**Courts, Legislatures and Delaware’s Competitive Strategy**

**Assaf Hamdani[[1]](#footnote-1)\* and Kobi Kastiel[[2]](#footnote-2)\*\***

Abstract

*Delaware is the leading state for incorporations. While commentators disagree over whether the race is to the top or to the bottom, they all agree that Delaware specialized Chancery courts and their expert judges play an important role in Delaware’s success. Indeed, states like Texas and foreign jurisdictions are creating specialized business courts to gain a competitive advantage in the market for incorporations. In this Article, we identify another feature that is essential to Delaware’s continuing success to maintain its edge as the leader in the market for incorporations: the interaction of Delaware’s legislative branch and its judiciary. We document a persistent pattern of legislative responses to judicial decisions and develop a framework that explains why legislative responsiveness is required especially for a regime that heavily relies on courts to develop and enforce corporate norms through litigation. Legislative responses (i) enable courts to set norms without imposing out-of-pocket liability on directors and officers; (ii) balance fiduciary duties and private ordering and provide tailored rules that might be in tension with fiduciary standards; and (iii) devise arrangements that require ‘political’ bargains across legal questions, provide certainty and address changing market practices. We explain how Delaware uses this interaction to respond to some of the challenges its system faces and explore the implications of our analysis and the normative questions it raises.*

[**Introduction** 2](#_Toc163269476)

[**I.** **The Prevailing Perspective on Delaware’s Law and Its Blind Spot** 10](#_Toc163269477)

[*A.* *Delaware Dominance: The Building Blocks* 10](#_Toc163269478)

[*B.* *The Missing Piece* 13](#_Toc163269479)

[**II.** **Courts, Legislatures, and Corporate Law: Toward a Comprehensive Framework** 15](#_Toc163269480)

[*A.* *Setting Norms without Out-of-Pocket Liability* 16](#_Toc163269481)

[*B.* *Fiduciary Tailoring* 23](#_Toc163269482)

[*C.* *Courts’ Institutional Limitations* 28](#_Toc163269483)

[**III.** **Implications** 36](#_Toc163269484)

[*A.* *Specialized Courts and the Competition Debate* 36](#_Toc163269485)

[*B.* *Normative Questions* 37](#_Toc163269486)

[*C.* *Deterrence and Stakeholder Protections* 38](#_Toc163269487)

[*D.* *A Look into the (Near) Future* 39](#_Toc163269488)

[**Conclusions** 40](#_Toc163269489)

# **Introduction**

In a dramatic decision in September 2021, the Delaware Chancery Court denied a motion to dismiss a derivative lawsuit against the directors of Boeing, a leading aerospace corporation.[[3]](#footnote-3) The Court signaled its willingness to accept the allegations that Boeing’s directors had failed to fulfil their oversight responsibilities, known as “*Caremark* duties,”[[4]](#footnote-4) by neglecting to monitor the safety of the company’s 737 Max airplanes.[[5]](#footnote-5) That oversight lapse was linked to the Lion Air and Ethiopian Airlines crashes, which resulted in the loss of 346 lives.[[6]](#footnote-6) Not long afterwards, the directors settled for $237.5 million, marking one of the largest settlements in the history of derivative lawsuits.[[7]](#footnote-7)

The development received significant attention from both the business press and the legal community.[[8]](#footnote-8) It was the latest in a series of decisions in which the Delaware courts allowed *Caremark*claims–historically difficult to plead–to survive a motion to dismiss.[[9]](#footnote-9) Law firms issued client alerts cautioning that “directors may be more exposed to [Caremark] claims than they have been in the past,” and advising on measures to reduce directors’ exposure to personal liability for corporate traumas.[[10]](#footnote-10) Corporate law scholars argued that this line of decisions marks a “new era” in which Delaware imposes enhanced duties on directors.[[11]](#footnote-11)

The Boeing settlement followed other mega settlements of derivative litigation involving large-cap companies where directors and officers (D&O) insurers made a significant contribution.[[12]](#footnote-12) Practitioners started describing increasing challenges for corporations seeking D&O coverage, including significant premium hikes and less favorable coverage terms.[[13]](#footnote-13) Insurance experts estimated that the large derivate settlements had driven up the cost of D&O insurance by 300–500% for most companies.[[14]](#footnote-14) Concerns were reported that existing insurance policies might not suffice to cover directors’ potential liability in future cases,[[15]](#footnote-15) and that the perceived liability risk “may reduce willingness to serve as directors.”[[16]](#footnote-16)

In February 2022, just four months after the Boeing settlement, a much less noticed legal development occurred. Delaware’s General Assembly approved an amendment to Delaware’s General Corporate Law (DGCL) allowing corporations to establish captive insurance subsidiaries to insure officers and directors against amounts paid in derivative claims.[[17]](#footnote-17) This seemingly technical amendment overturns a fundamental principle of corporate law: that a company cannot cover the damages imposed on director-defendants in a derivative lawsuit filed on behalf of the company itself.[[18]](#footnote-18) On its face, the amendment contradicts the prohibition on companies from indemnifying officers and directors for payments made to the company in settlement of derivative claims.[[19]](#footnote-19)

To clarify, Section 145(g) of DGCL explicitly permits corporations to *insure* a director or officers against losses, “whether or not the corporation would have the power to indemnify such person.” However, Section 145(g) was interpreted as permitting companies to acquire insurance only from *third-party* providers,[[20]](#footnote-20) and corporations were reluctant to use captive insurance as protection from *derivative* claims.[[21]](#footnote-21) The amendment removed this uncertainty, offering a swift response to the concern that the courts’ apparent expansion of directors’ oversight duties would increase their exposure to out-of-pocket liability.[[22]](#footnote-22)

