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THE UNDERAPPRECIATED IMPORTANCE OF PERSONAL JURISDICTION IN DELAWARE'S SUCCESS

*Eric A. Chiappinelli**

“Let me first say that I hate, hate, the wastefulness and wheel spinning that is engendered by multijurisdictional class litigation of this type, right down to the bottom of my narrow, penny-pinching soul do I hate it.”¹

INTRODUCTION

The judges of the Delaware Court of Chancery are in a full-on offensive mode. They believe, and some hard evidence suggests, that stockholder litigation involving Delaware corporations is no longer being filed as robustly in the Court of Chancery as it once was. The judges are not shy about making it known that stockholder litigation involving Delaware corporations should be filed in Delaware only. Cases filed elsewhere are a bad thing.²

By some measures, Delaware has been losing cases for about the last ten years, although the extent and nature of this litigation exodus have not been definitively established. Whether Delaware is actually seeing fewer cases or whether it is seeing a smaller percentage of

* Frank McDonald Endowed Professor of Law, Texas Tech University School of Law. I benefitted greatly from the participants in the Corporate & Securities Litigation Workshop held in Chicago on November 8 and 9, 2013 and especially to Professors Jessica Erickson and Verity Winship, who organized and hosted the workshop. Thanks also to the organizers and participants at the fifth annual National Business Law Scholars Conference held at Loyola Law School on June 19 and 20, 2014. I also presented this Article, and received useful input, at lunchtime faculty presentations at the law schools of Texas Tech, the University of Arkansas at Fayetteville, and the University of Oklahoma. Thanks also to Kyle Wagner Compton, editor of *The Chancery Daily*.

1. Transcript of Teleconference on Defendants' Motion to Proceed in One Jurisdiction at 19, *In re MAKO Surgical Corp. Stockholders Litig.*, C.A. No. 8958-VCG (Del. Ch. Oct. 29, 2013) [hereinafter Transcript of Teleconference] (statement of V.C. Sam Glasscock III).

2. *See, e.g., id.* at 19–20; Transcript of Settlement Hearing and Rulings of the Court at 56, *In re Burlington N. Santa Fe S'holder Litig.*, C.A. No. 5043-VCL (Del. Ch. Oct. 28, 2010) (statement of V.C. J. Travis Laster); Edward B. Micheletti & Jenness E. Parker, *Multi-Jurisdictional Litigation: Who Caused This Problem, and Can It Be Fixed?*, 37 DEL. J. CORP. L. 1, 27 & n.111 (2012); Donald F. Parsons, Jr. & Jason S. Tyler, *Docket Dividends: Growth in Shareholder Litigation Leads to Refinements in Chancery Procedures*, 70 WASH. & LEE L. REV. 473, 506–10 (2013) (lead author is a Vice Chancellor); Leo E. Strine, Jr. et al., *Putting Stockholders First, Not the First-Filed Complaint*, 69 BUS. LAW. 1 (2013) (lead author is the former Chancellor, and is the current Chief Justice of the Delaware Supreme Court).

stockholder litigation is unclear. Moreover, there is a qualitative aspect to this question as well as a quantitative one. Whether Delaware is retaining the important cases is a question that is currently keenly debated.

Whether Delaware remains the center of stockholder litigation has real consequences for Delaware and for corporate law. Delaware, as is well known, is the leader in pseudo-domestic incorporations.³ That position is important to Delaware because those corporations generate roughly one-fifth of Delaware's annual tax revenue.⁴ Further, the Delaware bar and the judiciary have obvious professional interests in Delaware's dominance and prominence.⁵

One of the main reasons that Delaware is the pseudo-domestic incorporation capital is that it is the center of stockholder litigation. Academics "have long agreed that Delaware's dominance is a result of its law and its judiciary. As a corollary, it was widely understood that Delaware courts decided most cases involving Delaware corporations."⁶ Most scholars who have looked at the question conclude that Delaware is not in danger of losing its hegemony in pseudo-domestic corporations.⁷ Over 80% of all pseudo-domestic corporations are incorporated in Delaware; the second-most popular state is Nevada, with only 8.03%.⁸ Some scholars, though, theorize that another state, most likely Nevada, could eventually challenge Delaware as the home of at least some kinds of pseudo-domestic corporations.⁹ Delaware's loss of litigation need not mean that another forum is becoming the

3. A corporation that has its headquarters and principal place of business in state *A*, but is incorporated in state *B*, is, as to state *B*, a pseudo-domestic corporation. As to state *A*, it is a pseudo-foreign corporation. Eric A. Chiappinelli, *The Myth of Director Consent: After Shaffer, Beyond Nicastro*, 37 DEL. J. CORP. L. 783, 788 n.29 (2013).

4. Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 67 (2009).

5. *See id.* at 69–74.

6. Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053, 1055 (2013) (footnote omitted); *see also* John Armour et al., *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1347 (2012) [hereinafter Armour et al., *Balancing Act*]; John Armour et al., *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605, 606 (2012) [hereinafter Armour et al., *Losing Cases*]; John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915, 1951–52 (2012).

7. Brian JM Quinn, *Arbitration and the Future of Delaware's Corporate Law Franchise*, 14 CARDOZO J. CONFLICT RESOL. 829, 830 (2013) (citing Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559 (2002); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002)).

8. Michal Barzuza & David C. Smith, *What Happens in Nevada? Self-Selecting Into Lax Law* 39–40 tbl.1 (Dec. 30, 2013) (unpublished manuscript), available at <http://ssrn.com/abstract=1644974>. As of 2011, Maryland (1.52%) is the only other state that has more than 1% of the total pseudo-domestic incorporations. *Id.*

9. *Id.*

litigation center. It is entirely possible that this litigation will not become centered in any particular forum, but rather will be divided among the state and federal courts in states in which public corporations have their headquarters.

Nonetheless, if Delaware continues to lose cases, the damage to Delaware will be nearly as severe as if another state were supplanting Delaware because a key to continued judicial expertise in a particular area is a constant flow of relevant lawsuits.¹⁰ Both scholars and judges agree that caseflow is vital to Delaware's preeminent position in corporation law.

Until recently, Delaware's claim to be the center of stockholder litigation seemed impregnable, but actually it is much more fragile than is generally realized. I document in Parts II and III that Delaware's position as the center of stockholder litigation did not come about until forty years after it became the undisputed leader in pseudo-domestic incorporations. New York became the first center of modern stockholder litigation in the 1920s and '30s. New York purposefully discouraged such lawsuits, however, in the mid-1940s. Delaware had the institutional, substantive, and procedural requisites to be attractive to the plaintiffs' bar, and by the mid-1960s it was the most popular state for stockholder litigation.

An underappreciated, nearly ignored fact is that the lynchpin of both New York's and Delaware's leadership in stockholder litigation was the ease and assurance with which fiduciaries could be sued. That is, both New York's and Delaware's success depended upon personal jurisdiction. Delaware's approach to personal jurisdiction, sequestration, was essentially unique; other states could not effectively replicate it. When *Shaffer v. Heitner* declared sequestration to be unconstitutional in 1977,¹¹ Delaware adopted a director consent statute that, as I have argued elsewhere, is also unconstitutional.¹² I discuss Delaware's reaction to *Shaffer* in Part IV. I argue in Part V that Delaware should adopt a new amenability statute that is both constitutional and effective in subjecting fiduciaries to personal jurisdiction. Moreover, the value to Delaware of my proposed statute could not effectively be duplicated by other states.

10. See Parsons, Jr. & Tyler, *supra* note 2, at 478; Mark J. Roe, *Delaware's Shrinking Half-Life*, 62 STAN. L. REV. 125, 131 (2009); Stevelman, *supra* note 4, at 62; Matthew D. Cain & Steven M. Davidoff, *A Great Game: The Dynamics of State Competition and Litigation* 30 (Jan. 2013) (unpublished manuscript), available at <http://ssrn.com/abstract=1984758>. See generally Coyle, *supra* note 6, at 1927–33.

11. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

12. See generally Chiappinelli, *supra* note 3.

To continue as the center of stockholder litigation, the Delaware Court of Chancery has taken at least seven steps to either encourage or coerce litigation in Delaware, which I also detail in Part V. The Court of Chancery has become more generous in its award of attorney's fees to entice plaintiffs to file in Delaware.¹³ The court has also suggested to corporations that they insert forum selection clauses in their bylaws or certificates of incorporation, which would require stockholder litigation to be filed in Delaware.¹⁴

The Court of Chancery judges have also taken more direct measures to curtail multiforum litigation, too. They have made it clear that they will not facilitate sweetheart settlements approved by courts in other states.¹⁵ One Vice Chancellor has refused to give full faith and credit to a California settlement, although the Delaware Supreme Court reversed.¹⁶ Chief Justice Strine has suggested that the rules of forum non conveniens and the "first-filed rule" for determining which jurisdiction should proceed first with litigation be modified to, in effect, ensure that Delaware judges control multiforum litigation.¹⁷ Finally, the Delaware General Assembly has tried to entice stockholder litigation to Delaware and away from other states by providing a confidential arbitration procedure presided over by a sitting member of the Court of Chancery.¹⁸ The U.S. Court of Appeals for the Third Circuit held that procedure unconstitutional, but did so in majority, concurring, and dissenting opinions that leave open the possibility that a revised arbitration provision could be found to be constitutional.¹⁹

Despite these measures, without a secure solution to its personal jurisdiction issue, Delaware is at risk of permanently losing its position as the center of stockholder litigation. Adopting my proposal, however, would help to convince the plaintiffs' bar that Delaware is both

13. See, e.g., Revised Final Order and Judgment, *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761 (Del. Ch. 2011) (C.A. No. 961-CS), *aff'd sub nom.* *Am. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).

14. *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 960 & n.8 (Del. Ch. 2010); see also *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013).

15. See Transcript of Courtroom Status Conference at 16–31, *Scully v. Nighthawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL (Dec. 17, 2010).

16. *La. Mun. Police Emps.' Ret. Sys. v. Pyott*, 46 A.3d 313, 357 (Del. Ch. 2012), *rev'd*, 74 A.3d 612 (Del. 2013).

17. See Strine, Jr. et al., *supra* note 2, at 7–8; see also Transcript of Teleconference, *supra* note 1, at 19–20 (statement of V.C. Sam Glasscock III); Transcript of Teleconference on Plaintiff's Motion to Expedite, *In re MAKO Surgical Corp. Stockholders Litig.*, C.A. No. 8958-VCG (Del. Ch. Nov. 4, 2013); Transcript of the Court's Ruling, *In re MAKO Surgical Corp. Stockholders Litig.*, C.A. No. 8958-VCG (Del. Ch. Nov. 5, 2013).

18. Act of April 2, 2009, ch.8, § 1, 77 Del. Laws 9 (codified at DEL. CODE ANN. tit. 10, § 349 (2013)).

19. *Del. Coal. for Open Gov't, Inc. v. Strine*, 733 F.3d 510 (3d Cir. 2013).

serious about attracting stockholder litigation and capable of providing a litigation environment in which personal jurisdiction over the fiduciaries is assured. Without addressing the personal jurisdiction problem, Delaware remains vulnerable to the possibility that headquarters states will garner stockholder litigation, at least in part because personal jurisdiction over the fiduciary defendants is more assured.

II. THE RISE OF MODERN STOCKHOLDER LITIGATION

A. *The Causes and Predicates of Modern Stockholder Litigation*

Stockholder litigation has been a fixture of the American legal system for over 150 years.²⁰ But modern stockholder litigation can trace its origins only to the Jazz Age. Even before World War I, at least some small stockholders brought derivative suits against corporate fiduciaries in ways that presaged the modern era.²¹ Paul Cravath, the legendary corporate lawyer, described the stockholder-plaintiffs in these actions as strikers, which he defined as “a person who seeks by creating a nuisance value for himself to force the payment of an amount wholly disproportionate to his interest in the [corporation] as the price of the withdrawal of the nuisance of his presence.”²²

The strike suit was well established by the end of World War I. Cravath observed in 1917 that “[t]here are a certain number of men who make it a profession to watch reorganizations and other large corporate transactions with a view to instituting litigation at some critical moment in the hope of creating nuisance value for themselves.”²³ What separates these strike suits from modern litigation is that the striker was the animating factor in the litigation. He or she chose the corporations to sue and directed the litigation.²⁴

In modern stockholder litigation, however, the plaintiff owns a very small amount of stock and does not initiate or control the litigation.

20. See Bert S. Prunty, Jr., *The Shareholders' Derivative Suit: Notes on its Derivation*, 32 N.Y.U. L. REV. 980, 985–92 (1957).

21. Perhaps the most famous such stockholder-plaintiff was Clarence Venner, whose career as a corporate litigant flourished from about 1900 to 1920. 1 ROBERT T. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS 1819–1947*, at 620–21 (1946) (explaining that, in 1907, Venner “was becoming a perennial plaintiff in minority stockholder litigation, a field which he made highly profitable during the first two decades of the 20th Century”); see also Obituary, *Clarence Venner, Litigant, is Dead*, N.Y. TIMES, June 26, 1933, at 15.

22. Paul D. Cravath, *The Reorganization of Corporations; Bondholders' and Stockholders' Protective Committees; Reorganization Committees; and the Voluntary Recapitalization of Corporations*, in *SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION* 153, 202 (1917).

23. *Id.*

24. Again, Venner was a paradigm of this style of litigant. See Obituary, *supra* note 21.

This typically means small in both the sense of the plaintiff's stock's worth and, more importantly, small in the sense that it represents a miniscule percentage of the corporation's outstanding shares. In modern stockholder litigation, the lawyer is the person who identifies the corporation that is to be the defendant, finds a stockholder willing to be the named plaintiff, and negotiates the settlement. In effect, the lawyer is the client even though in form the lawyer acts for the named plaintiff and the other stockholders.²⁵ Stockholder litigation of all sorts was significant enough to warrant scholarly scrutiny by the mid-1920s.²⁶ It is unclear exactly when this modern, lawyer-driven form of stockholder litigation began, but it was recognized by the early 1930s in the academic literature.²⁷

Two conditions were necessary to transform traditional stockholder litigation into the modern form. First, a sufficient supply of pliant plaintiffs had to exist. Second, stockholders, or those lawyers who wished to represent them, had to learn of possible wrongdoing by corporate fiduciaries.²⁸ The first condition did not obtain until about 1920 or so. The second condition was not reliably in place until 1934.

Stockholders with holdings small enough to be willing to let their lawyers decide every aspect of the litigation were probably not numerous until the post-World War I dispersion of stockholdings. After the War, for the first time, the common stock of large corporations was marketed in earnest to individual investors located outside the principal financial cities of the Northeast.²⁹ For the first time, large corporations frequently had no stockholders with any significant percentage of stock. Further, the stockholders of these corporations were dispersed throughout the country. Stockholders with a significant proportion of their wealth invested in a particular company were obviously much less likely to abdicate all litigation decisions to legal

25. See J. Travis Laster, *Goodbye to the Contemporaneous Ownership Requirement*, 33 DEL. J. CORP. L. 673, 692–93 (2008); see also Armour et al., *Balancing Act*, *supra* note 6, at 1364 & n.71; John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 677–78 (1986).

26. See, e.g., Garrard Glenn, *The Stockholder's Suit—Corporate and Individual Grievances*, 33 YALE L.J. 580 (1924).

27. See, e.g., Churchill Rodgers & Littleton Groom, *Reorganization of Railroad Corporations Under Section 77 of the Bankruptcy Act*, 33 COLUM. L. REV. 571, 589 (1933); Note, *Extortionate Corporate Litigation: The Strike Suit*, 34 COLUM. L. REV. 1308, 1310 n.8 (1934).

28. See Note, *supra* note 27, at 1308–10.

29. See JONATHAN BARRON BASKIN & PAUL J. MIRANTI, JR., *A HISTORY OF CORPORATE FINANCE* 177 (1997); see also VINCENT P. CAROSSO, *INVESTMENT BANKING IN AMERICA: A HISTORY* 249–54 (1970).

counsel than were stockholders who had a relatively small proportion of wealth in a particular company's shares.

