delaware has influenced not only the corporate law of other jurisdictions in the United States, but has also impacted international developments in corporate law. A recent book, *Globality: Competing with Everyone from Everywhere for Everything*, describes how companies from emerging markets are reshaping global business.<sup>133</sup> Multinational corporations present courts around the world with legal issues involving mergers, acquisitions, corporate governance, and public or private finance. In deciding those issues, the courts of other countries rely upon Delaware's well-established precedents.

Delaware law has significantly influenced recent developments in Japanese takeover law. This influence can be seen in the Corporate Value Report (Report), produced by a group of experts formed by Japan's Ministry of Economy, Trade and Industry (METI),<sup>134</sup> and the guidelines based on this Report (Guidelines).<sup>135</sup> The Report "embraces Delaware takeover jurisprudence . . . in suggesting appropriate standards for Japan."<sup>136</sup> The Guidelines, issued by METI and the Japanese Ministry of Justice, draw heavily from Delaware law<sup>137</sup> and appear to "adopt, to a remarkable degree of specificity, twenty years of Delaware jurisprudence."<sup>138</sup>

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131. John W. White, Dir., Div. of Corporate Fin., Sec. & Exch. Comm'n, Speech by SEC Staff: Corporation Finance in 2008—A Year of Progress (Aug. 11, 2008), available at <http://www.sec.gov/news/speech/2008/spch081108jww.htm>

132. Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 350 (2001).

133. HAROLD L. SIRKIN, JAMES W. HEMERLING & ARINDAM K. BHATTACHARYA, *GLOBALITY: COMPETING WITH EVERYONE FROM EVERYWHERE FOR EVERYTHING* (2008).

134. Jack B. Jacobs, *Implementing Japan's New Anti-Takeover Defense Guidelines Part I: Some Lessons from Delaware's Experience in Crafting "Fair" Takeover Rules*, 2 N.Y.U. J. L. & BUS. 323, 324 (2006); Curtis J. Milhaupt, *In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan*, 105 COLUM. L. REV. 2171, 2173 (2005).

135. Jacobs, *supra* note 134, at 324; Milhaupt, *supra* note 134, at 2173.

136. See Milhaupt, *supra* note 134, at 2173.

137. *Id.*

138. Pamela A. Fuller, *Whither M&A in Japan?*, N.Y.L.J., Nov. 7, 2005, at 10.

The Guidelines are based on “precepts that are enshrined in the Delaware case law: protecting and enhancing corporate value and the interests of shareholders as a whole, requiring full disclosure of the existence and details of the defense to enable shareholders to make appropriate investment decisions, and prohibiting takeover defenses that are ‘excessive.’”<sup>139</sup> The law developed by Delaware courts over the last three decades has provided Japan with a developed model to use in advancing Japanese corporate takeover law.<sup>140</sup>

Delaware's influence on Japanese takeover law can also be found in Japan's case law. In one case, according to commentators, the Japanese courts “had been briefed on how the issue would be resolved under Delaware law.”<sup>141</sup> In that case, the High Court affirmed a district court's decision to enjoin a company's defensive actions, describing those actions as “grossly unfair” since their primary purpose was “to maintain control, by diluting the holdings of another shareholder who has made a hostile bid.”<sup>142</sup> The High Court, however, also described situations in which such defensive actions may be permitted—if they are “necessary and appropriate” to fend off a hostile bidder who plans to “exploit[] the target.”<sup>143</sup> The High Court's framework mirrors Delaware's law, which requires that defensive measures be “reasonable in relation to the threat posed.”<sup>144</sup>

Delaware influences can be found in Japanese statutes and case law involving directors' fiduciary duties. In one shareholder derivative suit, the court held the directors of Daiwa Bank responsible for \$775 million in damages because they failed to notice unauthorized trades that caused “almost \$1.5 billion in losses and fines.”<sup>145</sup> Their breach of duty was described as a failure to monitor employee misconduct,<sup>146</sup> which mirrors Delaware's *Caremark* duty to monitor.<sup>147</sup> In 1950, Japan codified a duty of loyalty to directors. It has been described as a “direct import” from the United States and a “key doctrinal desideratum of some of the most venerable . . . cases of the Delaware courts.”<sup>148</sup> The statute was rarely applied until decades later, but since then, Korea and Taiwan have transplanted the Japanese duty of loyalty, furthering the reach of Delaware's influence on international corporate law jurisprudence.<sup>149</sup>

Delaware's international influence was summarized by Chief Justice In-Jaw Lai of Taiwan when he took office last year. The headline of his interview with the *Commercial Times of Taiwan* reads: “Use Delaware in the U.S. as the Model.”<sup>150</sup> When the Chief

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139. Jacobs, *supra* note 134, at 326.

140. *See id.* at 327 (suggesting that Japan could learn from the evolution of Delaware takeover law).

141. Milhaupt, *supra* note 134, at 2194.

142. *Id.* at 2193 (quoting *Nippon Hosho K.K. v. Raibudoa K.K.*, 1173 Hanrei Taimuzu 125 (Tokyo High Ct., Mar. 23, 2005)).

143. *Id.* at 2194 (quoting *Nippon Hosho K.K.*, 1173 Hanrei Taimuzu 125).

144. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985).

145. Milhaupt, *supra* note 134, at 2188.

146. *Id.*

147. *Id.*; *see also In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 968–71 (Del. Ch. 1996).

148. Hideki Kanada & Curtis J. Milhaupt, *Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 AM. J. COMP. L. 887, 888, 892 (2003).

149. *Id.* at 900.

150. *In-Jaw Lai: Use Delaware in the U.S. as the Model*, COMMERCIAL TIMES (Taiwan), Nov. 12, 2007. That interview with Chief Justice In-Jaw Lai was translated by a Delaware attorney, Zhun Lu, Esquire, of Connolly, Bove, Lodge & Hutz. Mr. Lu specializes in corporate law and intellectual property matters nationally and internationally. He was part of the legal faculty when the judges from Taiwan visited Delaware in

Justice was asked how the quality of the judiciary impacts a country's economic development, he responded:

Delaware is a perfect example. The State of Delaware, with a population less than 860,000 and size of 1,982 square miles, is the second smallest state in the US. But, about 370,000 companies, including most companies traded on the New York Stock Exchange and more than 60% of Fortune 500 companies are registered in this small state. For many well-known Taiwanese companies, their overseas subsidiaries are also registered in Delaware. The annual fees from these companies account for a significant amount of income for the Delaware government.

Delaware's corporate law, tax system, and court system (Court of Chancery and Supreme Court) have contributed to Delaware's success. Judges there are very familiar with the business essence of the companies. The law and court decisions relating to company operations balance shareholder interest with company management needs. All these attributes earned Delaware the "Corporate Capital of the World" title.<sup>151</sup>

The Chief Justice was also asked if the judicial system of Taiwan could replicate Delaware's success. He answered, "Our legal system is different from the Delaware system and cannot follow it exactly the same way. But, a comprehensive and efficient business law and judicial system will be helpful in promoting the country's economic development and the competitiveness of its enterprises."<sup>152</sup>

#### XI. CONCLUSION

The focus of 2008's Justice Sandra Day O'Connor Project on the State of the Judiciary was "Our Courts and Corporate Citizenship." Two important questions were being addressed. First, can corporations be brought back to courts as a dispute-resolution mechanism? Second, should that happen? The Delaware business courts' answer to both questions is a resounding "yes."

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September to study Delaware's business courts.

151. *Id.*

152. *Id.*