This legislation did not overturn the Boeing decision, nor did it even mention directors’ oversight duties. Yet, a careful examination of the amendment and its legislative history shows that its objective was to expand the protection of directors against oversight claims. Although a failure to comply with *Caremark* duties is legally treated as a violation of the duty of loyalty that is un-exculpable under Section 102(b)(7) of DGCL, the amendment allows corporations to use captive insurance to shield directors from liability for *Caremark* claims (as long as they did not *knowingly* cause the corporation to violate the law).[[23]](#footnote-23)

This overlooked development, we argue, is just one example of a pattern that characterizes Delaware’s distinct approach to corporate law.[[24]](#footnote-24) Delaware relies on its prized judiciary not only to enforce the DGCL, but also to promulgate norms that guide companies, directors, and their advisors.[[25]](#footnote-25) Delaware courts, however, may set norms that increase the risk out of-of-pocket liability for corporate officers and directors. This could lead to concerns about deterring highly qualified individuals from board service or from making risky decisions.[[26]](#footnote-26) To address these concerns, Delaware’s General Assembly has consistently acted to provide corporations with greater flexibility to shield corporate insiders from out-of-pocket liability.

This pattern, however, is itself a subset of a persistent dynamic of legislative responses to court rulings that is a core feature of Delaware’s corporate law. In this Article, we document this dynamic and develop a framework to explain why it is necessary to address the inevitable challenges of a corporate law regime that heavily relies on courts and privatelitigation not only to enforce statutory rules, but also to develop norms that govern board conduct, corporate acquisitions, takeovers and other corporate matters.[[27]](#footnote-27) This dynamic, we argue, is essential to maintaining Delaware’s dominance in the market for incorporations, especially when states like Nevada, (now) Texas and other foreign jurisdictions created specialized business courts to lure companies away from Delaware.[[28]](#footnote-28) We also show how this dynamic helps Delaware to respond to some of the unique challenges it faces and explore the normative questions that it raises.[[29]](#footnote-29)

Delaware’s role as the dominant corporate law jurisdiction has occupied scholars for decades. Optimists argue that Delaware wins the incorporations race by catering to investors and generating an optimal corporate law.[[30]](#footnote-30) Pessimists argue that the race runs to the bottom and Delaware mainly seeks to please managers, even at the expense of investor protection.[[31]](#footnote-31) Others argue that Delaware is mindful of federal intervention in corporate law,[[32]](#footnote-32) or that Delaware’s reliance on vague standards to govern corporate affairs is aimed to benefit Delaware’s legal community and to reinforce Delaware monopolistic power.[[33]](#footnote-33)

We do not take a position in these long-standing debates. Rather, we focus on the interaction between Delaware courts and its legislature.[[34]](#footnote-34) The prevailing view is that Delaware’s specialized Chancery courts and their expert judges play a crucial role in Delaware’s success.[[35]](#footnote-35) Indeed, a core feature of the Delaware model is that the DGCL leaves it to courts to set many corporate law norms through detailed opinions that apply fiduciary principles to complex transactions and other corporate settings.[[36]](#footnote-36) For example, Delaware courts determine whether management can fend off takeover attempts by adopting a poison pill or taking other defensive measures.[[37]](#footnote-37) In contrast, the Delaware legislature is perceived as relatively passive on major corporate law questions[[38]](#footnote-38) and instead is primarily tasked with making statutory changes on technical issues.[[39]](#footnote-39)

Delaware’s heavy reliance on courts, however, creates a puzzle. Business planners involved in mergers, acquisitions, and other significant corporate transactions require *certainty* about the rules of the game. Boards and their advisors are less likely to engage in major transactions when the rules that govern these transactions are unclear. Yet, the courts’ reliance on indeterminate standards introduces some inevitable uncertainty. Moreover, the reliance on litigation to produce legal norms leaves directors and officers exposed to an omnipresent risk of personal liability.[[40]](#footnote-40)

Our article sheds new light on this puzzle. Our core claim—supported by our analysis of legislative amendments in the past 55 years—is that Delaware uses legislation to address some of the challenges that inevitably arise from its reliance on courts to develop corporate law norms. We develop a framework that identifies three of these fundamental challenges. We show how the interaction between the General Assembly and courts provides Delaware with the flexibility to shape its corporate law in a manner that addresses these challenges and responds to some of the pressure that might affect Delaware’s corporate law.

The *first* challenge arises from the tension between the reliance on courts to produce corporate law norms and the traditional reluctance to subject directors to out-of-pocket liability.[[41]](#footnote-41) As the *Boeing* example demonstrates, the development of corporate law is driven by shareholder litigation seeking to hold directors accountable for corporate failures. Private enforcement—class and derivative actions—is led by attorneys driven mostly by their interest in receiving fees.[[42]](#footnote-42) Because fees are determined in proportion to the damages awarded, plaintiff attorneys are incentivized to seek high damages.[[43]](#footnote-43) This, in turn, further increases the risk that directors and officers face out-of-pocket liability.