The second precondition to modern stockholder litigation was the public availability of information suggesting corporate wrongdoing.³⁰ Until the mid-1930s, such information typically became available in three situations. First, and perhaps most typically, large corporations were sometimes forced to reorganize as economic downturns periodically roiled the American economy. Reorganization was typically effected outside of federal bankruptcy laws and involved privately ordered negotiations between the embarrassed corporation and its various creditors, often debt-holders.³¹ Stockholders frequently charged that the corporate fiduciaries were breaching their duties in the terms of the deals they struck.³² Stockholder litigation increased following the major recession in 1921, and, of course, the Great Depression following the 1929 stock market crash.³³

Second, when a corporation entered into a fundamental transaction in which the stockholders were required to vote, potential plaintiffs and their counsel were alerted to possible conflicts of interest or other overreaching by corporate fiduciaries. Third, the occasional governmental hearing might disclose evidence of wrongdoing upon which a stockholder might predicate a viable lawsuit.³⁴

With the enactment of the Securities Exchange Act of 1934,³⁵ stockholders finally had a continuing and reliable source of corporate information upon which to determine whether a derivative claim for relief existed.³⁶ From mid-decade onward, modern stockholder litigation

30. See Note, *supra* note 27, at 1308–10. On the general lack of public information about public corporations, see BASKIN & MIRANTI, JR., *supra* note 29, at 197–200. On the difficulty of obtaining such information, see Harris Berlack, *Stockholders' Suits: A Possible Substitute*, 35 MICH. L. REV. 597, 603–04 (1937); George D. Hornstein, *Legal Controls for Intracorporate Abuse—Present and Future*, 41 COLUM. L. REV. 405, 416–20 (1941) [hereinafter Hornstein, *Legal Controls*].

31. See Cravath, *supra* note 22, at 154–55.

32. See *id.* at 202.

33. See 2 SWAINE, *supra* note 21, at 677 (“For the past hundred years [i.e., since the mid-nineteenth century] every depression has brought a wave of minority stockholders’ class suits against corporate directors.”); see also *id.* at 447 (“During the [1923–1928] boom Cravath clients were subjected to very little minority stockholders’ litigation.”); Norman Winer, *Jurisdiction Over the Beneficiary Corporation in Stockholders’ Suits*, 22 VA. L. REV. 153, 153 (1935).

34. See Hornstein, *Legal Controls*, *supra* note 30, at 419; see also Chester B. McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder’s Suit*, 46 YALE L.J. 421, 421 (1937).

35. Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78pp (2012)).

36. See BASKIN & MIRANTI, JR., *supra* note 29, at 201; see also George D. Hornstein, *Rights of Stockholders in the New York Courts*, 56 YALE L.J. 942, 949 (1947) [hereinafter Hornstein, *Rights of Stockholders*] (noting that stockholder suits “rapidly increased in number after 1933,

was a constant fact of life for corporate fiduciaries and their counsel.³⁷ By the mid-1940s modern derivative litigation was so common that it was perceived to be a paradigm practice area for white-shoe corporate defense firms.³⁸

B. The Personal Jurisdiction Landscape in Stockholder Litigation Before International Shoe

Almost as soon as stockholder litigation appeared in the mid-nineteenth century, the importance of procedural issues and the danger of abuses,³⁹ quickly became apparent. Without question, the most important procedural issue in stockholder litigation was personal jurisdiction. In the nearly seventy years between *Pennoyer v. Neff*⁴⁰ in 1877 and *International Shoe Co. v. Washington*⁴¹ in 1945, the rules for personal jurisdiction over individuals were clear and largely easy in application. A state could assert personal jurisdiction over any person physically present in the state when served with process;⁴² any domiciliary, even when absent from the state;⁴³ and anyone who consented, either in advance or by appearance in a lawsuit.⁴⁴

No sooner had *Pennoyer* been decided than the American economy became national in scope, and after 1900, American culture became increasingly mobile.⁴⁵ As a consequence, questions of personal jurisdiction over nonresidents—especially corporations—became increasingly common and plaintiffs became increasingly stymied because of the states' inability to obtain personal jurisdiction in many settings.

One of the areas in which the *Pennoyer* regime was problematic was personal jurisdiction over corporate fiduciaries. Corporate fiduciaries

when Congressional disclosures made known to stockholders how some directors and officers were looting their corporations”).

37. See Hornstein, *Rights of Stockholders*, *supra* note 36, at 949–50.

38. See 2 SWAINE, *supra* note 21, at 714–15.

39. See, e.g., *City of Quincy v. Steel*, 120 U.S. 241, 244–45 (1887) (noting that abuses were so frequent that the Supreme Court adopted Equity Rule 94, 104 U.S. ix (1882), later retained as FED. R. CIV. P. 23.1(b), to embody the contemporaneous ownership rule and the demand requirement announced in *Hawes v. Oakland*, 104 U.S. 450 (1881)).

40. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

41. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

42. *Pennoyer*, 95 U.S. at 723–28.

43. Personal service was not necessarily required for domiciliaries. Rather, they could validly be served through process left at their residence in the forum state. See *McDonald v. Mabee*, 243 U.S. 90, 92 (1917); see also Austin W. Scott, *Jurisdiction Over Nonresidents Doing Business Within a State*, 32 HARV. L. REV. 871, 875 & n.25 (1919).

44. See Scott, *supra* note 43, at 873–74.

45. See, e.g., *Hendrick v. Maryland*, 235 U.S. 610, 622 (1915); *Kane v. New Jersey*, 242 U.S. 160, 161–63 (1916); *Hess v. Pawloski*, 274 U.S. 352, 356 (1927). See generally ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977).

have long been indispensable parties in the typical case in which the stockholder seeks recompense for the corporation from the corporate fiduciaries who harmed the corporation.⁴⁶ Personal jurisdiction was problematic where not all of the directors were domiciled in the forum state. Nonresident directors had to be personally served within the jurisdiction. If the forum were located where the corporation was headquartered, service could usually be effected. If the headquarters were outside the forum state, however, there might be no state with personal jurisdiction over all of the fiduciaries.

But this problem was somewhat blunted because, although fiduciaries are indispensable, their liability is joint and several. A plaintiff need not join every wrongdoing fiduciary, though of course recovery may only be had against those properly joined and served.⁴⁷ The plaintiff could choose, for reasons of strategy or practicality (such as suing the defendants with the deepest pockets) as well as reasons of procedure, to sue some but not all of the possible fiduciary defendants.

Personal jurisdiction over the corporation was also required in stockholder litigation, even when the real defendants were only the corporate fiduciaries. It was early on held in state courts⁴⁸ and authoritatively held by the Supreme Court of the United States in 1873 that the corporation is an indispensable party in derivative litigation.⁴⁹

Personal jurisdiction over the corporation was a chronic problem under the *Pennoyer* regime once the American economy became more national in scope. A state could always exercise personal jurisdiction over its domestic corporations.⁵⁰ Personal jurisdiction over foreign corporations, however, was more complicated.⁵¹ A state could assert personal jurisdiction over a foreign corporation only if the cor-

46. See *Geer v. Mathieson Alkali Works*, 190 U.S. 428, 436–37 (1903).

47. Chester Rohrlich, *Suits in Equity by Minority Stockholders as a Means of Corporate Control*, 81 U. PA. L. REV. 692, 722 (1933); see also, e.g., *Harden v. E. States Pub. Serv. Co.*, 122 A. 705, 707 (Del. Ch. 1923).

48. The leading state case is *Robinson v. Smith*, 3 Paige Ch. 222 (N.Y. Ch. 1832).

49. *City of Davenport v. Dows*, 85 U.S. (18 Wall.) 626, 627 (1873) (corporation held indispensable to facilitate receipt of damages from defendants and to preclude the corporation from filing additional suits against the defendants on the same cause of action); see also *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522–23 n.2 (1947); George T. Washington, *Stockholders' Derivative Suits: The Company's Role, and a Suggestion*, 25 CORNELL L.Q. 361, 362 (1940); Note, *Joinder of Foreign Corporations in Stockholders' Derivative Suits*, 50 YALE L.J. 1261, 1261 & n.1 (1941); Note, *Necessity of Joinder of Corporation in Representative Suit Against the Directors*, 44 YALE L.J. 1091, 1091 (1935).

50. See Scott, *supra* note 43, at 878.

51. See *Pennoyer v. Neff*, 95 U.S. 714, 734–35 (1877); see also *Ex parte Schollenberger*, 96 U.S. 369, 377–78 (1877).

poration either consented to jurisdiction or were present within the forum state.⁵²

The paradigm foreign corporation envisioned in these principles was one that conducted its operations in other states *as well as* in the state of incorporation. But by 1880 a variation of the foreign corporation appeared with sufficient regularity to be dealt with separately. Corporations began to be formed to conduct business *only* in other states and *not* in the state of incorporation. Presumably the promoters of these corporations understood that the state of incorporation's corporate law would govern the internal affairs.

Today we would call these entities "pseudo-foreign corporations"⁵³ or, regarding them from the point of view of the incorporating state, "pseudo-domestic corporations."⁵⁴ In the nineteenth century they were called "tramp corporations."⁵⁵ Three kinds of tramp corporations presented jurisdictional problems. First, many, if not most, tramp corporations were always intended to have their operations in a single state, though one different from the state of incorporation. These were simply local business that the promoters chose to incorporate elsewhere.⁵⁶

A second kind of tramp corporation was intended to operate in one state, but its promoters, who were likely to be the directors and senior officers, were in a second state, and the corporation was incorporated in yet a third state. This scenario could come about when, for example, eastern entrepreneurs saw a business opportunity in another area of the country, often with an emerging economy. For example, New York businessmen might incorporate a firm in Delaware to pursue a business opportunity in an expanding market, such as Colorado.⁵⁷ Finally, some tramp corporations did business on a national or international scale. They incorporated in a state in which they were not headquartered and their operations were widespread in many states.

Jurisdiction based on domicile could not be effective over a foreign corporation, even a pseudo-foreign corporation, because a corpora-

52. See *Schollenberger*, 96 U.S. at 376-78; see also *St. Clair v. Cox*, 106 U.S. 350, 356 (1882); *Pennoyer*, 95 U.S. at 722; William F. Cahill, *Jurisdiction Over Foreign Corporations and Individuals Who Carry on Business Within the Territory*, 30 HARV. L. REV. 676, 689-90 (1917).

53. Elvin R. Latty, *Pseudo-Foreign Corporations*, 65 YALE L.J. 137, 137 (1955) (apparently the first use of the term).

54. Chiappinelli, *supra* note 3, at 788 n.29.

55. *E.g.*, *Kimball v. Davis*, 52 Mo. App. 194, 213 (1892) (apparently the first use of the term in print, though the opinion, written by distinguished corporate scholar, law journal editor, and judge of the Missouri Court of Appeals Seymour D. Thompson, suggests that the appellation was well known).

56. See, *e.g.*, *Troy & N.C. Gold Mining Co. v. Snow Lumber Co.*, 92 S.E. 494, 495 (N.C. 1917).

57. See, *e.g.*, *Wootton Land & Fuel Co. v. Ownbey*, 265 F. 91, 92 (8th Cir. 1920).

tion was domiciled only in its state of incorporation, regardless of where its headquarters was.⁵⁸ A foreign corporation could consent to personal jurisdiction, as an individual could.⁵⁹ Since in many circumstances a state had the power to exclude foreign corporations, states often conditioned doing business on the foreign corporation's registering with the state and designating an in-state agent for service of process. These statutes also frequently provided for consent to personal jurisdiction, often construed as general jurisdiction.⁶⁰

Frequently, though, a corporation would have dealings in a foreign state without being registered in that state.⁶¹ The corporation might not have registered because it believed it was engaged wholly in interstate commerce, in which case the states were without power to exclude foreign corporations.⁶² The corporation might also have believed that its dealings with the other state were insufficient to meet the state's statute requiring registration. More strategically, the corporation might have purposefully failed to register simply to complicate or narrow any subsequent litigation. A corporation's foreign registration might open it up to general jurisdiction, while not registering would only result in specific jurisdiction.⁶³ Finally, the corporation's failure to register might have been a mere oversight.

In such cases personal jurisdiction over the foreign corporation could be predicated on four theories; one was implied consent. The foreign corporation's consent to jurisdiction was implied from the fact that it took actions within the forum state.⁶⁴ A second theory, primarily advanced by scholars, predicated personal jurisdiction on the fairness of subjecting foreign corporations to jurisdiction for acts

58. *St. Clair v. Cox*, 106 U.S. 350, 355 (1882).

59. Scott, *supra* note 43, at 879.

60. See *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 94–96 (1917); see also *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1855); Cahill, *supra* note 52, at 689–90. See generally Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1 (1990).

61. Scott, *supra* note 43, at 880 (“Not infrequently it happens that a foreign corporation does business in a state without having filed consent to any form of service . . .”).

62. See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 182–83 (1868). But note that even in those instances states could require a foreign corporation to appoint an in-state agent for service of process. See *Int'l Harvester Co. of Am. v. Kentucky*, 234 U.S. 579, 587–88 (1914).

63. Compare *Pa. Fire Ins. Co.*, 243 U.S. 93 (scope of consent via registration broadly construed), with *Simon v. S. Ry. Co.*, 236 U.S. 115, 116–17, 132 (1915), and *Smolik v. Phila. & Reading Coal & Iron Co.*, 222 F. 148, 150 (S.D.N.Y. 1915). See also Charles W. “Rocky” Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 394 n.33 (2012).

64. *Lafayette Ins. Co.*, 59 U.S. (18 How.) at 408–09; see also *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8, 22 (1907); Scott, *supra* note 43, at 880–83.

performed in the forum state.⁶⁵ This theory was occasionally found in legal opinions. Judges Learned Hand and Benjamin Cardozo both espoused it,⁶⁶ and it was adopted *sub silentio* in *International Shoe*.⁶⁷ But until *International Shoe*, the theory was not widely regarded as viable.

Typically, however, personal jurisdiction was based on the third and fourth theories, which were closely related. In one, jurisdiction was said to attach when the foreign corporation was “present” in the jurisdiction.⁶⁸ This approach was intellectually consonant with *Pennoyer*’s focus on territoriality.⁶⁹ Frequently “presence” was made to turn on whether the corporation was “doing business” within the forum state.⁷⁰ The concept of “doing business” sufficient to confer personal jurisdiction spawned a rather large commentary.⁷¹

The related theory predicated jurisdiction simply on “doing business.” This theory was based either on a truncated logic that doing business was the proper test for presence,⁷² a belief that doing business was required to meet due process,⁷³ or, on a nonconstitutional level, an interpretation of the state’s amenability statute.⁷⁴

65. See, e.g., Calvert Magruder & Roger S. Foster, *Jurisdiction Over Partnerships*, 37 HARV. L. REV. 793 (1924); Scott, *supra* note 43; Note, *What Constitutes Doing Business by a Foreign Corporation for Purposes of Jurisdiction*, 29 COLUM. L. REV. 187 (1929).

66. See *Hutchinson v. Chase & Gilbert*, 45 F.2d 139 (2d Cir. 1930) (opinion of L. Hand, J.); *Smolik*, 222 F. 148 (opinion of L. Hand, J.); *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915 (N.Y. 1917) (opinion of Cardozo, J.); *Bagdon v. Phil. & Reading Coal & Iron Co.*, 111 N.E. 1075 (N.Y. 1916) (opinion of Cardozo, J.).

67. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317–18 (1945).

68. Cahill, *supra* note 52, at 678; see also Note, *supra* note 65, at 188.

69. See *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 106 (1898).

70. Scott, *supra* note 43, at 881–82.

71. See generally, e.g., F. Arnold Daum, *The Transaction of Business Within a State by a Non-Resident as a Foundation for Jurisdiction*, 19 IOWA L. REV. 421 (1934); Elcanon Isaacs, *An Analysis of Doing Business*, 25 COLUM. L. REV. 1018 (1925); Note, *supra* note 65.