The General Assembly can and does act to mitigate this tension. When court decisions produce new norms and increase the real or perceived risk of out-of-pocket liability, the General Assembly has taken measures to ensure that the new rules do not leave directors and officers exposed to any risk of out-of-pocket liability. As we explain, these legislative interventions did not overturn the courts’ decisions concerning director duties. Rather, they expanded the set of arrangements that companies can deploy to shield directors and officers from out-of-pocket liability. Moreover, this type of legislative intervention is often based on private ordering—it is shareholders who decide whether to adopt the new arrangements. The most famous example is the enactment of Section 102(b)(7) (which exculpates directors from monetary liability for breaches of duty of care) in the aftermath of the *Van Gorkom* decision.[[44]](#footnote-44) But there are more recent examples: the 2022 captive insurance amendment discussed above and another 2022 amendment allowing companies to extend the 102(b)(7) protection to officers (and not only directors) in response to a recent trend in merger litigation.[[45]](#footnote-45)

A related line of amendments responded to rulings that created uncertainty regarding the permissibility and scope of governance arrangements that insulate executives from personal liability. Some of the examples go back all the way to the 1960s and 1940s. In these cases, the legislature amended the DGCL, following the courts’ decisions, to clarify its rules concerning the use of indemnification and D&O liability insurance.[[46]](#footnote-46)

The *second* challenge arises from the nature of the substantive corporate law doctrines that courts use to promulgate norms.[[47]](#footnote-47) Whether it is hostile takeovers, responses to shareholder activism, friendly sales, related-party transactions, or even bylaw amendments, courts ultimately rely on directors’ fiduciary duties.[[48]](#footnote-48) This imposes two constraints on courts’ ability to shape corporate law. First, the nearly universal scope of fiduciary duties makes it difficult for courts to interpret them in a manner that is tailored to specific contexts. Consider, for example, the common-law principle that fiduciaries cannot agree to arrangements that limit their discretion.[[49]](#footnote-49) This principle led Delaware’s Supreme Court to limit shareholders’ ability to adopt bylaw amendments in the context ofproxy access,[[50]](#footnote-50) and to prevent directors from committing to bring a merger proposal to a shareholder vote after the board changes its mind about the merger (a “force the vote” provision).[[51]](#footnote-51) Recognizing the advantages behind limiting directors’ discretion in these specific contexts, legislative amendments allowed Delaware to carve out exceptions to directors’ fiduciary duties and overcome the limitations imposed by courts.

The second constraint arises from the tension between *private ordering* and fiduciary duties. One of the core features of Delaware’s corporate law is that it leaves many issues to *private ordering*, *i.e.* the law provides default arrangements that investors can decide to adopt. A topic that becomes the subject of private ordering is no longer governed by directors’ fiduciary duties. Only the General Assembly, however, can move an issue from the realm of fiduciary duties to private ordering.[[52]](#footnote-52) Consider, for example, the waiver of the prohibition on appropriating corporate opportunities by corporate fiduciaries. The court expressed doubt about the permissibility of including such a provision in the corporate charter.[[53]](#footnote-53) This led to uncertainty over the validity of these waivers, and companies avoided adopting them despite increasing market demand for such waivers in the late 1990s.[[54]](#footnote-54) A legislative amendment expressly provided that private ordering governed this area.

The *third* challenge arises from courts’ institutional limitations as lawmakers. Courts cannot strike grand ‘political’ bargains; they are focused on adjudicating disputes between *specific* parties and might fail to foresee the market-wide implications of their holdings or reasoning; and they are sometimes limited by existing statutory arrangements. These limitations exist in other areas of common law, but they make legislative action especially valuable in the corporate realm, where financial stakes are high, certainty is crucial, and the corporate and legal communities closely follow specific courts’ decisions—and their reasoning—to evaluate their broader implications.

The General Assembly has repeatedly addressed concerns arising from these limitations. Consider questions that require ‘political’ bargains that go beyond the specific dispute, such as the adoption of fee-shifting bylaws that require plaintiffs to pay certain legal expenses if they were not successful in court.[[55]](#footnote-55) These questions involve competing interests, such as deterring frivolous lawsuits that can consume significant resources from corporations and the judiciary on the one hand, and the concern of overly chilling the filing of legitimate shareholder claims that could enhance development of market norms, on the other hand.[[56]](#footnote-56) Courts often lack the institutional competence to produce an arrangement that overall strikes the right balance between different constituencies. The legislature is more suitable for this task.

Additionally, when courts adjudicate disputes, they might make statements or raise questions on issues with significant implications for many companies. This in turn might create uncertainty that could produce undesirable chilling effects in the corporate community that relies on courts’ decisions to draw practical lessons.[[57]](#footnote-57) In theory, courts could clarify their position and restore much-needed certainty. Judges, however, cannot simply clarify their decisions or correct the way in which commentators and practitioners interpret them.[[58]](#footnote-58) They must wait for an appropriate case to arrive at the courtroom. Parties, however, may not be willing to take the risk, especially in the high-stakes world of corporate law, so the opportunity for the courts to clarify its prior positions could never arrive. This might lead to *sticky norms*. Consider the example of corporate opportunities waivers discussed above.[[59]](#footnote-59) Once the court expressed doubt about the legality of these waivers, market participants opt to avoid using them in order not to expose corporate insiders to fiduciary duties violations. As a result, an old ruling was not challenged in court despite changes in businesses practices that could justify a legal evolution. The General Assembly, in contrast, can act swiftly to restore certainty and eliminate the sticky norms problem. Relatedly, and most importantly, the General Assembly is also better suited than courts to respond to fast-changing market parties.

Our analysis is largely institutional and descriptive. We shed a new light on the interplay between Delaware’s judicial and legislative branches by identifying a consistent pattern of legislative responses to court decisions. While our framework explains how these legislative responses address the challenges facing a jurisdiction that relies on courts to develop corporate law norms, we do not take a position on whether each amendment was desirable. Nor do we argue that this dynamic of legislative intervention provides the optimal balance between the interests of managers, shareholders, and other constituencies.