72. Scott, *supra* note 43, at 881–82.

73. Note, *supra* note 65, at 187 (“[I]t is a fundamental requisite under the Constitution that the corporation shall be ‘doing business’ in the state or district where the service is made to sustain [service of process’s] validity.”).

74. See Cahill, *supra* note 52, at 695. During this period very few states also adopted amenability statutes covering foreign corporations in lawsuits arising out of their actions within the state. See Edward W. Cleary & Arthur R. Seder, Jr., *Extended Jurisdictional Bases for the Illinois Courts*, 50 NW. U. L. REV. 599, 604 (1955). Note that these statutes are distinct from the nearly universal statutes requiring a foreign corporation doing business within the state to register and consent to jurisdiction. These statutes were, in part, declaratory of the judicial holdings basing personal jurisdiction on either implied consent or presence via doing business, but at least one arguably went further, covering in-state torts, even if the corporation were not doing business within the state. The validity of none of these statutes was, apparently, litigated before *International Shoe* and it is difficult to know whether they had any effect. *Id.* at 604.

As early as 1916, clarifying the theory of personal jurisdiction over foreign corporations was perceived as a chronic and important issue.⁷⁵ By the end of the 1920s this was perceived as a major issue and was the subject of much academic analysis.⁷⁶ *International Shoe*, itself, went to the Supreme Court on the question of whether the company's activities in Washington state were sufficient to constitute "doing business."⁷⁷

Personal jurisdiction would not have been especially troublesome in the simplest tramp corporation setting: a local business incorporated out of state. Typically, stockholder suits against such corporations could easily have been brought in the state in which the corporation actually operated. Because the corporation was always intended to do business in the forum state, it probably registered to do business there and so had appointed an agent upon whom service of process could be made. If it had not registered, personal jurisdiction over the corporation could nonetheless be invoked under theories of implied consent, fairness, or, more likely, presence through doing business. The directors and officers of such a corporation were very likely to be domiciled in the forum state or at the very least to be frequently present in the forum state to attend to the corporation's business. Service of process over those individuals could, in the normal case, be effected without difficulty.

Where the tramp corporation's operations were intended to be remote from the corporate headquarters, a stockholder might have considerable difficulty obtaining personal jurisdiction in one forum over both the corporation and the fiduciaries. The corporation would be amenable only in states where it did business and in its state of incorporation. The presence of officers or directors was considered irrelevant to whether the corporation itself was present.⁷⁸ Thus, service of process within the jurisdiction on such a person was ineffective to confer jurisdiction over the corporation if the corporation were not otherwise present. The promoters were likely to be amenable to process,

75. Cahill, *supra* note 52, at 676.

76. See, e.g., Isaacs, *supra* note 71; Note, *When is a Foreign Corporation "Doing Business" Within the State?*, 21 COLUM. L. REV. 362 (1921); Note, *supra* note 65.

77. Statement as to Jurisdiction at 20–24, *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945) (No. 107) (noting two questions presented by the case: whether company's actions in Washington constituted "doing business" and whether Washington's unemployment tax unduly burdened interstate commerce.); see also *Int'l Shoe Co. v. Washington*, 65 S. Ct. 1579 (noting probable jurisdiction and stating that "[t]he Court does not care to hear argument on the question whether the statutes attacked placed an undue burden on interstate commerce").

78. *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189, 194–95 (1915); see also *Conley v. Mathieson Alkali Works*, 190 U.S. 406, 411 (1903); *Goldey v. Morning News*, 156 U.S. 518, 521 (1895).

however, only where they lived or worked. If the promoters were careful to avoid traveling to the state in which the corporation's operations were actually located, there might be no forum in which the case could be brought.

In the case of a truly national tramp corporation, the corporation might be amenable in many states, but again the directors would only be amenable to personal jurisdiction in their state of domicile or wherever they could be found. If they routinely worked in a state other than that in which they lived, such as directors who worked in New York City but lived in Connecticut or New Jersey, then they might, as a practical matter, be liable to service in both states. Otherwise, service was possible only if the plaintiff knew the fiduciary were to be traveling to a state in which the plaintiff wished to bring suit and could arrange for personal service within that state.

The state of incorporation was not likely to be a viable or even preferable venue for stockholder litigation over these local tramp corporations. Personal jurisdiction over the corporation was, of course, assured, but was not substantially more certain or easier to effect than in the corporation's headquarters state. But the state of incorporation was likely to have no personal jurisdiction over the individual defendants. They were not domiciled there, nor was there any reason connected with the corporation for them to be in the state. This was especially true for tramp corporations incorporated in less populous states such as Delaware, West Virginia, Maryland, South Dakota, or Maine, all of which had sizeable numbers of pseudo-domestic corporations.⁷⁹ For these corporations, then, stockholder litigation was, as a practical matter, confined to the state in which the corporation actually operated.

As a practical matter, the feasibility of stockholder litigation turned on whether the corporation could be made a party in the state or states in which the directors lived or worked. A plaintiff's lawyer would logically start by assessing where the most directors, or those with the deepest pockets, could be served and then would assess whether the corporation could be served in that same forum.

79. See Christopher Grandy, *New Jersey Corporate Chartermongering, 1875-1929*, 49 J. ECON. HIST. 677, 685 (1989); see also Charles M. Yablon, *The Historical Race: Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910*, 32 J. CORP. L. 323, 361 n.226, 365 n.251, 366 (2007).

C. New York's Personal Jurisdiction Advantage Makes It the Center of Stockholder Litigation

By 1920 Delaware was the leader in pseudo-domestic incorporations.⁸⁰ Yet stockholder litigation was not centered in Delaware. Rather, modern stockholder lawsuits were much more likely to be brought in Manhattan than in Wilmington. Moreover, the important caselaw regarding stockholder litigation was being developed by the New York state courts, not the Delaware courts.⁸¹ New York was the center of stockholder litigation because it was the most certain forum in which to secure personal jurisdiction over both directors and corporations.

In all likelihood, directors of public companies, if not also officers, were likely to reside or work in a financial center, because they were likely to need to be close to investment bankers, leading entrepreneurs, and one another. Also, because they typically did not tend to the daily management of the corporation, they had no need to live near the corporation's operational center.

That meant that the directors, particularly those perceived to have deep pockets, were usually subject to personal jurisdiction in New York, New Jersey, Connecticut, Massachusetts, or Illinois.⁸² It seems likely that many directors who lived in New Jersey or Connecticut would either work in New York or at least be frequently present to attend to business there. Although many corporations doing business in New York might not have registered there, they might be found to be present or to be doing business there for purposes of personal jurisdiction.

80. ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 206 n.18 (1933) ("Of the whole list [of the 573 NYSE actively traded listed companies in 1928], 148 of the 573 corporations hold Delaware charters, most of them relatively recent; New York is second with 121, most of them relatively old; New Jersey third with 87, most of which grow [sic] out of the great merger period from 1898–1910."); see also JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970*, at 148 (1970).

81. See, e.g., *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915 (N.Y. 1917); *Bagdon v. Phil. & Reading Coal & Iron Co.*, 111 N.E. 1075 (N.Y. 1916); *Pollitz v. Gould*, 94 N.E. 1088 (N.Y. 1911). Much federal litigation also involved stockholder litigation. See, e.g., *Hutchinson v. Chase & Gilbert*, 45 F.2d 139 (2d Cir. 1930); *Smolik v. Phil. & Reading Coal & Iron Co.*, 222 F. 148 (S.D.N.Y. 1915).

82. See Hornstein, *Legal Controls*, *supra* note 30, at 405 n.5 ("The necessity of effecting service within the jurisdictional limits of the court upon both the corporation and the defendant directors has proved responsible for the prosecution of so many of these suits in New York City, where there is a pronounced concentration of directors."); see also Winer, *supra* note 33, at 153 ("The directors and officers of large corporations are likely to be located in New York or Chicago, where the corporation cannot be found.").

Regardless of the actual incidence of stockholder litigation, it is clear that New York was the most important forum state. As early as 1924, at the start of the age of modern stockholder litigation, a thorough academic discussion of stockholder litigation in the *Yale Law Journal* cited more than 150 cases from more than 30 different courts. More than one-third of those cases were decided by the New York state courts. U.S. Supreme Court cases were a distant second with 14%.⁸³ This initial dominance reinforced, and was reinforced by, a robust and concentrated plaintiffs' bar in New York City. A study in the 1940s found that over half of the substantial stockholder suits brought in New York were filed by 14 firms.⁸⁴ New York's dominance continued into the late 1940s. A standard deskbook on corporate law cited 166 cases in its chapter on stockholder litigation, of which 29% were from New York state courts.⁸⁵

More stockholder litigation might have been filed in Delaware, or at least not been heard in New York, had a procedural doctrine not declined in vigor just as modern stockholder litigation was evolving. Earlier in the twentieth century, many state courts dismissed stockholder litigation involving foreign corporations on the ground of forum non conveniens. Even then, they sometimes adjudicated stockholder litigation when the foreign corporation's headquarters were located in the forum state. That is, courts sometimes decided cases involving pseudo-foreign corporations. But by the late 1920s, just as modern stockholder litigation was emerging as a force in corporate law, courts deemphasized the forum non conveniens doctrine in corporate cases and routinely decided foreign corporation cases.⁸⁶ Most importantly, courts would hear such suits that alleged fraud or

83. See Glenn, *supra* note 26. New Jersey (8%) and Maine (5%) were the only states with 5% or more. Only one case out of the 156 was decided by a Delaware state court.

84. FRANKLIN S. WOOD, CHAMBER OF COMMERCE OF THE STATE OF N.Y., SURVEY AND REPORT REGARDING STOCKHOLDERS' DERIVATIVE SUITS 57 (1944).

85. See ROBERT S. STEVENS, HANDBOOK ON THE LAW OF PRIVATE CORPORATIONS 783-837 (2d ed. 1949). United States Supreme Court cases and cases from Maryland were tied for a distant second (8% each). Three of the 166 cases (<2%) were decided by a Delaware state court.

86. See Note, *Internal Regulation of Foreign Corporations*, 29 COLUM. L. REV. 968, 969 (1929). Courts did tend to dismiss cases seeking dissolution or appointment of a receiver for a foreign corporation, issuing or cancelling stock, and cases requiring a ruling on a stockholder or board meeting or the election or removal of directors. *Id.* at 971-72, 975-76. Courts would entertain stockholder actions involving foreign corporations where the suit sought an accounting or alleged an ultra vires act. See *Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 144-45 (1933) (Stone, J., dissenting); see also Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 22 & n.104 (1929); Joseph Dainow, *The Inappropriate Forum*, 29 ILL. L. REV. 867 (1935); Note, *Forum Non Conveniens and the "Internal Affairs" of a Foreign Corporation*, 33 COLUM. L. REV. 492 (1933).

wrongdoing by the foreign corporation's fiduciaries, even though liability turned on interpreting and applying the state of incorporation's corporation law.⁸⁷ Thus the New York courts could and did routinely hear stockholder litigation involving Delaware corporations. The experienced plaintiffs' bar in New York sought to litigate there because New York provided the best chance for personal jurisdiction over both the corporation and the most important directors. Further, the leading cases in that corporate law area were New York cases.

III. STOCKHOLDER LITIGATION SHIFTS TO DELAWARE

A. *New York Becomes Antagonistic to Stockholder Litigation*

Between the passage of the Securities Act of 1934 and the early 1940s, the number of derivative suits brought in New York increased substantially.⁸⁸ As might be expected, those who were on the receiving end of such lawsuits were not particularly pleased by that increase.⁸⁹ Accordingly, a series of legislative and judicial procedural initiatives during the 1940s resulted in stockholder litigation becoming decentered in New York.

First, in the spring of 1941, the New York legislature explicitly gave corporations the power to indemnify directors.⁹⁰ Although not directly intended to curb stockholder litigation, the legislation was seen as favoring directors at the expense of the stockholders because the fiduciaries' expenses were paid from corporate funds, which would have otherwise been available for settlement or general corporate purposes.⁹¹

New York's other procedural changes were specifically directed at curtailing stockholder litigation.⁹² The statute of limitations in derivative actions was shortened from ten years to six in 1942.⁹³ Perhaps more potently, the statute eliminated the equitable doctrine of tolling,

87. Note, *supra* note 86, at 972–73, 975.

88. WOOD, *supra* note 84, at 32.

89. Note, *Security for Expenses in Shareholders' Derivative Suits: 23 Years' Experience*, 4 COLUM. J.L. & SOC. PROBS. 50, 52 (1968).

90. The legislature did so in two overlapping and uncoordinated statutes. See Act of April 2, 1941, ch. 209, 1941 N.Y. Laws 813; Act of April 14, 1941, ch. 350, 1941 N.Y. Laws 1034. These statutes were reconciled by Act of April 18, 1945, ch. 869, 1945 N.Y. Laws 1971. See George D. Hornstein, *New Aspects of Stockholders' Derivative Suits*, 47 COLUM. L. REV. 1, 9 (1947) [hereinafter Hornstein, *New Aspects*]. The intent of the statutes was to overturn the result in *N.Y. Dock Co. v. McCollum*, 16 N.Y.S.2d 844 (Sup. Ct. 1939).

91. Hornstein, *New Aspects*, *supra* note 90, at 8–10.

92. See STEVENS, *supra* note 85, at 732 n.80.

93. Act of May 15, 1942, ch. 851, 1942 N.Y. Laws 1873.

thus making the statute effectively a statute of repose.⁹⁴ At first blush, this change would not seem to work a hardship because even a six-year statute of limitations would seem luxurious in terms of filing a suit for corporate wrongdoing. However, many corporate fiduciaries were apparently able to conceal their questionable actions for years.⁹⁵ In fact, even under the ten-year statute of limitations with tolling, some stockholder suits had been defeated on statute of limitations grounds.⁹⁶

The third and fourth initiatives were adopted as companion pieces of legislation in 1944, although one was far more controversial than the other.⁹⁷ The less controversial, though probably more important,⁹⁸ change was the adoption of a contemporaneous ownership rule, which limited the number of potential plaintiffs and increased the plaintiffs' bar's burden of finding a representative plaintiff.⁹⁹ The more controversial act gave the corporation the option to seek security for expenses in certain derivative litigation.¹⁰⁰ That is, the corporation, typically controlled by the fiduciary defendants, could require the plaintiff in a derivative action to post a bond at any stage in the proceeding. The bond was to be sufficient to cover "the reasonable expenses, including attorney's fees, which may be incurred by" all the defendants, including, of course, the corporate fiduciaries.¹⁰¹ Moderate defense costs of such a suit in New York in the mid-1940s were estimated to be equivalent to about \$1,300,000 today.¹⁰² This measure was undoubtedly intended to discourage all but the strongest derivative lawsuits.

94. See George D. Hornstein, *The Death Knell of Stockholders' Derivative Suits in New York*, 32 CALIF. L. REV. 123, 126 n.9 (1944) [hereinafter Hornstein, *Death Knell*] (noting that the statute of limitations was reduced from ten years to six and ran from the fraudulent action, not from its discovery).

95. For example, *Hauben v. Morris* involved challenged actions that occurred seven years before the complaint, *Hauben v. Morris*, 5 N.Y.S.2d 721, 723 (App. Div. 1938), *aff'd*, 22 N.E.2d 482 (N.Y. 1939), and *Turner v. American Metal Co.* revolved around actions that took place twenty years prior to suit. *Turner v. Am. Metal Co.*, 36 N.Y.S.2d 356, 385 (Sup. Ct. 1942), *rev'd*, 50 N.Y.S.2d 800 (App. Div. 1944) (trial court held suit viable against one defendant because the statute was tolled, though others dismissed on statute of limitations grounds).

96. Hornstein, *New Aspects*, *supra* note 90, at 8.

97. See Sergei S. Zlinkoff, *The American Investor and the Constitutionality of Section 61-b of the New York General Corporation Law*, 54 YALE L.J. 352, 353 n.7 (1945).