In fact, we believe that our account calls for more informed comparative and normative analysis of Delaware’s corporate law.[[60]](#footnote-60) In the last part of the Article, we highlight the implication of our account on the long-standing debate on state competition for incorporations and explore a set of interesting questions and potential concerns that our account raises. This discussion is particularly timely in light of the recent proposed legislative intervention following the *Moelis*’ decision.[[61]](#footnote-61)

The article proceeds as follows. Part I lays out the background to our discussion. It also presents the prevailing perspective in the literature on the dominance of Delaware courts and their blind spot. Part II provides a systematic analysis of the activity of the Delaware legislature in response to state judiciary decisions. This Part exposes the major factors that trigger regulatory interventions and presents a comprehensive framework of this phenomenon. Finally, Part III outlines the potential normative and comparative implications of our framework.

# **The Prevailing Perspective on Delaware’s Law and Its Blind Spot**

1. *Delaware Dominance: The Building Blocks*

The state of Delaware is the global capital of corporate law. It is the leader in attracting incorporations, especially of publicly traded companies.[[62]](#footnote-62) Its corporate laws not only inspire other states, but also serve as a benchmark for lawmakers around the world.[[63]](#footnote-63)

While many view Delaware as promoting a “race to the top” with laws that balance management and shareholder interests to attract incorporations,[[64]](#footnote-64) others argue that Delaware’s dominance reflects a “race to the bottom,” where Delaware’s laws cater to managers (and not investors), thereby undermining national corporate governance standards.[[65]](#footnote-65) Another view holds that Delaware faces no serious competition from other states,[[66]](#footnote-66) and that its objective is to provide “middle ground [rules] on the promanager/pro-shareholder dimension and otherwise focusing on maximizing quality.”[[67]](#footnote-67)

Catering to managers’ interests is not the only criticism. It is argued that Delaware’s approach, which prefers judge-made law over statutory rules, fosters ambiguity and thus benefits Delaware’s legal professionals with increased demand for their services while adversely affecting investors, who shoulder the costs of legal uncertainty.[[68]](#footnote-68) Some also argue that the courts’ maintenance of vague standards aims not at fostering incorporations, but at maintaining their own power and bolstering their prestige.[[69]](#footnote-69)

Despite this lack of consensus among corporate law scholars, they all agree that Delaware courts are a major driver of the state’s success: the Court of Chancery—a specialized trial court for corporate matters—and the Supreme Court, whose justices often include former Chancery members.[[70]](#footnote-70) Scholars identify several institutional advantages of Delaware courts. Firstly, the Court of Chancery adjudicates cases without a jury.[[71]](#footnote-71) The judiciary is non-politicized, and judges are selected based on merit by a nominating commission for set terms, ensuring that they are attuned to the nuances of the corporate world.[[72]](#footnote-72) Delaware’s reputation attracts highly experienced legal experts to serve as chancellors and vice-chancellors.[[73]](#footnote-73) Additionally, the Court of Chancery does not preside over criminal or tort cases, which often create backlogs, and its business focus allows for quicker hearings and timely decisions.[[74]](#footnote-74) Consequently, the Court of Chancery has created a substantial body of legal precedents, offering guidance for market players. One observer even argues that the unique combination of specialized judges, efficient case handling, and a robust body of precedents allows the Delaware courts to recreate the policymaking toolbox of a modern regulatory agency.[[75]](#footnote-75)

Delaware’s Chancery Court is also renowned for its pivotal role in establishing corporate law norms by applying fiduciary duty standards across a broad spectrum of corporate contexts.[[76]](#footnote-76) As Ed Rock observed, in their holdings, Delaware judges often conduct a detailed examination of directors’ performance and the way they discharge their duties, and through that “exercise,” judges set norms and offer guidance to directors who will be dealing with similar issues in the future.[[77]](#footnote-77)

Inspired by the Delaware model, other states, including Nevada and (now) Texas, have attempted to establish their own specialized courts.[[78]](#footnote-78) The trend has expanded beyond the U.S., with the World Bank’s 2012 “Doing Business” report noting that at least 23 economies improved contract enforcement through specialized courts.[[79]](#footnote-79) However, many jurisdictions have encountered financial, political, and constitutional hurdles,[[80]](#footnote-80) and none have matched Delaware’s preeminence in corporate law or its dominance in company incorporations.[[81]](#footnote-81)

Scholarly focus also examines, albeit to a lesser extent, the state’s distinct corporate law legislative process.[[82]](#footnote-82) In Delaware, while the General Assembly formally ratifies amendments to the Delaware General Corporation Law (DGCL), the substantive drafting is in the purview of the Corporation Law Section of the Delaware State Bar Association’s governing Council (the “Council”),[[83]](#footnote-83) an exclusive body of 27 members.[[84]](#footnote-84) This Council consists of prominent Delaware corporate law practitioners, typically including nominees from both major and smaller local firms, offering a blend of litigation and transactional expertise, with some members (currently three members) specializing in shareholder representation.[[85]](#footnote-85)

The Council operates through monthly private sessions where it considers proposed legislation, many sessions prompted by the Council’s members based on their interactions with their clients.[[86]](#footnote-86) The Council monitors and identifies needed legislative changes, often due to a changed business environment or market needs, and rigorously examines and revises amendments in subcommittees before seeking approval.[[87]](#footnote-87) Inputs from external sources like lawyers, academics, and corporations, though not formalized, do inform their discussions.[[88]](#footnote-88) Once vetted by the full Corporation Law Section, the proposals are advanced to the legislature, where they typically receive expedited attention and pass unanimously.[[89]](#footnote-89)

This architecture enables an *expeditious* and *responsive* legislative process, which is crucial for adapting to the dynamic needs of the market. The Council’s intimate understanding of corporate law and market developments facilitates informed policy formulation.[[90]](#footnote-90) Also, the Council’s non-partisan nature reflects the value that Delaware attaches to professional non-politicized lawmaking mechanism.[[91]](#footnote-91) Scholars argue that the integration of professional and apolitical legislative processes with speed and efficiency promotes the stability and certainty that the business environment deeply requires.[[92]](#footnote-92) As one a former Delaware Supreme Court justice concluded, “the characteristics of the Council and its internal process are what contribute to the successful development of Delaware’s corporation law.”[[93]](#footnote-93)

1. *The Missing Piece*

The common view among corporate law scholars is that Delaware courts—and not its legislature—play the dominant role in crafting Delaware’s corporate law. The legislature, in contrast, is perceived as largely passive, focusing mostly on technical amendments and clarifications that exert significantly less influence on the shaping of Delaware’s corporate law.[[94]](#footnote-94)

Indeed, many corporate law scholars view Delaware’s legislature as “little more than a bit player,” with its contributions since the significant overhaul of the DGCL in 1967 being modest and incremental.[[95]](#footnote-95) The impetus for legislative amendments is believed to come from attorneys seeking to resolve ambiguities or technical issues within a statute in response to the business community’s needs.[[96]](#footnote-96) Critical developments in corporate law come from judicial decisions rather than legislation.[[97]](#footnote-97) As explained, “[t]he most noteworthy trait of Delaware’s corporate law is the extent to which important and controversial legal rules are promulgated by the judiciary, rather than enacted by the legislature.”[[98]](#footnote-98) Armour and Skeel, for example, noted in their analysis of hostile takeover rules that, in the United States, “the principal decision-makers are Congress and the Delaware courts.”[[99]](#footnote-99)

There is also a line of literature addressing the *dynamics* between Delaware’s legislative and judicial branches. While scholars recognize that judicial decisions can spur legislative responses,[[100]](#footnote-100) they generally believe that Delaware’s legislature tends to yield to the judiciary’s role in shaping corporate law through the judicial process. Kahan and Rock suggest that Delaware’s division of labor between its legislature and judiciary is strategic: By entrusting its courts with the task of fine-tuning corporate laws, Delaware circumvents the perils associated with more confrontational laws that could elicit federal interference or public backlash.[[101]](#footnote-101) Hamermesh, however, notes that deference to the judiciary is grounded in a clear preference for incremental legislation and broad statutory frameworks, particularly with fiduciary duty issues. This approach, according to him, reflects the view that complex legal matters are better resolved through judicial interpretation than fixed statutes.[[102]](#footnote-102)

Skeel, for example, points out two instances in 2009 and 2015 where Delaware’s General Assembly responded to judicial decisions.[[103]](#footnote-103) He, as well as other scholars, emphasize the rarity of such a legislative reaction, noting that the last notable occurrence before these amendments was in 1986 following the iconic *Smith v. Van Gorkom* case.[[104]](#footnote-104) Furthermore, Skeel argues that these legislative actions are also unlikely to become commonplace, given the need to maintain the credibility of Delaware’s judiciary as a deterrent to frequent legislative overruling.[[105]](#footnote-105)

We believe the prevailing narrative to be incomplete. It does not tell the whole story about the delicate balance on which Delaware law is based. As we shall explain below, the General Assembly plays a more active role in responding to court decisions.

Our analysis, we believe, offers a new answer to a puzzle that has fascinated many scholars. Business planners require certainty about the rules of the game. Boards and their advisors are less likely to engage in mergers, acquisitions, and other corporate transactions when the rules that govern these transactions are unclear. How then does Delaware manage to dominate the incorporations race despite its heavy reliance on *ex-post* litigation in courts that use fiduciary duties and other indeterminate standards? Moreover, the heavy reliance on *ex-post* litigation and broad standards sometimes exposes directors and officers to an omnipresent risk of personal liability.[[106]](#footnote-106) When objective, professional, and independent judges set norms through “richly detailed narratives of good and bad behavior,”[[107]](#footnote-107) they might also impose severe sanctions where appropriate. This is an inconvenient reality for managers and officers. What prevents the public companies they manage from fleeing to Nevada or Texas (as Elon Musk recently suggested)?[[108]](#footnote-108)

Scholars point to some of Delaware’s unique advantages, such network benefits, a proficient judiciary, and unique commitment to corporate needs.[[109]](#footnote-109) Our account of Delaware law sheds new light on this interesting puzzle. It shows how Delaware uses legislative interventions to alleviate the potential downsides of a corporate law regime that heavily relies on courts to develop and enforce norms. We argue that this unique and persistent dynamic is a core feature, essential to Delaware’s continuing success in maintaining its edge as the leader in the market for incorporations. In our account, Delaware’s legislature is not just a “little more than a bit player.”[[110]](#footnote-110) Rather, it offers a deliberate *complement* to courts, often elevating external pressures when a judicial ruling creates shocks or uncertainties in the market.

# **Courts, Legislatures, and Corporate Law: Toward a Comprehensive Framework**

This Article focuses on amendments to the DCGL that responded to decisions by Delaware’s judiciary. In this Part, we develop a framework that explains these legislative reactions as addressing the challenges that inevitably arise when a legal system relies on the judiciary not only to enforce statutory rules, but also to create corporate law norms. We describe each challenge and explain why the legislature is often better positioned than courts to address it. We also provide examples of past amendments to the DCGL that responded to each challenge. Our analysis draws on our study of DCGL amendments between 1967 and 2023 in response to courts’ decisions. Appendix A describes the methodology we used to locate these amendments. Appendix B includes a list of these amendments.