98. See Ralph M. Carson, *Further Phases of Derivative Actions Against Directors*, 29 CORNELL L.Q. 431, 458 (1944).

99. Act of April 9, 1944, ch. 667, 1944 N.Y. Laws 1454.

100. Act of April 9, 1944, ch. 668, 1944 N.Y. Laws 1455.

101. *Id.*

102. See Hornstein, *Death Knell*, *supra* note 94, at 124 (\$100,000 in 1944); see also *CPI Inflation Calculator*, BUREAU OF LAB. STAT., http://www.bls.gov/data/inflation_calculator.htm/ (last visited Apr. 10, 2014) (\$100,000 in 1944 equivalent to \$1,333,982.95 in 2014)

The statute exempted stockholders who held 5% or more of the corporation's stock or who held stock with a market value of more than \$50,000, which is equivalent to more than \$650,000 today.¹⁰³ As contemporaneous commentators pointed out, in the public company setting, the \$50,000 limitation was the practical one; 5% of a publicly traded company would certainly be worth much more than \$50,000.¹⁰⁴ The security-for-expenses statute was harshly criticized at the time of adoption both for its substance and for the stealth process by which it was enacted.¹⁰⁵ The cumulative effect of these procedural changes was stark. Derivative actions in New York City against large corporations, which had been averaging over fifty per year between the mid-1930s and the mid-1940s, fell by 96% to two per year thereafter.¹⁰⁶

B. *The Federal Courts Briefly Attract Stockholder Litigation*

Perhaps the most obvious venue for stockholder litigation, given the procedural developments in New York, was the federal courts.¹⁰⁷ But two procedural aspects of federal litigation made the federal courts less attractive than New York courts to stockholder litigation plaintiffs' lawyers.¹⁰⁸ First, the Federal Rules of Civil Procedure required court approval of any derivative litigation settlement, which put a damper on collusive or sweetheart settlements.¹⁰⁹ New York, by contrast, failed to exercise any significant judicial oversight of stockholder litigation settlements until 1961.¹¹⁰ Further, because in New York only the named parties were bound until a final judgment, private set-

103. *CPI Inflation Calculator*, *supra* note 102 (\$50,000 in 1944 equivalent to \$666,991.48 in 2014).

104. Hornstein, *Death Knell*, *supra* note 94, at 124.

105. See STEVENS, *supra* note 85, at 815–17; see also Hornstein, *Death Knell*, *supra* note 94, at 123–24; Zlinkoff, *supra* note 97, at 353–54. Lawrence Mitchell has persuasively argued that anti-Semitism played a large role in the statute's adoption. See generally Lawrence E. Mitchell, *Gentleman's Agreement: The Antisemitic Origins of Restrictions on Stockholder Litigation*, 36 *QUEEN'S L.J.* 71 (2010).

106. Hornstein, *New Aspects*, *supra* note 90, at 5, 12–13.

107. See Carson, *supra* note 98, at 459.

108. At least two procedural approaches important to stockholder litigation were essentially the same in the federal court as in New York and other principal states and thus did not make a difference to plaintiffs' counsel in deciding where to file suit. First, the federal system had a contemporaneous ownership requirement since *Hawes v. Oakland*, 104 U.S. 450 (1881). See Additional Rule of Practice in Equity 94, 104 U.S. ix (1882) (current version at FED. R. CIV. P. 23.1(b)(1)). Second, state law security-for-expenses statutes were binding on the federal courts in those states and thus did not provide any advantage. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

109. FED. R. CIV. P. 23(c) (1939) (current version at FED. R. CIV. P. 23.1(c)).

110. Business Corporation Law, ch. 855, § 626(d), 1961 N.Y. Laws 2356, 2404 (codified at N.Y. BUS. CORP. LAW § 626(d) (McKinney 2012)) (adding section 626 to the Business Corporations Law, which required, in subsection (d), judicial approval of derivative action settlements).

tlements were frequent.¹¹¹ The difference between New York and federal practice in this regard tended to keep stockholder litigation in New York state courts.¹¹²

Second, the subject matter jurisdiction requirements of the federal courts cut against centering stockholder litigation there. Until the mid-1960s, federal stockholder litigation was based on diversity of citizenship. Because of the complete diversity rule, every named plaintiff had to be a citizen of a different state from every defendant.¹¹³ Because so many individual defendants were citizens of New York, New Jersey, or Connecticut, plaintiffs residing in any of those states defeated diversity jurisdiction.¹¹⁴ Thus the New York plaintiffs' bar found it more difficult to find plaintiffs of diverse citizenship because of the lack of easily accessible information about stockholders and the limitations on lawyer solicitation of clients.¹¹⁵ Paradoxically, then, the strong likelihood of personal jurisdiction over all indispensable parties in New York, the very factor that made New York the center of corporate litigation, cut against federal litigation.

Nonetheless, from the mid-1960s to the mid-1970s, the federal courts were centers for stockholders asserting what were essentially corporate law claims.¹¹⁶ Three principal developments led to this florescence.¹¹⁷ First, the SEC held that stockholders could characterize at least some breaches of corporate law fiduciary duties in market transactions as SEC Rule 10b-5 claims.¹¹⁸ Second, in 1964 the Supreme Court held that stockholders could recover damages under the

New York had considered, and rejected, such a provision in 1942. Hornstein, *Death Knell*, *supra* note 94, at 136.

111. See STEVENS, *supra* note 85, at 822-30.

112. George D. Hornstein, *Problems of Procedure in Stockholder's Derivative Suits*, 42 COLUM. L. REV. 574, 591 (1942).

113. 28 U.S.C. § 1332(a)(1) (2012).

114. Until 1958, corporations were considered citizens only of the state of incorporation. See 13F CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3624, at 41 (3d ed. 2009).

115. See Hornstein, *New Aspects*, *supra* note 90, at 13.

116. The federal courts during this period also saw an explosion of stockholder litigation based on traditional interpretations of section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (2013). These cases did not necessarily federalize state corporation law claims for relief. For that reason, the rise of strictly federal securities litigation is not directly relevant to the question of centering for stockholder derivative litigation.

117. On the rise and fall of federal stockholder litigation during this period, see Richard A. Booth, *The Fall and Rise of Federal Corporation Law*, 2 J. BUS. & TECH. L. 161 (2007); Brian Cheffins et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, 2012 COLUM. BUS. L. REV. 427; Mark J. Loewenstein, *A Perspective on Federal Corporation Law*, 2 J. BUS. & TECH. L. 425 (2007); Michael A. Perino, *The Milberg Weiss Prosecution: No Harm, No Foul?*, BRIEFLY. . . , May 2008, at 1.

118. *In re Cady, Roberts & Co.*, 40 S.E.C. 907, 913 (1961).

federal securities law for fundamental corporate transactions such as mergers.¹¹⁹ These two changes meant that stockholders could litigate in federal court based on federal question jurisdiction, thus avoiding problems of demonstrating complete diversity.¹²⁰

Finally, the Court amended Federal Rule of Civil Procedure 23 in 1966 to make class actions opt-out, which increased the preclusive effect of derivative actions. Before 1966, derivative actions were “opt in,” binding only those stockholders who affirmatively requested to be included; in reality the rule provided only for permissive joinder. By binding all stockholders, the amendments increased the amount of damages sustained by the plaintiff class and, by extension, the attorney’s fees for plaintiffs’ counsel, which created an incentive to litigate in federal court.¹²¹

These changes resulted in a concentration of stockholder litigation in the federal courts beginning around 1965.¹²² But a decade later, over the course of just twenty months, the Supreme Court made federal stockholder litigation distinctly inhospitable to plaintiffs. In June 1975 the Court imposed a more restrictive test for implying private rights of action and also restricted standing under the securities laws to those who actually purchased or sold securities.¹²³ Less than a year later, the Court in *Ernst & Ernst v. Hochfelder* held that plaintiffs in Rule 10b-5 actions had to show that defendants intended to defraud them.¹²⁴ Ten months after *Ernst & Ernst*, the Court in *Santa Fe Industries, Inc. v. Green* effectively shunted much stockholder litigation to the state courts by holding that claims for fiduciary duty violation, divorced from any allegation of deception, could not be brought under Rule 10b-5.¹²⁵

119. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

120. See Note, *supra* note 89, at 59–61 (detailing successful efforts to transform stockholder litigation based on state corporate law into federal securities suits).

121. Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 69, 94–107 (1966). On the effect of the amendments for stockholder derivative suits, see Bernstein Litowitz Berger & Grossman LLP, *Plaintiffs’ Perspective*, in *LITIGATING SECURITIES CLASS ACTIONS* § 1.01 (Jonathan N. Eisenberg ed., 2011) (detailing the history of securities class actions).

122. See Cheffins et al., *supra* note 117, at 444; see also Perino, *supra* note 117, at 11–13 (describing the rise of federal securities litigation starting in the mid-1960s).

123. *Cort v. Ash*, 422 U.S. 66, 78 (1975); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 753–54 (1975).

124. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

125. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 473–74 (1977); cf. *Burks v. Lasker*, 441 U.S. 471 (1979) (holding that federal courts would look to state law to determine whether a special litigation committee was independent, even when litigating a federal securities claim, which gave plaintiffs no substantive advantage to litigating securities claims in federal court).

*C. Delaware's Personal Jurisdiction Advantage Makes It the
Center of Stockholder Litigation*

1. Institutions

After New York affirmatively discouraged stockholder litigation, Delaware had the institutional and doctrinal elements necessary to be the new center of stockholder litigation. The institutional elements that made Delaware the center of stockholder litigation were largely in place by 1950. The lynchpin of Delaware's success in becoming the center of stockholder litigation was its procedure. Specifically, Delaware's sequestration system of personal jurisdiction and the theory on which it was based were unique to Delaware and could not readily be copied by other states.

The earliest institution contributing to Delaware's emergence as the center of litigation, a Court of Chancery presided over by a Chancellor, was in existence by 1800.¹²⁶ Although not intended at the time, a separate court of equity and a judge whose jurisdiction was wholly equitable led to the speedy decisions and subject matter expertise that are highly prized, at least *ex ante*, by corporate litigants and their lawyers. Courts of equity became the exclusive venue for stockholder derivative actions on the theory that a court of law would not recognize the power of a stockholder to control the corporation; that power was vested in the board.¹²⁷ Moreover, the Delaware General Assembly occasionally added to the Chancellor's jurisdiction in corporate matters by statutorily granting the power to resolve certain intra-corporate disputes that might not otherwise have fallen within his jurisdiction.¹²⁸ In 1939 the position of Vice Chancellor was created, which further institutionalized the previously *ad hominem* nature of Delaware equity.¹²⁹ A second Vice Chancellor position was created in 1961.¹³⁰

A second necessary institution was essentially in place by 1900. The General Corporation Law (DGCL) of 1899¹³¹ was not primarily

126. DEL. CONST. OF 1792, art. VI, §§ 1, 14. Delaware had courts of chancery before the American Revolution but no separate judicial officer administering them. Rather, it appears that the same judges heard cases in both law and equity. See DEL. CONST. OF 1776, art. 13; see also William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792–1992*, 18 DEL. J. CORP. L. 819, 825 (1993).

127. This approach was developed in the mid-nineteenth century and was firmly in place by 1882. See *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1856); *Hawes v. Oakland*, 104 U.S. 450 (1882).

128. Quillen & Hanrahan, *supra* note 126, at 834.

129. See *id.* at 846–48.

130. Act of Mar. 2, 1961, ch. 5, § 1, 53 Del. Laws 7, 7.

131. General Corporation Law, ch. 273, 21 Del. Laws 445 (1899)

wrought by Delaware lawyers or even with Delaware in mind. Rather, it was adopted wholesale, with some modest changes thought to be improvements, from New Jersey's corporation law of 1896.¹³² The DGCL was perceived as effective (whether for good or for ill) for corporate managers from 1899 onward and has never been considered to be significantly outdated or inappropriate for public corporations.¹³³ Since its adoption, the statute has undergone only three major retoolings:¹³⁴ almost immediately after adoption,¹³⁵ in the late 1920s just before the Crash,¹³⁶ and in 1967.¹³⁷ The 1967 revision entailed a thorough review of the existing substantive provisions, and the final product was thought to be a state-of-the-art modern corporation statute for public corporations.¹³⁸

The third institution important to Delaware's success, a large body of caselaw, was also, and rather surprisingly, in place by 1900. The surprising part is that such a body of decisions could be put in place within a year of the statute's adoption. However, Chancellor Nicholson held, in accord with a traditional maxim of statutory interpretation, that by adopting New Jersey's corporation statute largely verbatim, the Delaware General Assembly intended that the statute be interpreted in accord with New Jersey caselaw.¹³⁹ In one stroke, nearly twenty-five years of relevant corporate law decisions were immediately imported into Delaware and grafted onto the DGCL.¹⁴⁰

132. Yablon, *supra* note 79, at 359–60; *see also* Grandy, *supra* note 79, at 685; William E. Kirk III, *A Case Study in Legislative Opportunism: How Delaware Used the Federal-State System to Attain Corporate Pre-Eminence*, 10 J. CORP. L. 233, 251–54 (1984); Harwell Wells, *The Modernization of Corporation Law, 1920–1940*, 11 U. PA. J. BUS. L. 573, 618 (2009). *See generally* LINCOLN STEFFENS, *THE STRUGGLE FOR SELF-GOVERNMENT* 209–294 (1906).

133. *See* Yablon, *supra* note 79, at 361 (“In short, Delaware’s proponents sought to present their law as a better, cheaper version of New Jersey.”).

134. *See* S. Samuel Arsht, *A History of the Delaware Corporation Law*, 1 DEL. J. CORP. L. 1, 9–11 (1976). In 1953, the DGCL was rearranged and reorganized as part of a recodification of all Delaware statutes, but the substance was not significantly changed. *Id.* at 11 n.69. For a harsh critique of Arsht’s interpretation of the DGCL, but one that does not take issue with his periodization, *see* Joel Seligman, *A Brief History of Delaware’s General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249 (1976).

135. Act of Mar. 7, 1901, ch. 166, 22 Del. Laws 255.

136. Act of Mar. 2, 1927, ch. 85, 35 Del. Laws 220; Act of Mar. 22, 1929, ch. 135, 36 Del. Laws 366. On the importance of those amendments, *see* A.A. Berle, Jr., *Investors and the Revised Delaware Corporation Act*, 29 COLUM. L. REV. 563 (1929).

137. Act of July 3, 1967, ch. 50, 56 Del. Laws 151.

138. On the drafting process of the 1967 statute, *see* Comment, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861, 863–72 (1969).

139. *Wilmington City Ry. Co. v. People’s Ry. Co.*, 47 A. 245, 251–53 (Del. Ch. 1900).

140. Yablon, *supra* note 79, at 361. Many key provisions of New Jersey’s corporations code were in place by 1875, so the relevant New Jersey case law spanned 25 years by 1900. *Id.* at 333–34, 340–45, 349–50.

That importation comprised a considerable body of precedent.¹⁴¹ Of course, the Delaware Court of Chancery immediately built upon that body of precedent. In terms of importance if not quantity, the Court of Chancery entertained major corporate litigation from the 1910s onward.¹⁴²

The final institutional component important to Delaware's success is its corporate bar.¹⁴³ According to an influential Delaware plaintiff's lawyer, by the late 1960s, the Delaware corporate bar was about twenty-five lawyers, which was only 5% of the total number of Delaware lawyers in private practice.¹⁴⁴ The corporate work was concentrated in three firms on the defendant side.¹⁴⁵ On the plaintiffs' side, the Delaware bar was likewise a "small coterie" of lawyers.¹⁴⁶ The point is that the Delaware corporate bar, whether specializing in non-litigation work on behalf corporations or litigation for plaintiffs or defendants, was relatively distinct and actively engaged in furthering Delaware's position as the leader in pseudo-domestic incorporations.¹⁴⁷

2. *Legal Rules*

In addition to the institutional elements of Delaware's success, the substance of Delaware's corporate law played a significant role, but not one that gave it advantages that other states could not replicate. In modern management parlance, most of Delaware corporate law has been "best practices" but not "sustainable advantages." That is, most of Delaware corporate law has been necessary to keep Delaware in the lead, but has not given Delaware any special advantage that could not be replicated by other states.¹⁴⁸

141. A Westlaw search reveals that between 1875 and 1899 New Jersey had 322 reported cases involving corporate law; Delaware had 22.

142. Quillen & Hanrahan, *supra* note 126, at 841.

143. See William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 692 (1974); see also Comment, *supra* note 138, at 864.

144. Comment, *supra* note 138, at 863-64 (citing Interview with Irving Morris, Esq., in Wilmington, Del. (July 25, 1968)); cf. Cary, *supra* note 143, at 692.

145. Comment, *supra* note 138, at 864.

146. Cheffins et al., *supra* note 117, at 463; see also Mary Williams, *Delaware's Sedate Chancery Court Is a Major Corporate Battleground*, WALL ST. J., May 10, 1984, at 37 ("A core of about two dozen lawyers work the court.").

147. Comment, *supra* note 138, at 863-64; see also Cary, *supra* note 143, at 668, 687-92; Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1939-40 (1998).

148. See Kamar, *supra* note 147, at 1933.

Other states could, and did, adopt Delaware's corporate statute more or less whole.¹⁴⁹ At least a handful of states currently base their corporations statute on Delaware's.¹⁵⁰ Indeed, as we have seen, Delaware itself initially took its corporations statute from another state. This New Jersey/Delaware corporations law might be thought of as being an urtext for corporate statutes. To the extent that revisions, large or small, in the ur-statute might give a state an advantage for awhile, other states could copy those provisions when they seem to be valuable or necessary. Delaware's substantive decisional law might also be imported, as Delaware did with New Jersey's decisions. But, as Ehud Kamar points out, that may no longer be the advantage it was in 1900.¹⁵¹ If nothing else, the equitable nature of many corporate law issues means that it is the judges as well as the decisions that matter. Unless other states clone the Court of Chancery jurists, adopting Delaware caselaw is probably not a sustainable advantage.¹⁵²

That leaves procedural law qualities with the potential to give Delaware a unique, sustainable advantage over other states. In general, Delaware's procedure was not less hospitable to stockholder plaintiffs than procedures in other states.¹⁵³ In two areas it was significantly more welcoming. However, those two aspects could have been dupli-

149. New Jersey kept the structure of its act, with some amendments, intact from 1875 until its own 1968 revision. *Statement of the Honorable Richard J. Hughes, Governor of the State of New Jersey, in Introduction to the Symposium of the Rutgers Law Review Examining "The New Jersey Business Corporation Act,"* 23 RUTGERS L. REV. 613, 613 (1968); see also Comment, *supra* note 138, at 892. Thus for more than 60 years, New Jersey and Delaware had comparable corporations statutes. Ironically, New Jersey revised its corporations statute at the same time Delaware did, and in part to adopt Delaware innovations, but paradoxically, New Jersey essentially adopted the Model Business Corporations Act structure. *Cain v. Merck & Co.*, 1 A.3d 834, 839 & n.2 (N.J. Super. Ct. App. Div. 2010); see also Comment, *supra* note 138, at 892; Patrick J. Ryan, Book Review, 48 BUS. LAW. 1745, 1745 (1993).

150. At least four U.S. jurisdictions currently do so. Michael P. Dooley & Michael D. Goldman, *Some Comparisons Between the Model Business Corporation Act and the Delaware General Corporation Law*, 56 BUS. LAW. 737, 738 & n.4 (2001) (listing Kansas, Nevada, Oklahoma, and Puerto Rico).

151. Kamar, *supra* note 147, at 1929–30.

152. *Id.*; see also Ryan, *supra* note 149, at 1745–46 (noting that New Jersey courts have not had the corporate law case flow that Delaware or New York has had, thus necessitating sophisticated treatises).

153. Delaware imposed a contemporaneous ownership rule on plaintiffs in 1945. Act of April 18, 1945, ch. 157, § 4, 45 Del. Laws 594, 598 (codified as amended at DEL. CODE ANN. tit. 8, § 327 (2013)); see also *Rosenthal v. Burry Biscuit Corp.*, 60 A.2d 106, 110–11 (Del. Ch. 1948). By the late 1940s, other important commercial states—including Maryland, New Jersey, New York, and Pennsylvania—had such a requirement. Hornstein, *New Aspects*, *supra* note 90, at 7 & n.36. The federal courts had such a rule since the 1890s. See *Hawes v. Oakland*, 104 U.S. 450 (1881); see also Additional Rule of Practice in Equity 94, 104 U.S. ix (1882) (current version at FED. R. CIV. P. 23.1(b)).

Delaware's demand requirement, which had been in place since 1911, also paralleled that of other states and the federal courts. See *Ellis v. Penn Beef Co.*, 80 A. 666, 668 (Del. Ch. 1911); see

cated by other states and thus were not sustainable advantages in the competition for caseflow.

Delaware's lack of a security-for-expenses statute made Delaware a distinctly more favorable jurisdiction in which to litigate than other states, especially New York.¹⁵⁴ Abe Pomerantz, a leading plaintiffs' lawyer of the time, believed it to be advantageous to sue in a state without a security-for-expenses statute and noted that Delaware was the favored jurisdiction in that regard.¹⁵⁵ By the late 1960s, at least ten states had such statutes, including California, Florida, Maryland, New Jersey, New York, and Pennsylvania, and those statutes were binding on the federal courts in those states.¹⁵⁶ Of course, any of these states could have duplicated Delaware's approach simply by repealing their statutes. If the absence of a security-for-expenses statute were an advantage in attracting stockholder litigation, it was one every state could possess.

Delaware's other procedural advantage was its approach to stockholder inspection rights. Delaware's attitude was probably inadvertent, but nonetheless was inviting to the plaintiff's bar.¹⁵⁷ Delaware, like virtually every other state, had codified the common law right of stockholders to inspect corporate records.¹⁵⁸ In the 1967 revision process, Irving Morris, the only plaintiff's bar member of the revision committee, persuaded the committee to continue to permit inspection without percentage or temporal ownership restrictions, which were increasingly common in other states.¹⁵⁹ He also convinced the committee to place the power to grant inspection in the Court of Chancery, eliminating a cumbersome Superior Court mandamus process.¹⁶⁰

also ERNEST L. FOLK III, REVIEW OF THE DELAWARE CORPORATION LAW 99 (1968) (noting the Delaware rule accords with that of other states).

Finally, Delaware developed a common law rule that permitted the Chancellor to approve a settlement of a stockholder derivative suit. *See, e.g.,* Karasik v. Pac. E. Corp., 180 A. 604 (Del. Ch. 1935). Approval became mandatory in 1948. *See* Mayer v. Adams, 133 A.2d 138, 140 (Del. Ch. 1957). Other states had developed a similar approach by the mid-1960s. FOLK III, *supra*, at 109 (listing eighteen states that had a similar rule to Delaware); *see also* Hornstein, *New Aspects*, *supra* note 90, at 20.

154. Comment, *supra* note 138, at 888.

155. Note, *supra* note 89, at 61 (citing Interview with Abraham L. Pomerantz, Attorney, in N.Y.C., N.Y. (Nov. 15, 1967)).

156. FOLK III, *supra* note 153, at 109; *see also* Hornstein, *New Aspects*, *supra* note 90, at 5-6 (listing Maryland, New Jersey, and Pennsylvania); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) (holding state security-for-expenses statutes to be substantive for *Erie* purposes).

157. *See* Comment, *supra* note 138, at 887-88.

158. FOLK III, *supra* note 153, at 165-68.

159. *See* Comment, *supra* note 138, at 887-88; *see also* FOLK III, *supra* note 153, at 165-68.

160. Comment, *supra* note 138, at 887-88; *see also* Memorandum from Irving Morris to Members of the Del. Corp. Law Revision Comm'n (Oct. 1, 1964), available at <http://law.widener.edu/>

With this change, plaintiffs had a streamlined method with fewer procedural hurdles to obtain corporate records that might reveal fiduciary duty breaches.¹⁶¹ Although this change was a definite advantage, it appears that only Morris realized just how attractive this would make Delaware in the eyes of the plaintiffs' bar.¹⁶² But again, as with the security-for-expenses statutes, any state could have adopted Delaware's approach.

3. Sequestration

Delaware's unique and inimitable system of personal jurisdiction was the key to Delaware becoming and remaining the center of stockholder litigation. From 1927 onward, Delaware had a method for obtaining personal jurisdiction over corporate fiduciaries that other states could not replicate: sequestration. When New York ceased to be the center of stockholder litigation and the federalization of stockholder claims ended, Delaware used sequestration to attract lawsuits and become the center of stockholder litigation.

Sequestration depended upon three elements. First, a Delaware statute declared that all shares of stock in Delaware corporations are located in Delaware. Second, Delaware adopted an amenability statute that asserted quasi-in-rem jurisdiction over nonresident fiduciaries by seizing their stock to induce them to enter a general appearance. Third, stock was seized by notifying the corporation's Delaware agent, not by seizing the certificate.

As for the first principle, Delaware's 1899 statute provided that the stock of a Delaware corporation was located in Delaware.¹⁶³ Constitutionally, this provision is important because, under *Pennoyer v. Neff*, a state has power over property located within its borders.¹⁶⁴ Locating shares of all Delaware corporations in Delaware lets the state adjudicate quasi-in-rem actions that are entitled to full faith and credit.¹⁶⁵

LawLibrary/Research/OnlineResources/DelawareResources/~/media/Files/lawlibrary/corporations/committeedocuments.ashx.

161. See Cary, *supra* note 143, at 688; see also Comment, *supra* note 138, at 887–88.

162. See Comment, *supra* note 138, at 887–88.

163. General Corporation Law, ch. 273, § 128, 21 Del. Laws 445, 499 (1899) (codified as amended at DEL CODE ANN. tit. 8, § 169 (2013)) (“For all purposes of title, action, attachment, garnishment taxation and jurisdiction of all courts held in this State, the situs of the ownership of the capital stock of all corporations existing under the laws of this State. . . shall be regarded as in this State.”).

164. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877).

165. See *id.* at 733–34.

The second principle, that personal jurisdiction over nonresident fiduciaries could be effected by seizing their Delaware stock, builds on the first principle and was put in place in 1927. In response to a decision of the Chancellor that he had no power to assert personal jurisdiction over nonresidents by seizing their stock,¹⁶⁶ the General Assembly enacted section 366, which became known as the sequestration statute.¹⁶⁷ It gave the Court of Chancery the power to assert personal jurisdiction over a nonresident defendant by seizing the defendant's Delaware property, including shares of stock. The court could sell the property to satisfy the plaintiff's claim unless the defendant made a general appearance.¹⁶⁸

Third, section 366 did not set out the procedure to be followed to seize the shares, leaving that power to the Chancellor.¹⁶⁹ The Chancellor's practice, eventually embodied in a rule, required that the plaintiff by affidavit assert, among other things, that the defendant owned stock in a particular Delaware corporation. The Chancellor then appointed a sequestrator who served a notice of seizure on the corporation's in-state agent. The notice directed the agent to identify to the sequestrator any shares held by the defendant and to reflect on the corporation's records that the shares in question were seized by the sequestrator.¹⁷⁰ Essentially, the sequestration procedure seized shares by providing notice to the corporation's in-state agent.

This "notice rule" for seizing stock was the nearly uniform approach in the early twentieth century.¹⁷¹ However, by the early 1930s many states had adopted a different approach. The Uniform Stock Transfer Act provided that stock could only be seized by physical capture of the certificate itself.¹⁷² This "certificate rule" was intended to facilitate a national market in securities by protecting purchasers. A bona fide purchaser of stock could be assured of good title if he or she received the certificate endorsed by the registered holder. Under the

166. *Skinner v. Educ. Pictures Sec. Corp.*, 129 A. 857, 860–61 (Del. Ch. 1925).

167. Act of Apr. 12, 1927, ch. 217, 35 Del. Laws 613 (1927) (codified as amended at DEL. CODE ANN. tit. 10, § 366 (2013)); *see also* *Wightman v. S.F. Bay Toll-Bridge Co.*, 142 A. 783, 784 (Del. Ch. 1928) ("The new provisions were enacted in order to obviate the effect of [*Skinner*]." (citation omitted)).

168. Act of Apr. 12, 1927 § 1, 35 Del. Laws at 614 (codified as amended at DEL. CODE ANN. tit. 10, § 366(a)).

169. *Id.* (codified as amended at DEL. CODE ANN. tit. 10, § 366(b)) ("The Chancellor shall have power to make all necessary rules respecting the form of process, the manner of issuance and return thereof . . .").

170. *See* DEL. CH. CT. R. 4(db); *see also* *Greene v. Johnston*, 99 A.2d 627, 629 (Del. 1953).

171. *See* Joseph Henry Beale, *The Exercise of Jurisdiction In Rem to Compel Payment of a Debt*, 27 HARV. L. REV. 107, 111 (1913).

172. UNIF. STOCK TRANSFER ACT § 13, 6 U.L.A. 17 (1922) (withdrawn 1951).

notice rule, the rights of such a purchaser might be subordinated to the rights of a person who had seized the shares by notice to the corporation.¹⁷³

Given a choice between protecting purchasers while facilitating securities markets on the one hand and protecting plaintiffs while facilitating personal jurisdiction over stockholders on the other, most states obviously would have chosen the former and thus adopted the certificate rule. For Delaware, however, the notice rule made more sense. Obviously, Delaware had (and has) very few residents; thus protecting purchasers of securities would have been a lower priority vis-à-vis facilitating personal jurisdiction for stockholder litigation. For Delaware, the sequestration procedure was a brilliant development.

The notice rule, coupled with Delaware's lead in pseudo-domestic corporations, created an advantage for stockholder litigation that other states could not duplicate. Even states such as New York that presumably had a large number of stock certificates within their borders could not have duplicated Delaware's advantage, because certificates are so mobile and most owners keep their certificates safe from physical seizure. Thus plaintiffs in stockholder litigation would, as a practical matter, be unable to effect personal jurisdiction over corporate fiduciaries by quasi-in-rem jurisdiction through seizing the fiduciaries' stock certificates. To have an advantage in securing personal jurisdiction over corporate fiduciaries, quasi-in-rem seizures need to operate under the notice rule. Only Delaware's sequestration approach, which located stock in Delaware and retained the notice rule, coupled with the large percentage of pseudo-domestic corporations, could provide this advantage.

By the early 1960s, Delaware was one of the few states that retained the notice rule. More importantly, Delaware was the only state that both retained the notice rule and had a significant number of pseudo-domestic corporations. Other commercially important states, including California, Connecticut, New Jersey, New York, Pennsylvania, Illinois, Michigan, and Ohio, had switched to the certificate rule by the early 1960s.¹⁷⁴ By the early 1970s, Delaware was unique in retaining the notice rule.¹⁷⁵

173. See *id.* § 13 commissioners' note, 6 U.L.A. at 18; see also U.C.C. § 8-317 cmt. (1951) (current version at U.C.C. § 8-112 (2012)).

174. See Robert P. Smith, Jr., Note, *Levy and Attachment of Corporate Stock*, 10 U. FLA. L. REV. 209, 212 n.8, 212-15 (1957) (providing detailed description of state approaches); see also FOLK III, *supra* note 153, at 264 (noting that California had impliedly repealed its sequestration approach in favor of a certificate approach).