Section A discusses the *first* challenge: the tension between Delaware’s reliance on shareholder lawsuits to develop norms and the long-standing reluctance to expose directors and officers to out-of-pocket liability.[[111]](#footnote-111) Section B discusses the *second* challenge that arises from courts’ reliance on fiduciary principles: courts have limited ability to tailor their application of legal standards to specific settings and they lack the power to decide that certain corporate issues shall be governed by private ordering. Section C discusses the *third* challenge that arises from the process by which courts create norms through adjudicating specific disputes. Court cannot devise rules that require “political bargains”, they need to wait for an appropriate dispute (that may never emerge) to resolve uncertainty and refine their guidance and they lack the power to modify statutory provisions to fit market developments. While this challenge is not unique the corporate law, addressing it in a timely manner is especially important for corporations and their advisors.

We should stress that our list of challenges is not mutually exclusive, and the legislative amendments we discuss in each section could be understood as responding to more than one challenge.

1. *Setting Norms without Out-of-Pocket Liability*

The first challenge arising from the reliance on courts to develop norms is the tension between *judicial lawmaking* and *out of pocket liability*. As noted earlier, Delaware courts promulgate norms while adjudicating specific disputes. Court are both guided by inherently indeterminate fiduciary standards and continuously shape these standards by applying them in specific settings.[[112]](#footnote-112) The evolution of Delaware’s corporate law thus depends on cases that will be litigated in court, thereby allowing Delaware’s judges to articulate norms of conduct as the business environment develops.

This also means that the development of Delaware’s corporate law critically depends on private litigation. Class actions and derivative lawsuits on behalf of shareholders are an important engine powering Delaware’s corporate law machinery.[[113]](#footnote-113) Typically, shareholder lawsuits contest decisions made by directors, often seeking *monetary damages*for supposed financial losses caused by directors’ conduct. After all, private enforcement is led by attorneys who are driven by their interest in being awarded fees, and the size of these fees is often a fraction of the monetary value of the compensation awarded in a lawsuit.[[114]](#footnote-114) Thus, the attorneys driving private enforcement have powerful incentives to challenge directors’ decisions in court and ask the court for damages for director misconduct.

However, a key principle underlying modern corporate law is that directors are shielded from out-of-pocket liability for business decisions and other conduct that does not amount to self-dealing.[[115]](#footnote-115) Requiring directors to pay damages to the company or its shareholders for flawed business decisions or poor judgment might discourage qualified individuals from board service. It could also make directors overly risk-averse and disincentivize them from undertaking initiatives that, though risky, could prove highly beneficial to the corporation.[[116]](#footnote-116) This is the premise that underlies the business judgment rule, liability insurance, Section 102(b)(7), and other arrangements designed to shield directors from out-of-pocket liability.[[117]](#footnote-117)

The reliance on private litigation for norm development is, therefore, in a clear tension with the reluctance to subject directors to out-pocket liability.[[118]](#footnote-118) We show how the General Assembly continuously conducted legislative interventions to address this tension (that courts alone could not settle). In this Section, we identify two types of such interventions.

1. Setting Norms that Increase Liability

We present three examples that form a consistent pattern: judicial decisions are perceived as raising bar of expectations from directors, thereby leading to marketwide concerns about liability exposure or the unavailability of mechanisms to insulate corporate leaders from such exposure. For courts, addressing these concerns could take a long time or even be impossible. The General Assembly responds swiftly not by changing the standards for director conduct, but by providing new mechanisms for companies to shield insiders from out-of-pocket liability.

*Director exculpation*. Perhaps the most famous legislative response to a court ruling in the realm of corporate law is the adoption of the director exculpation provision in the aftermath of *Smith v.* *Van Gorkom*.[[119]](#footnote-119) In that iconic case, decided in 1985, the Delaware Supreme Court ruled that the Trans Union directors had breached the duty of care by approving the sale of the company with minimal discussion and insufficient information.[[120]](#footnote-120) By applying and arguably shaping fiduciary norms, the court held directors accountable for their failure to conduct an adequate sale process. [[121]](#footnote-121) Indeed, *Van Gorkom* is still seen today as a decision that transformed norms concerning M&A practices.[[122]](#footnote-122)

This change, however, came at the “price” of a widespread perception of greater exposure to out-of-pocket liability. Many feared that the decision limited directors’ protection from liability under the “business judgment rule.” D&O insurance premiums skyrocketed raising concerns about an insurance crisis.[[123]](#footnote-123) There were also claims about “an exodus of talented directors and potential directors from corporations” due to the enhanced litigation risk and potential monetary exposure.[[124]](#footnote-124)

The General Assembly was quick to respond, and enacted Section 102(b)(7) in 1986.[[125]](#footnote-125) The new provision allowed companies to adopt charter amendments to exempt directors from monetary liability for breaches of duty of care. The General Assembly’s response did not provide a statutory definition of the duty of care or the business judgment rule. Rather, it devised a novel mechanism to shield directors from out-of-pocket liability.[[126]](#footnote-126) In the year following this enactment, over 4,200 companies changed their charter to adopt the director exculpation provision.[[127]](#footnote-127)

*Officer exculpation*. While less dramatic than the enactment of Section 102(b)(7) following *Van Gorkom*, the officer exculpation amendment is a recent example of a legislative action in response to court developments that exposed insiders to personal liability. Section 102(b)(7), as originally adopted, applied only to directors.[[128]](#footnote-128) Perhaps it was deemed unnecessary for officers because Delaware courts generally lacked personal jurisdiction over officers until the amendment to Section 3114 in 2003.[[129]](#footnote-129) At any rate, fiduciary litigation involving officers solely in their capacity as such remained relatively uncommon even after 2003.[[130]](#footnote-130)

Developments in merger litigation, however, have increased officers’ exposure to duty-of-care claims. In *Corwin*,[[131]](#footnote-131) the Delaware Supreme Court limited plaintiffs’ ability to sue directors for post-closing monetary damages when merger transactions were approved by an informed and uncoerced shareholder vote.[[132]](#footnote-132) In the aftermath of *Corwin*, a series of lawsuits that included claims against officers for breaching their duty of care, mostly in connection with the disclosure of merger documents, began to emerge.