175. Pierre R. Loiseaux, *Liability of Corporate Shares to Legal Process*, 1972 DUKE L.J. 947, 959-61.

By the mid-1960s, Delaware was undoubtedly the most popular state for stockholder litigation. More importantly, it was widely believed that Delaware's primary advantage in attracting cases was its sequestration procedure. One former Delaware Chief Justice remembered that derivative litigation in Delaware was the "big thing" when he first came to the bar in 1963.¹⁷⁶ Even by the mid- to late-1950s, Delaware litigation was prominent. As another former Chief Justice of the Delaware Supreme Court noted, "I served a summer 'clerkship' at Sullivan and Cromwell in New York in 1956, when almost all cases I worked on were in Delaware."¹⁷⁷ Two prominent plaintiffs' lawyers of the 1960s believed that by 1968 Delaware had become the most attractive alternative to New York.¹⁷⁸ Likewise, defendants' lawyers also preferred Delaware by the mid-1960s.¹⁷⁹

Practitioners and academics in the 1960s and 1970s recognized that the centering of stockholder litigation in Delaware was in large part caused by sequestration and that changing sequestration might have truly disastrous consequences for Delaware caseflow. Former Chief Justice Moore observed that, in the mid-1960s, stockholder litigation "provided a very comfortable living for both the plaintiffs' and the defendants' bar and educated a great many children."¹⁸⁰ Professor Folk also thought sequestration was key to Delaware caseflow.¹⁸¹ The thoughtful and well-informed student-author of the famous *Law for Sale* Comment also believed that sequestration was key to centering stockholder litigation in Delaware.¹⁸² Certainly the Delaware lawyers who revised the DGCL in the 1960s believed sequestration was vital to Delaware's success. Both a leading plaintiffs' attorney and a prominent defendants' attorney were of the view that sequestration was key to retaining stockholder litigation.¹⁸³ But Delaware's position as

176. Andrew G.T. Moore II, *Shareholder Rights Still Alive and Well in Delaware: The Derivative Suit: A Death Greatly Exaggerated*, 38 ST. LOUIS U. L.J. 947, 954 (1994).

177. E. Norman Veasey, *Musings from the Center of the Corporate Universe*, 7 DEL. L. REV. 163, 164 (2004).

178. Note, *supra* note 89, at 61–62 (quoting Abraham L. Pomerantz and Sidney B. Silverman).

179. Minutes of Thirty-Second Meeting of Delaware Corporation Law Study Committee 2 (Apr. 15, 1966), available at <http://law.widener.edu/LawLibrary/Research/OnlineResources/DelawareResources/~media/Files/lawlibrary/corporations/committeeminutes.ashx> (reflecting that numerous members of the New York defendants' bar "felt Delaware was a more favorable forum than any other available").

180. Moore II, *supra* note 176, at 954.

181. FOLK III, *supra* note 153, at 265; see also Ernest L. Folk III & Peter F. Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749, 795–96 (1973).

182. Comment, *supra* note 138, at 890. The author became a distinguished antitrust scholar, Professor Harry First, of N.Y.U. School of Law.

183. Minutes of Thirty-Third Meeting of Delaware Corporation Law Study Committee 1–2 (Apr. 25, 1966), available at <http://law.widener.edu/LawLibrary/Research/OnlineResources/De->

the center of stockholder litigation was not as secure as it appeared. Within a few years Delaware's unique advantage would be struck down.

*D. Shaffer v. Heitner Ends Delaware's Unassailable Advantage*¹⁸⁴

Delaware's sequestration process, the lynchpin of its success in stockholder litigation, was struck down by the Supreme Court of the United States in *Shaffer v. Heitner*, which held that sequestration violated the Due Process Clause because it did not comport with the minimum contacts test of *International Shoe*.¹⁸⁵ Delaware had been the center of state stockholder litigation since the mid-1960s and no doubt eagerly anticipated the effects on the Court of Chancery's docket of the Supreme Court's decisions that relegated much federal stockholder litigation to state courts. But that eager anticipation must have turned to dread when, on the first Monday in October 1976, the Court noted probable jurisdiction in *Shaffer*.¹⁸⁶ The paradox was that three months after the Court put the final nail in the coffin for federal stockholder suits based on state corporate law claims, it destroyed Delaware's primary tool for hearing those suits.¹⁸⁷ *Shaffer* arose when the Greyhound Corporation, a Delaware corporation, and its California subsidiary violated the antitrust laws, resulting in a judgment and fines of over \$13.5 million.¹⁸⁸ Arnold Heitner, a Greyhound stockholder, filed a derivative suit in the Delaware Court of Chancery, naming the corporation and twenty-eight nonresident directors and officers.¹⁸⁹

lawareResources/~media/Files/lawlibrary/corporations/committeeminutes.ashx (Irving Morris, plaintiffs' lawyer, opining that amending the sequestration statute would send corporate litigation to other states); *see also id.* at 3 (S. Samuel Arsht, defendants' lawyer, expressing similar support for sequestration).

184. The best description of the events leading up to *Shaffer* is Wendy Collins Perdue, *The Story of Shaffer: Allocating Jurisdictional Authority Among the States*, in *CIVIL PROCEDURE STORIES* 129 (Kevin M. Clermont ed., 2004). As Professor David L. Ratner noted, "Although the Supreme Court had quite a bit to say on the subject in its *Shaffer* opinion, what it said is not very clear." David L. Ratner & Donald E. Schwartz, *The Impact of Shaffer v. Heitner on the Substantive Law of Corporations*, 45 *BROOK. L. REV.* 641, 645 (1979).

185. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977). *See generally* *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

186. *Shaffer v. Heitner*, 429 U.S. 813 (1976).

187. *See* Richard J. Agnich et al., *What Business Will Look for in Corporate Law in the Twenty-First Century*, 25 *DEL. J. CORP. L.* 6, 30 (2000) (Justice Jack Jacobs observing that *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977), resulted in "a complete reallocation of the corporate law dispute business from the federal to the state courts. A further result . . . of that decision was that the Delaware Court of Chancery became one of the most active corporate law courts in the country . . .").

188. Complaint at 4–7, *Heitner v. Greyhound Corp.*, 1 *DEL. J. CORP. L.* 188 (Del. Ch. 1975) (No. 4514).

189. *Id.* at 1–4.

The plaintiff's Delaware counsel obtained an order of sequestration against twenty-one of the defendants, seizing over \$1.5 million worth of stock.¹⁹⁰

The individual defendants challenged the sequestration system on three grounds. First, the defendants reasoned that because the avowed purpose of sequestration was to compel a general appearance, the sequestration procedure was really an action in personam and must meet the requirements of *International Shoe*. Second, they asserted that section 169, the situs statute, was ineffective to locate the Greyhound stock in Delaware and that therefore there was no property within Delaware to be seized. Only seizure of the certificates would be effective. Finally, they argued that the sequestration process violated the pre-and post-seizure safeguards required by recent Supreme Court cases.¹⁹¹ As would be expected, both the Court of Chancery and the Delaware Supreme Court rejected all of these arguments.¹⁹²

On appeal, the Supreme Court of the United States was largely unanimous in its view, although the Court's analysis had little to do with the due process mechanics of the Delaware sequestration system actually raised by the parties. Justice Marshall, speaking for the Court, observed that *International Shoe* was pivotal in refocusing the in personam inquiry away from territorial presence to whether the defendant had sufficient contacts with the forum state such that asserting personal jurisdiction would comport with traditional notions of fair play and substantial justice.¹⁹³ But no comparable concepts had yet undercut *Pennoyer's* territoriality principle in cases where the dispute involved in rem or quasi-in-rem rather than in personam jurisdiction.¹⁹⁴ Justice Marshall then concluded, "We think that the time is ripe to consider whether the standard of . . . *International Shoe* should be held to govern actions in rem as well as in personam."¹⁹⁵

190. *Heitner*, 1 DEL. J. CORP. L. 188, 193-94, *aff'd*, 361 A.2d 225 (Del. 1976), *rev'd sub nom. Shaffer*, 433 U.S. 186. The affidavit in connection with the sequestration asserts the defendants owned 101,753 shares of Greyhound stock and that the closing price was \$15.25 per share, for a total of \$1,551,733. See Affidavit Pursuant to Rules 4(da) and 4(db), *Heitner*, 1 DEL. J. CORP. L. 188 (No. 4514). Apparently seven defendants did not own Greyhound shares and so were not amenable to the sequestration statute. *Shaffer*, 433 U.S. at 192 n.8.

191. *Heitner*, 1 DEL. J. CORP. L. at 192-98. In particular, the defendants contended that sequestration violated the teachings of *Fuentes v. Shevin*, 407 U.S. 67 (1972), and *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

192. *Heitner*, 1 DEL. J. CORP. L. 188, *aff'd*, 361 A.2d 225.

193. See *Shaffer*, 433 U.S. at 203-04.

194. *Id.* at 205.

195. *Id.* at 206.

He decided that it did. Prudence might have suggested that the Court remand the case to the Delaware court system either to dismiss the action or for further proceedings if the plaintiff could show minimum contacts. Some of the Justices favored this approach.¹⁹⁶ But in the end, the Court assessed the minimum contacts question for a variety of reasons, including a belief that the parties had, in fact, addressed the minimum contacts factual question; probable embarrassment at issuing an opinion that sidestepped the question presented; and, at least for Justice Powell, the perceived unfairness of subjecting the defendants to continued litigation (the shares had been sequestered for over three years by the time the Supreme Court issued its opinion).¹⁹⁷

In a gigantic leap of logic, Justice Marshall assumed in a footnote that, if minimum contacts existed, Delaware's sequestration statute and rule would be sufficient to make the defendants amenable in this case.¹⁹⁸ Even a cursory reading would reveal that no such amenability was stated or intended by Delaware, and Justice White's questions at oral argument made clear that Delaware's view was that without sequestration the defendants were not amenable to personal jurisdiction.¹⁹⁹ Justice Brennan rightly took Justice Marshall to task for this approach.²⁰⁰

In any event, undeterred by the state of the record or the text of Delaware law, the Court moved ahead to reject the plaintiff's suggestion that Delaware's interest in overseeing domestic corporations was a sufficient contact. Justice Marshall correctly held that a state's interest for choice of law purposes is not sufficient for personal jurisdiction purposes.²⁰¹ Likewise, Justice Marshall dismissed plaintiff's argument that serving as a director *vel non* is a sufficient contact, even with the benefits that the plaintiff noted in his brief (i.e., the possibility of indemnification and of interest-free loans). Rather, that interest is,

196. See Letter from Justice William J. Brennan, Jr. to Justice Thurgood A. Marshall (May 18, 1977); Letter from Justice Potter Stewart to Justice Thurgood A. Marshall (May 18, 1977). These letters are available at <http://civprostories.law.cornell.edu/chap03/shaffer03.pdf>.

197. See Letter from Justice Byron R. White to Justice Thurgood A. Marshall (May 18, 1977); Letter from Justice Lewis F. Powell, Jr. to Justice Thurgood A. Marshall (May 31, 1977); Letter from Justice Harry A. Blackmun to Justice Thurgood A. Marshall (May 31, 1977). These letters are available at <http://civprostories.law.cornell.edu/chap03/shaffer04.pdf>.

198. *Shaffer*, 433 U.S. at 213 n.40.

199. See Oral Argument at 52:20–56:10, *Shaffer*, 433 U.S. 186 (No. 75-1812), available at http://www.oyez.org/cases/1970-1979/1976/1976_75_1812/argument.

200. See *Shaffer*, 433 U.S. at 219–21 (Brennan, J., concurring in part and dissenting in part).

201. *Id.* at 213–15 (majority opinion).

again, sufficient for choice of law purposes but not personal jurisdiction purposes.²⁰²

So it was that Delaware's unassailable advantage in personal jurisdiction was declared unconstitutional. Because Delaware had no general long-arm statute nor a specific amenability statute for fiduciaries, *Shaffer* left Delaware with no method at all of asserting personal jurisdiction over nonresident fiduciaries. The First State was in danger of being last.

IV. DELAWARE'S DIRECTOR CONSENT STATUTE KEEPS STOCKHOLDER LITIGATION CENTERED IN DELAWARE UNTIL THE 1990s

A. Delaware Adopts a Director Amenability Statute and Remains the Center of Stockholder Litigation

Within two weeks after *Shaffer*, Delaware approved the current method of obtaining personal jurisdiction over directors: a director amenability statute, section 3114, ostensibly predicated upon implied consent.²⁰³ Given that broad long-arm statutes had been adopted in many other states for a decade or more,²⁰⁴ one might think that the easiest and most efficacious solution was either a broad long-arm statute or a statute targeted at directors and based on the director's minimum contacts rather than his or her fictitious "implied" consent. In fact, a year after section 3114 was enacted Delaware adopted a broad long-arm statute.²⁰⁵ But like every other state, it has consistently found that nonresident directors' actions do not fall within any of the provisions.²⁰⁶

Delaware's reliance on implied consent is puzzling in light of the fact that when section 3114 was adopted the Supreme Court of the

202. *Id.* at 215–17.

203. Act of July 7, 1977, ch. 119, 61 Del. Laws 328 (codified at DEL. CODE ANN. tit. 10, § 3114 (2013)); *see also* Chiappinelli, *supra* note 3, at 797–98. The statute was later expanded to include officers because fewer officers also served as directors after Sarbanes-Oxley. Act of June 30, 2003, ch. 83, § 3, 74 Del. Laws 213, 213 (codified at DEL. CODE ANN. tit. 10, § 3114(b)).

204. *See* AM. LAW. INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 376 nn.2–3 (1968) (listing, as of May 1965, Arkansas, Idaho, Illinois, Maine, Michigan, New Mexico, New York, Oklahoma, Rhode Island, Washington, and Wisconsin).

205. Act of July 11, 1978, ch. 471, 61 Del. Laws 1328 (codified as amended at DEL. CODE ANN. tit. 10, § 3104).

206. Chiappinelli, *supra* note 3, at 805–09; *cf.* Keith H. Beyler, *The Illinois Long Arm Statute: Background, Meaning, and Needed Repairs*, 12 S. ILL. U. L.J. 293, 423–24 (1988). Professors Kahan and Kamar "are unaware of cases upholding the exercise of jurisdiction over a director of a domestic corporation where the state lacked a specific statute authorizing such jurisdiction and the director did not have other contacts with the state." Kahan & Kamar, *supra* note 7, at 714 n.118.

United States had rejected personal jurisdiction based on implied consent for half a century.²⁰⁷ Several motivations suggest themselves for Delaware's choice of implied consent. Probably the strongest is that the Delaware drafters had grave concerns that any long-arm statute, rooted as it must be in minimum contacts, would fail to bring in non-resident directors because ordinarily they would not, in fact, have sufficient contacts with Delaware.²⁰⁸ Despite the obvious constitutional problems with section 3114, the Delaware Supreme Court quickly upheld it against due process challenges.²⁰⁹

What no one could have predicted in 1977 was that a new wave of merger and acquisition activity would begin and would be characterized by, among other things, increased litigiousness.²¹⁰ A former Chancellor and Delaware Supreme Court Justice called it a "litigation barrage" "largely caused by the takeover wars" of the 1980s.²¹¹ Likewise, Professors Armour, Black, and Cheffins, who have written the most detailed analyses of Delaware stockholder litigation, report that "[c]orporate litigation surged [in Delaware] in the 1980s," primarily because of an increase in M&A and LBO activity.²¹²

In addition to the well-known flood of Chancery litigation during the 1980s mergers and acquisitions wave, a significant amount of Delaware stockholder litigation in the 1980s was generated because the Delaware Supreme Court decided three cases that greatly unsettled Delaware corporate procedure. First, and ultimately least important, the court decided in late 1977 that a majority stockholder could not effect a merger for the sole purpose of eliminating the ownership interests of the minority; the majority must show another "business purpose" for the merger.²¹³ Obviously, this *Singer* test made second-step mergers more difficult. Much litigation ensued both to define the business purpose test and to establish whether that test had been met in a particular merger. The *Singer* test lasted only five-and-a-half years, but saw fifty reported decisions.