*Morrison v. Berry*, for instance, addressed claims against Fresh Market’s outside directors who approved the company’s acquisition by private equity funds. The Court declined to dismiss claims against the company’s general counsel and chief executive officer, as the Court found it reasonably plausible that these officers were grossly negligent in preparing the disclosure documents.[[133]](#footnote-133) *In re Mindbody, Inc.*, the court declined to dismiss duty of care claims against Mindbody’s CFO because he had allegedly acted with gross negligence by obeying the CEO’s instructions and tilting the sale process to the buyer.[[134]](#footnote-134) In *re Baker Hughes Inc.,* the court found that the complaint pleads facts supporting a reasonable inference that the company CEO may be subject to liability for non-exculpated gross negligence with respect to the preparation of the proxy he signed as Baker Hughes’ CEO.[[135]](#footnote-135) In *Roche*, the court sustained claims against the CEO for the allegedly misleading proxy because she was involved in preparing the proxy as an executive officer.[[136]](#footnote-136) In two additional merger decisions, *In Voigt v. Metcalf* and *In re Coty Inc. Stockholder Litigation*, the Court of Chancery sustained breach of the duty of loyalty claims against CEOs, while also noting that each of these CEOs “could have breached his duties in his capacity as an officer.”[[137]](#footnote-137)

It is unclear what stands behind these court rulings – is it an a deliberate attempt to send a message to officers about the appropriate process or simply a byproduct of the absence of an exculpation for officers that left courts with no choice but adjudicate duty-of-care claims targeting officers.[[138]](#footnote-138) Critics of these claims portray them as nuisance claims, that in absences of any procedural obstacle to bring them, could proceed to expensive and time consuming discovery that gave the plaintiff’s lawyers leverage to extract a settlement.[[139]](#footnote-139) Supports of these claims, however, argue that many of them also involve duty of loyalty violations (and not just due care claims), that access to discovery makes it easier to substantiate the loyalty claims, and that some of these cases ended in substantial monetary recoveries.[[140]](#footnote-140) We do not take a stand on whether these developments were required to protect target shareholders’ interests. Regardless of the reasons underlying this litigation trend or its merits, one thing is clear: it raised the specter of significant personal liability for officers and raised concerns that officers—for whom 102(b)(7) exculpation is unavailable—could be exposed to duty of care claims even when the same claims against directors are dismissed.

In 2022, the General Assembly amended Section 102(b)(7) to allow corporations to exculpate officers from monetary liability for duty of care by including such provision in their certificate of incorporation.[[141]](#footnote-141) Officer exculpation only applies to *direct* (and not derivative) claims—the type of claims that are typical in mergers and acquisitions litigation.[[142]](#footnote-142)

In 2023, following this amendment, 271 Delaware companies proposed amendments to their certificates of incorporation to offer exculpation to their officers. Most of these proposals (85%) were successful.[[143]](#footnote-143) Even where the proposals failed, such failures were often attributed to the complexities of the voting process rather than stockholder opposition.[[144]](#footnote-144)

*Captive insurance*. A similar pattern repeated itself in the aftermath of *Boeing* and other developments concerning director oversight liability that we discussed in the Introduction. Again, the market perceived a series of court decisions as changing the expectations from directors concerning compliance, safety and oversight duties. This led to widespread concerns—justified or not—about directors’ exposure to out-of-pocket liability and the cost of acquiring protection. The General Assembly responded quickly not by limiting directors’ oversight duties, but by further expanding companies’ ability to insulate directors.

These three legislative responses have a few reoccurring features. *First*, the General Assembly tends not interfere directly with the norms promulgated by courts. Rather, it devised a new mechanism to shield directors from out-of-pocket liability. *Second*, the solution adopted is often based on *private ordering*. Delaware leaves it to shareholders to decide about the scope of liability. After *Van Gorkom* several states adopted “self-executing” arrangements that automatically apply to all corporations, without the need for a shareholder vote.[[145]](#footnote-145) Delaware did not follow that path. This could be viewed as leaving important decisions to investors or as a sophisticated move to divert any negative reaction from the state’s legislature to the companies who opt to adopt these exemptions.[[146]](#footnote-146)

*Third,* the amendments are narrowly-tailored to the specific litigation risk. For example, the officer exculpation only applies to *direct claims*, which are relevant to the specific merger litigation risk that officers faced. Officers have a less acute need for a broader exculpation provision that also covers derivative lawsuits due to the procedural hurdles associated with the submission of these claims.[[147]](#footnote-147) At the very same time, a narrower exculpation clause for officers could make this proposed amendment look more moderate. The General Assembly could also proceed with a more aggressive legislative response to *Boeing* that limits the filing of *Caremark*claims altogether by, for example, exculpating directors and officers from any act that does not amount to a conscious violation of the law, as Nevada did.[[148]](#footnote-148) Yet, the General Assembly chose a solution that ensures that plaintiffs lawyers will still be able to bring these cases, enabling Delaware courts’ to keep setting norms, while providing additional protections from liability to directors.