Second, the court in *Zapata Corp. v. Maldonado* provided an avenue for corporate management to dismiss fiduciary duty litigation, but only after the Court of Chancery had conducted a fact-intensive inves-

207. Chiappinelli, *supra* note 3, at 812–14.

208. *Id.* at 814–15.

209. See *Armstrong v. Pomerance*, 423 A.2d 174 (Del. 1980).

210. See Cheffins et al., *supra* note 117, at 450–52; see also Steven M. Davidoff, *The SEC and the Failure of Federal Takeover Regulation*, 34 FLA. ST. U. L. REV. 211, 224 (2007).

211. Quillen & Hanrahan, *supra* note 126, at 860.

212. Cheffins et al., *supra* note 117, at 450–51.

213. *Singer v. Magnavox Co.*, 380 A.2d 969, 979–80 (Del. 1977), *overruled by* *Weinberger v. UOP, Inc.* 457 A.2d 701 (Del. 1983).

tigation into the bona fides of the managers who recommended dismissing the litigation.²¹⁴ *Zapata* did not lead to more cases being filed, but it did lead to more litigation activity in those cases and to more reported opinions as the Chancery court members struggled to reach a consensus on *Zapata*'s requirements.²¹⁵

Finally, and most importantly, in 1984 the Delaware Supreme Court put teeth into the demand requirement for derivative litigation.²¹⁶ The demand requirement had been part of Delaware law since 1911, but since at least the 1920s it had been merely a pro forma requirement. It was sufficient to allege in the complaint that demand was excused because the directors themselves were the defendants.²¹⁷ But in *Aronson v. Lewis* the court held that the Court of Chancery was no longer to accept these allegations on their face, but rather was to conduct its own inquiry into whether the directors were disinterested and independent and whether the challenged transaction was the product of business judgment before deciding whether demand on the board was excused as futile.²¹⁸

The combined effect of these changes was to intensify the litigation in the Delaware Court of Chancery. Within a decade of *Aronson*, over one-hundred Court of Chancery opinions had been filed dealing with *Zapata*, *Aronson*'s demand futility test, or both.²¹⁹ While on the surface one might think this would have been viewed with favor by the Delaware bench and bar, the reality was that the plaintiffs' bar in other states, which typically spearheaded stockholder litigation, viewed these developments as overtly hostile to their interests and therefore made Delaware less attractive to the plaintiffs' bar.²²⁰ As the author of *Aronson* himself noted, after *Zapata* and *Aronson*,

[S]ome members of the plaintiffs' bar began decrying the death of the derivative action.

. . . The prerequisite that shareholders submit particularized pleadings to sustain a finding of demand futility was viewed by some in the plaintiffs' bar as insurmountable. What really caused alarm, with some justification, is the fact that a claim of demand futility

214. *Zapata Corp. v. Maldonado*, 430 A.2d 779, 788–89 (Del. 1981).

215. See Quillen & Hanrahan, *supra* note 126, at 860 (observing that *Zapata* required the trial court to determine three new fact-intensive inquiries: (1) how long should the action be stayed while the committee investigates, (2) how much discovery should plaintiff be allowed into the committee's activities, and (3) an assessment of the committee's substantive decision).

216. See *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984).

217. Moore II, *supra* note 176, at 956 (citing *Fleer v. Frank H. Fleer Corp.*, 125 A. 411, 414 (Del. Ch. 1924)).

218. *Aronson*, 473 A.2d at 814.

219. Quillen & Hanrahan, *supra* note 126, at 860–62.

220. Moore II, *supra* note 176, at 956–57.

must survive the defendants' motion to dismiss *without* the benefit of discovery.²²¹

B. Delaware Believes It Is Losing Cases

At the turn of the twenty-first century Delaware still appeared to be the center of stockholder litigation.²²² One detailed study shows that in 1999 and 2000, roughly half of all stockholder lawsuits involving acquisition transactions were filed in the Court of Chancery with the remainder scattered in other state and federal courts.²²³ But for as long as fifteen years before the millennium at least some leaders of the plaintiffs' bar were unhappy litigating in Delaware.²²⁴ According to the most detailed study, beginning in the late 1990s, stockholder litigation began to flow out of Delaware, typically to courts in corporate headquarters states.²²⁵ Some litigation also flowed into the federal courts.²²⁶ This trend became more pronounced from about 2002 onward.²²⁷ The upshot, according to these scholars, is that Delaware corporations faced more stockholder litigation, especially in mergers transactions.²²⁸ Further, they were more likely to have those suits filed in multiple fora.²²⁹

The reasons for this decline in Delaware's hegemony are the subject of some considerable speculation. For our purposes, it matters less what the actual causes are as it does what the Delaware judiciary and bar believes the causes to be. It is Delaware's reaction to the changes that is important. The leading academics, whose work is closely followed by the Delaware judiciary, suggest five causes: public state-

221. *Id.* at 957 (footnote omitted).

222. Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1750, 1760 (2004). *But see* Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY L. REV. 1749, 1762–63 (2010) (“The federal courts are now the center of a significant percentage of corporate litigation . . .”).

223. C.N.V. Krishnan et al., *Jurisdictional Effects in M & A Litigation*, 11 J. EMPIRICAL LEGAL STUD. 132, 140 tbl.1, 140–44 (2014).

224. Cheffins et al., *supra* note 117, at 452; *see also* Moore II, *supra* note 176, at 957.

225. Armour et al., *Losing Cases*, *supra* note 6, at 607; *cf.* Randall S. Thomas, *The Evolving Role of Institutional Investors in Corporate Governance and Corporate Litigation*, 61 VAND. L. REV. 299, 305 (2008). *But see* Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 U. ILL. L. REV. (forthcoming 2014) (manuscript at 1–2), *available at* <http://ssrn.com/abstract=2285485> (suggesting that cases are not flowing out of Delaware but rather more transactions are subject to multiform litigation).

226. Erickson, *supra* note 222, at 1762, 1763.

227. Armour et al., *Losing Cases*, *supra* note 6, at 607; *see also* Krishnan et al., *supra* note 223, at 133.

228. Armour et al., *Losing Cases*, *supra* note 6, at 642.

229. *Id.*; *see also* Cain & Davidoff, *supra* note 10, at 3; Myers, *supra* note 225 (manuscript at 1–2).

ments by Delaware judges that are critical of the plaintiffs' bar and the suits they file; Delaware judges' award of attorney fees that the plaintiffs' bar considers too low, especially since 2005;²³⁰ Delaware judges' ceasing to select the attorneys of the first filed case as lead counsel; Delaware judges' reluctance to order expedited discovery compared to judges in other jurisdictions; and a fragmentation in the plaintiffs' bar that encouraged multiforum litigation as a means for smaller, less established plaintiffs' firms to have a chance to be named lead counsel.²³¹ Regardless of the actual extent of this decline, there seems to be a perception among academics that "Delaware no longer dominates" stockholder litigation.²³²

The Delaware bar has its own theories for the rise of multiforum litigation. One experienced plaintiffs' counsel has named the following factors as important causes of the exodus from Delaware: the high standard for obtaining expedited discovery in Delaware; the Delaware judges' custom of refusing to hear a motion for preliminary injunction until the corporation has made its proxy disclosures to stockholders; the Delaware judges' custom of denying a preliminary injunction in M&A transactions in which only one bidder appears; the lack of juries in the Court of Chancery; and the sense that non-Delaware courts will be more amenable to appointing the filer as lead plaintiff and lead counsel.²³³ An equally experienced defendants' counsel ascribed the following as causes: the plaintiffs' bar's belief that non-Delaware judges may be more likely to interpret Delaware corporate law more favorably to plaintiffs; the lack of jury trials in the Court of Chancery; the lack of punitive damages in the Court of Chancery; and the belief that non-Delaware judges may be more likely to award higher attorney's fees.²³⁴

Losing caseload would be damaging to Delaware for several reasons. First, it might allow another state to supplant Delaware as the center of stockholder litigation.²³⁵ Another downside is that losing

230. Micheletti & Parker, *supra* note 2, at 8–9 (tracing the origin of plaintiffs' bar's dissatisfaction with Delaware fee awards to then-Vice Chancellor Strine's opinion in *In re Cox Communications, Inc. Shareholders Litigation*, 879 A.2d 604 (Del. Ch. 2005)).

231. Armour et al., *Balancing Act*, *supra* note 6, at 1380; *see also* Cheffins et al., *supra* note 117, at 429–30.

232. Griffith & Lahav, *supra* note 6, at 4.

233. Stuart M. Grant, Managing Dir., Grant & Eisenhofer P.A., Remarks at Columbia University School of Law Symposium: The Delaware Court of Chancery: Change and Continuity, Panel: Delaware's World: Who Are Its Competitors? (Nov. 11, 2011), in 2012 COLUM. BUS. L. REV. 640, 668–670.

234. Micheletti & Parker, *supra* note 2, at 6–9.

235. *See* Roe, *supra* note 10, at 131 (contending that to compete with Delaware, a state would "need a flow of cases to work with[] to be at the top of their game").

cases “would dilute the distinctiveness of Delaware corporate law, and erode the value of Delaware’s chartering business.”²³⁶ Some academics believe that caseflow helps a state to attract and retain pseudo-domestic incorporations.²³⁷

Aside from a competition model of caseflow, Delaware and other states may take a more qualitative or high-road view. Continued caseflow allows judges to “build expertise and prominence and further buttress their state’s stature and attractiveness.”²³⁸ Caseflow, particularly the cumulative effect of many case holdings, is “central to the value of Delaware’s corporate law franchise.”²³⁹

Not only do academics see the danger to Delaware from diminished caseflow; the Court of Chancery judges do, too. Vice Chancellor Parsons believes that the volume of cases in the Court of Chancery “accelerate[s] the development of refined doctrine, measured balance, and valuable predictability. In short, with repeat experience comes ready expertise and real efficiency.”²⁴⁰ Vice Chancellor Laster, too, has indicated that caseflow leads to better caselaw.²⁴¹ Finally, former Chancellor Strine has expounded at length on why caseflow in Delaware both serves investors’ expectations and helps to develop valuable authoritative corporate law precedent.²⁴²

V. DELAWARE’S PROCEDURAL RESPONSES

A. Delaware’s Efforts to Attract and Coerce Stockholder Litigation

Beginning in the fall of 2010, the judges of the Court of Chancery began publicly to discuss their dissatisfaction with non-Delaware stockholder litigation,²⁴³ although there were a few earlier indications that they were becoming aware of the phenomenon.²⁴⁴ They did so at first, as they frequently do, through transcript rulings, which Chief Justice Strine has called “the new samizdat literature” of corporate law.²⁴⁵

236. Stevelman, *supra* note 4, at 62.

237. Cain & Davidoff, *supra* note 10, at 7.

238. *Id.*

239. Quinn, *supra* note 7, at 832.

240. Parsons, Jr. & Tyler, *supra* note 2, at 478.

241. Micheletti & Parker, *supra* note 2, at 29 & n.127 (collecting statements).

242. Strine, Jr. et al., *supra* note 2, at 55–60.

243. Micheletti & Parker, *supra* note 2, at 25 & n.106 (collecting statements).

244. *See id.* at 25 n.108.

245. Transcript of Rulings of the Court from Oral Argument on Plaintiffs’ Motion for a Preliminary Injunction at 6, *In re NYSE Euronext S’holders Litig.*, C.A. No. 8136-CS (Del. Ch. May 10, 2013).

The Court of Chancery then began to take actions to ensure that Delaware remains the center of stockholder litigation. It has taken at least seven steps to entice or coerce litigation to take place in Delaware. Missing in all of these reactions, though, is any attempt to address the question of personal jurisdiction. Simply put, Delaware has underappreciated the importance of personal jurisdiction to its success.²⁴⁶

The most widely noted move was then-Chancellor Strine's award of \$304 million in attorney's fees in a stockholder derivative suit.²⁴⁷ That award represented 15% of the total judgment, and was over \$35,000 per hour for the plaintiffs' lawyers.²⁴⁸ This result was seen as a signal to the plaintiffs' bar that Delaware was going to be more generous to plaintiffs' attorneys, at least in genuinely successful cases, than it had been in the recent past.²⁴⁹

But changing the plaintiffs' bar's perception of Delaware's receptiveness to stockholder litigation is only part of Delaware's solution. Even though the plaintiffs' bar might remain either hostile to filing voluntarily in Delaware or at least hostile to filing voluntarily only in Delaware, the Court of Chancery has nonetheless attempted to coerce plaintiffs by enlisting the help of corporate managers. Perhaps the earliest such attempt was Vice Chancellor Laster's suggestion to pseudo-domestic corporations that they include forum selection clauses in their certificates of incorporation.²⁵⁰ Thus stockholders would, by purchasing stock, agree to litigate intra-corporate disputes in Delaware to the exclusion of other fora. The ostensible rationale for corporate managers is that multiform litigation entails additional

246. Academics, too, have generally ignored personal jurisdiction as a factor in Delaware's success, though Professor Coyle has perceptively surfaced the issue. Coyle, *supra* note 6, at 1954, 1970. See also Kahan & Kamar, *supra* note 7, at 714 & n.118.

247. Revised Final Order and Judgment, *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761 (Del. Ch. 2011) (C.A. No. 961-CS), *aff'd sub nom.* Am. Mining Corp. v. Theriault, 51 A.3d 1213 (Del. 2012).

248. Transcript of Oral Argument on Plaintiff's Petition for Award of Attorneys' Fees and Expenses and Rulings of the Court at 78-79, *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761 (No. 961-CS).

249. Alison Frankel, *Record \$285 Ml Fee Award Is Strine's Message to Plaintiffs' Bar*, REUTERS (Dec. 21, 2011, 2:57 PM), <http://blogs.reuters.com/alison-frankel/2011/12/21/record-285-ml-fee-award-is-strines-message-to-plaintiffs-bar/>. Vice Chancellor Laster, when in private practice, also suggested an enticement to the plaintiffs' bar to sue in Delaware. He suggested that Delaware repeal the contemporaneous ownership requirement. Doing so would make Delaware a more hospitable state for stockholder litigation because plaintiffs' counsel would not face the stricture of identifying a stockholder who had owned stock at the time of the alleged wrong. He candidly acknowledged that it is plaintiffs' counsel that drives stockholder litigation and noted that in some instances, suits have been allowed to continue without a named plaintiff. Laster, *supra* note 25, at 692-93.

250. *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 960 & n.8 (Del. Ch. 2010).

corporate costs that exceed any benefits to the stockholders.²⁵¹ Then-Chancellor Strine later went a step further and validated such clauses even when adopted only by the board, in the bylaws, without a stockholder vote.²⁵² Vice Chancellor Laster also endorsed that approach.²⁵³

The first court to consider such a bylaw, however, invalidated it. A board-adopted bylaw of a Delaware corporation was struck down by a federal court in California on the ground that a bylaw adopted only by the board, which was adopted after the wrongdoing complained of by the plaintiffs and adopted by board members who were named defendants, cannot bind stockholders, at least those who were stockholders before the bylaw was adopted.²⁵⁴ Further, one knowledgeable corporate lawyer and academic in California has suggested that California may not honor forum selection clauses that require suit in the Delaware Court of Chancery because that court's lack of juries would run afoul of a provision of the California constitution.²⁵⁵ More generally, the Delaware courts have acknowledged that at least questions of comity militate toward having the issue of enforceability considered in the first instance by the non-contracted-for forum.²⁵⁶ A decision by that court, of course, implicates full faith and credit questions. Nonetheless, the Court of Chancery judges have decided enforceability issues in advance of a decision by the non-contracted-for forum, and they have indicated that they may continue to do so.²⁵⁷

The Court of Chancery has also explored the possibility that it could effectively eliminate multiforum litigation. This would not prevent stockholder litigation from being filed exclusively outside Delaware, but rather would make litigation filed in Delaware and

251. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 944 & n.31 (Del. Ch. 2013) (collecting sources).

252. *Id.* at 954–58. Note that these clauses are typically a one-way street; they bind stockholders but not the corporation itself. A study of stockholder litigation in 1999–2000 showed that target corporations in M&A deals that chose to file suit (only 5 companies) all chose to file in their headquarters state rather than in Delaware, presumably to gain the benefits of hometown affinity. Krishnan et al., *supra* note 223, at 143 tbl.2, 144.

253. Transcript of Telephonic Hearing on Plaintiff's Motions for Expedited Proceedings and for Temporary Restraining Order and Rulings of the Court at 30, *Edgen Grp. Inc. v. Genoud*, C.A. No. 9055-VCL (Del. Ch. Nov. 5, 2013).

254. *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1174–75 (N.D. Cal. 2011).

255. Keith Paul Bishop, *Forum Selection Bylaws—Why a California Court May Not Follow Delaware*, CAL. CORP. & SEC. L. (June 27, 2013), <http://calcorporatelaw.com/2013/06/forum-selection-bylaws-why-a-california-court-may-not-follow-delaware/>.

256. Transcript of Telephonic Hearing on Plaintiff's Motions for Expedited Proceedings and for Temporary Restraining Order and Rulings of the Court, *supra* note 253, at 38–42.

257. *Id.*; see also *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 938 (Del. Ch. 2013).

elsewhere subject to heightened control in the Delaware Court of Chancery. Vice Chancellor Laster sent a warning in 2010 to both the plaintiffs' and defendants' bars that Delaware would not sit idly by and let parallel litigation in other states usurp what Delaware considered its rightful power to approve settlements in multiform stockholder litigation.²⁵⁸ The dynamic the Vice Chancellor was concerned about was so-called reverse auction litigation in which the defendants welcome multiform litigation because they can then negotiate with plaintiffs in each jurisdiction for the best (i.e., quickest or cheapest) settlement, obtain approval from the relevant court, and then dismiss the other litigation under the full faith and credit clause.²⁵⁹ While the Court of Chancery took no action against any parties or their counsel, the point was surely not lost on those constituencies that Delaware judges would be carefully watching to ensure that Delaware's role was not diminished by reverse auctions.²⁶⁰

In a related attempt to ensure that Delaware retained control over multiform stockholder litigation, Vice Chancellor Laster refused to accord a California federal judgment full faith and credit on the grounds that the named plaintiffs in the California actions were different from those in the Delaware suit and were not in privity with each other. Thus the California judgment was not entitled to preclusive effect.²⁶¹ Further, he found that the California plaintiffs were inadequate representatives of the stockholders generally and therefore could not bind the plaintiffs and stockholders in the Delaware action.²⁶² The Delaware Supreme Court reversed both holdings, but the attempt illustrates the aggressiveness with which the Court of Chancery judges are attacking this problem.

The Delaware judges have also attempted to convince judges in other states to allow Delaware to proceed with multiform stockholder litigation. Since at least 2009, the Court of Chancery judges have looked with favor, if not actively encouraged, defense counsel to file a motion simultaneously in the Court of Chancery and in the other courts in which similar litigation is pending. The motion prays for the litigation to proceed in only one jurisdiction and is ostensibly neutral

258. See Transcript of Courtroom Status Conference, *supra* note 15, at 16–31.

259. Brief of Special Counsel at 2–5, *Scully v. Nighthawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL (Del. Ch. Mar. 11, 2011).

260. See *id.*; see also Transcript of Courtroom Status Conference, *supra* note 15, at 16–31; Letter from Hon. J. Travis Laster, Vice Chancellor, Del. Court of Chancery, to counsel in *Scully v. Nighthawk Radiology Holdings, Inc.* (Apr. 12, 2011) (on file with author).

261. *La. Mun. Police Emps.' Ret. Sys. v. Pyott*, 46 A.3d 313, 334–35 (Del. Ch. 2012), *rev'd*, 74 A.3d 612 (Del. 2013).

262. *Id.* at 335.

as to which jurisdiction is the active one. The motion requests that the judges in each court confer among themselves and decide which court is the most appropriate to handle the case.²⁶³

Although the conversations among the judges are confidential, presumably the Delaware judges marshal arguments that the case should proceed in Delaware because Delaware substantive law will apply, that the Delaware judges are well versed in that law and in resolving high-stakes stockholder litigation, and that the Delaware courts are capable of resolving such cases quickly and with finality. Surprising and frustrating as it may be to Delaware, these motions do not always produce a consensus that Delaware is the most appropriate forum.²⁶⁴

Chief Justice Strine, like Vice Chancellor Laster, has attempted to corral multiforum stockholder litigation in Delaware by changing procedural rules. He would effect this by modifying the forum non conveniens factors a court should consider. In stockholder litigation, Chief Justice Strine would make the primary consideration the choice of law to be applied.²⁶⁵ Because of the internal affairs doctrine, of course, that means that a court outside of Delaware should decline to hear stockholder litigation involving a Delaware pseudo-domestic corporation while the Delaware Court of Chancery should retain jurisdiction.

Chief Justice Strine would also eliminate the presumption that the first filed lawsuit takes priority over subsequently filed actions. Rather, which action should proceed typically ought to be, again, the action filed in the state of incorporation because that best represents the putative preference of the corporation's stockholders who indirectly indicate that preference when they purchase stock.²⁶⁶ The rationales for these changes are that they better effect stockholders' expectations and that they will result in more efficient judicial administration.²⁶⁷ However genuine these arguments may be, it cannot have

263. See Micheletti & Parker, *supra* note 2, at 17–18; 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*, CORP. COUNSELING & LITIG. (Young Conaway Stargatt & Taylor, LLP, Wilmington, Del.), Fall 2011, available at <http://www.youngconaway.com/files/upload/CorporateFall2011.pdf>; Transcript of Teleconference, *supra* note 1, at 19–20.

264. See Micheletti & Parker, *supra* note 2, at 17–18; see also C. Barr Flinn & Kathaleen St. J. McCormick, *supra* note 263; Transcript of Teleconference, *supra* note 1, at 19–20.

265. Strine, Jr. et al., *supra* note 2, at 72–73.

266. *Id.* at 67, 74–75.

267. *Id.* at 5–6, 61–62, 67, 69, 74–75, 77–78.

escaped the Chief Justice and his co-authors that the Delaware Court of Chancery would be the primary beneficiary of these changes.²⁶⁸

Delaware's most recent attempt to attract and retain stockholder litigation involves arbitration. The Delaware legislature adopted a process, codified at section 349, whereby stockholder litigation could, at the election of the parties, be resolved in nonpublic binding arbitration presided over by sitting Court of Chancery judges.²⁶⁹ Although the impetus for this statute is opaque,²⁷⁰ the purpose is clear. The usual role of arbitration in a state's dispute resolution system is to lighten the burden on the courts and to give civil parties a quicker resolution.²⁷¹ Section 349, by contrast, seems intended to retain in Delaware arbitrations that otherwise would take place in other jurisdictions, though there seems to be no real evidence of any significant demand by corporate planners for arbitration nor any evidence of competition for such arbitrations from other states.²⁷² However, if such a demand did develop, Delaware would likely approve the use of mandatory arbitration provisions in the certificate of incorporation and possibly the bylaws, by analogy to Chief Justice Strine's decision in *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*²⁷³ A trial judge in Baltimore held that a mandatory arbitration bylaw covering stockholder litigation against a Maryland pseudo-domestic entity was valid under Maryland law.²⁷⁴ That decision, and the consequences of Delaware's approval of mandatory stockholder arbitration in section 349, were the subject of a critical appraisal by one of the most influential business journalists in the country.²⁷⁵ A dozen corporate law professors filed affidavits in a companion case arguing that the bylaw should be overturned.²⁷⁶

268. One co-author, Lawrence Hamermesh, is among the most distinguished corporate law scholars, was a successful Delaware practitioner, and is currently a faculty member at the only law school in Delaware. The other co-author is a former law clerk to the Chief Justice.

269. Act of Apr. 2, 2009, ch. 8, § 1, 77 Del. Laws 9, 9 (codified at DEL. CODE ANN. tit. 10, § 349 (2013)), implemented by DEL. CT. CH. R. 96-98).

270. See Quinn, *supra* note 7, at 842.

271. *Id.* at 844.

272. *Id.* at 844, 862, 874.

273. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013).

274. *Corvex Mgmt. LP v. Commonwealth REIT*, No 24-C-13-001111, 2013 Md. Cir. Ct. LEXIS 3, at *36-37 (Md. Cir. Ct. May 8, 2013).

275. Alison Frankel, *Wake Up, Shareholders! Your Rights May Be in Danger*, REUTERS (June 25, 2013, 6:40 PM), <http://www.reuters.com/article/2013/06/25/us-column-frankel-shareholders-idUSBRE95O1HO20130625>.

276. Alison Frankel, *Law Profs, Ex-SEC Chair Protest Commonwealth Arbitration Bylaw*, REUTERS (June 12, 2013, 8:27 PM), <http://blogs.reuters.com/alison-frankel/2013/06/12/law-profs-ex-sec-chair-protest-commonwealth-arbitration-bylaw/>.

Section 349 was heavily criticized, most thoroughly by Brian Quinn, on the grounds that it should not use sitting Court of Chancery judges as arbitrators; that allowing confidential arbitration in stockholder litigation settings would be deleterious to stockholders' interests in general; that confidential arbitration would erode the robustness of Delaware common law and thus reduce the state-of-the-art quality of Delaware jurisprudence; and that it would devalue Delaware's corporate law advantage by undermining the network effects of Delaware law among corporate law practitioners.²⁷⁷ More consequentially, a citizens' group successfully challenged section 349 on the ground that it was the functional equivalent of a civil trial and thus subject to the First Amendment right of access by the public.²⁷⁸

B. Delaware Should Enact a New Personal Jurisdiction Statute

The forum selection clauses and arbitration clauses bring to the fore a question that Delaware has not dealt with since 1977: how to get personal jurisdiction over nonresident officers and directors. Even if Delaware were not suggesting forum selection and arbitration clauses, the personal jurisdiction issue would remain. Obviously, though, these clauses are closely allied with personal jurisdiction and it is striking that Delaware has not thought to address this head-on. Delaware judges and legislators have underappreciated the importance of personal jurisdiction in Delaware's past and future success.

It is clear that corporate counsel understand that neither forum selection nor arbitration clauses necessarily confer personal jurisdiction over indispensable parties. That knowledge is clear from the large number of forum selection clauses that specify that the clause is effective only where the selected court has personal jurisdiction over indispensable parties.²⁷⁹ Moreover, corporate planners affirmatively do not wish to have officers and directors consent in advance to the personal jurisdiction of a forum that might not otherwise have personal jurisdiction over them. Of the hundreds of corporations that have

^{277.} See generally Quinn, *supra* note 7.

^{278.} Del. Coal. for Open Gov't, Inc. v. Strine, 733 F.3d 510 (3d Cir. 2013). As the district court summarized the case,

In the Delaware proceeding, the parties submit their dispute to a sitting judge acting pursuant to state authority, paid by the state, and using state personnel and facilities; the judge finds facts, applies the relevant law, determines the obligations of the parties; and the judge then issues an enforceable order. This procedure is sufficiently like a civil trial that [the First Amendment] governs.

Del. Coal. for Open Gov't v. Strine, 894 F. Supp. 2d 493, 503 (D. Del. 2012), *aff'd*, 733 F.3d 510.

^{279.} See CLAUDIA H. ALLEN, KATTEN MUCHIN ROSENMAN LLP, STUDY OF DELAWARE FORUM SELECTION IN CHARTERS AND BYLAWS 4, 8–9 (2012).

adopted forum selection bylaws and charter provisions, only one corporation included a consent to personal jurisdiction provision for its directors.²⁸⁰ That corporation subsequently amended its bylaws to eliminate the forum selection and personal jurisdiction provisions.²⁸¹

Delaware's dominance in stockholder litigation, and New York's before it, were rooted in advantages in personal jurisdiction over corporate fiduciaries. Although it remains in effect, section 3114 is not consistent with the Due Process Clause, and Delaware's general long-arm statute is not sufficient to make fiduciaries amendable to personal jurisdiction.²⁸² The statute is premised on implied consent, which the Supreme Court of the United States has rejected for decades. Further, nonresident fiduciaries do not have sufficient connections to Delaware such that litigation there comports with due process. That is true regardless of whether one accepts the "purposefully avails" prong or the "fair play and substantial justice" prong for due process.²⁸³ That means that Delaware must find a constitutional method for personal jurisdiction, preferably one that has advantages over other states' approaches and which those other states cannot easily replicate.

My proposed amenability statute is constitutional and workable.²⁸⁴ It would require each officer and director to consent to personal jurisdiction in the Delaware courts for actions arising from the officer's or director's actions on behalf of the corporation. That consent must be made annually and personally by each officer and director and would be filed by the corporation as part of its annual report.²⁸⁵ This kind of actual consent clearly comports with the Due Process Clause and could easily be implemented with appropriate legislation.²⁸⁶

If Delaware adopted this proposal, forum selection and arbitration clauses would have considerably more force because plaintiffs could be assured that all indispensable parties would be subject to Delaware jurisdiction. Even if corporations choose not to adopt forum selection clauses or arbitration clauses, my proposed amenability statute would

280. CLAUDIA H. ALLEN, NEAL GERBER & EISENBERG LLP, *STUDY OF DELAWARE FORUM SELECTION IN CHARTERS AND BYLAWS* 23 (2011) (Netlist, Inc. was the corporation).

281. Netlist, Inc., Current Report (Form 8-K) Exhibit 3.1 (Dec. 20, 2012).

282. See generally Chiappinelli, *supra* note 3.

283. See *id.*; see also Eric A. Chiappinelli, *The Implications of Walden v. Fiore for Delaware's Officer and Director Consent Statute*, CLS BLUE SKY BLOG (Mar. 12, 2014), clsbluesky.law.columbia.edu/2014/03/12/the-implications-of-walden-v.-fiore-for-delawares-officer-and-director-consent-statute/.

284. See *id.* at 835–44.

285. *Id.* at 835–39.

286. *Id.* at 839–44.

help plaintiffs and thereby Delaware because it would replace the constitutionally impermissible section 3114 approach.

More importantly for Delaware's quest to remain the center of stockholder litigation, the new amenability statute's effectiveness could not be duplicated by other states. Obviously, every other state could adopt such a statute, but the practical effect of such a statute is exponentially more valuable to Delaware than to other states because of Delaware's advantage in pseudo-domestic corporations. More than 80% of pseudo-domestic corporations are incorporated in Delaware. Nevada, the next most popular state for such corporations, has less than 9%.²⁸⁷ Delaware can implement an approach to personal jurisdiction that is certain of application and which would be of value only to Delaware.

VI. CONCLUSION

The Delaware legal establishment believes, with good reason, that stockholder litigation that once was routinely and nearly exclusively filed in Delaware is now litigated in multiple fora instead. The Court of Chancery judges and the Delaware General Assembly have been actively engaged in efforts to both entice and coerce this litigation back to Delaware. What has been underappreciated, by both those in Delaware and those in academia, is that Delaware's role as the center of stockholder litigation came relatively late, came by default, and is quite fragile. That is, Delaware was the center of pseudo-domestic incorporations by 1920 but was not the center of stockholder litigation until forty years later. That centering only came about when New York, the original center, began to actively discourage stockholder litigation. Perhaps the most underappreciated aspect of this story is that both New York's success and Delaware's was largely caused by their inimitable advantage in personal jurisdiction over fiduciaries. Delaware's current approach to personal jurisdiction is unconstitutional and it has no other viable system.

Although Delaware has taken several steps to ensure that stockholder litigation remains centered there, it should adopt my proposed actual consent statute for personal jurisdiction over corporate fiduciaries. Doing so would give Delaware an additional weapon, and one that cannot be effectively replicated by other states, to attract and retain litigation in Delaware.

287. Barzuza & Smith, *supra* note 8, at 39–40 tbl.1. As of 2011, Maryland (1.52%) is the only other state that has more than 1% of the total pseudo-domestic incorporations. *Id.*