*Fourth*, in all three cases, the Delaware legislature could have waited for courts to clarify the scope of directors’ and officers’ liability over time through judicial rulings, and based on a case-by-case distinctions. It is, however, a lengthy process.[[149]](#footnote-149) Indeed, after *Boeing,* some court decisions reassured market participants that “[o]versight claims should be reserved for extreme events.” [[150]](#footnote-150) Data we collected also shows that in the past five years, there has been only a slight decline in the rate of Caremark claims that did not survive a motion to dismiss.[[151]](#footnote-151) Still, it could have taken courts several years to clarify the scope of oversight liability, and some degree of uncertainty will inevitably remain, when courts use open-ended standards. In *Van Gorkom* there was another concern, that it might have taken years until a suitable case emerge and courts could clarify that *Van Gorkom* had not significantly altered the application of the business judgment rule. Directors and public companies, however, not only prize certainty, but also require immediate measures to cope with developments in the market for D&O insurance. Unlike courts, the General Assembly can act rapidly, and provide certainty without the need to wait for the right case to arrive.

*Finally*, one could wonder to what extent an exculpation provision that limits the ability to submit duty of care lawsuits contributes to norm setting. The answer to that quibble relates to the way courts reacted to 102(b)(7) and kept developing norms around it. Miller shows how the enactment of Section 102(b)(7) and elimination of the possibility of monetary damages post-closing, created strong incentives for shareholders alleging their directors had breached their fiduciary duties in approving a merger to bring suit before the merger closed. According to him, 102(b)(7) was thus an essential building block in a creating “Revlon-Unocal system of preclearance,” and enabling holding that directors breached their duties, without the problematic implication of imposing enormous monetary damages on them.[[152]](#footnote-152) Similarly, Arlen shows how *Caremark* doctrine was developed by Delaware courts around the bad faith exception to 102(b)(7).[[153]](#footnote-153) Here again, the combination of 102(b)(7) and subsequent case law led to the delicate balance of expanding directors’ oversight duties and court’s ability to set norms of conduct, while constraining courts’ authority to impose damages on directors for poor compliance decisions.

1. Insulation from Liability

Another related pattern addresses concerns about the availability of arrangements insulating insiders from out-of-pocket liability, such as indemnification and liability insurance. Unlike the cases we discussed above, these amendments were triggered by courts’ rulings that exposed vulnerabilities or ambiguities in directors’ protection against personal liability, not by the courts’ promulgation of new norms of director conduct.

*The introduction of i* *ndemnification and D&O Insurance.* Indemnification statutes sought to remedy the problem created by a 1939 New York case,*New York Dock Co. v. McCollom*.[[154]](#footnote-154) The McCollom court held that a corporation had no power to pay the expenses of its directors in a derivative lawsuit brought against them, even though those directors were *vindicated* on the merits. Although it was rejected by several courts, *McCollom* created considerable alarm among business executives, including in the Delaware business community.[[155]](#footnote-155) Delaware adopted section 122(10) of the Delaware code,[[156]](#footnote-156) giving corporations the power to indemnify directors or officers against expenses incurred by them, unless the director has been actually “adjudged… to be liable for negligence or misconduct in the performance of duty.”[[157]](#footnote-157)

Ambiguity remained as to the applicability of the new indemnification provision to settlements of derivative lawsuits. In a 1962 decision, *Essential Enterprises Corp. v. Dorsey Corp,*[[158]](#footnote-158) the Chancellor called the legislature to clarify whether it is proper to indemnify directors’ legal expenses in a derivative lawsuit, which settled with court approval.[[159]](#footnote-159) Another uncertainty existed regarding the ability of a corporation to purchase an insurance policy against directors’ and officers’ liability.[[160]](#footnote-160) That uncertainty stemmed from the public policy against insuring misconduct or intentional violations of laws, even if the director bears the premium costs.[[161]](#footnote-161) It was also argued that in instances where the statute explicitly forbids indemnification for certain types of director misconduct, procuring D&O insurance as an alternative means of protection may also be considered unlawful.[[162]](#footnote-162)

In 1963, a “Revision Committee” was appointed and hired Virginia law professor Ernest Folk to draft a report recommending revisions, including to the indemnification provision.[[163]](#footnote-163) The Folk report resulted in the 1967 new corporate law statute, which offered the following compromise: it clarified that officers and directors could be indemnified for legal expenses in derivative litigation but not for any payments made due to a judgment or settlement.[[164]](#footnote-164) The statute also authorized for advancing litigation expenses,[[165]](#footnote-165) and it authorized the corporation to purchase D&O insurance, regardless of whether indemnification in that situation was permissible.[[166]](#footnote-166)

*Limiting retroactive revocation of indemnification.*  In 2008, the Delaware Court of Chancery held in *Schoon* that the right to indemnification under a bylaw does not vest, and therefore *can* be taken away from a director indemnitee, prior to the time a lawsuit is filed against the director.[[167]](#footnote-167) The decision received wide attention from the legal community.[[168]](#footnote-168) Prominent lawyers warned that the decision “may leave former directors, in particular, vulnerable to bylaw amendments affecting their right to advancement of expenses.”[[169]](#footnote-169) Directors were advised “to be certain that they understand the extent of their rights to indemnification and advancement of expenses and that those rights are secure.”[[170]](#footnote-170)

In response to *Schoon,* Delaware amended Section 145(f) to specify a default rule for when indemnification and expenses advancement rights vest. The new default rule provides some assurance to directors that if they act in their corporate capacity at a time when the certificate of incorporation or bylaws provide for indemnification or advancement, those rights will not be taken away by future amendments to that provision.[[171]](#footnote-171)

One might argue that the dynamic we document in this subpart is that of a legislature captured by interest groups (mainly managers). One could respond, however, that this pattern is consistent with the interest of shareholders in attracting qualified candidates to the board and incentivizing them to take risks. We do not take a stand. Our goal is more modest: to shed light on how Delaware’s protections from out-of-pocket liability are the product of a gradual and ongoing dynamic between the judiciary and the legislature in Delaware.

1. *Fiduciary Tailoring*

Another limitation of Delaware courts arises from their doctrinal toolkit: the nature of the substantive law they use to shape corporate law doctrine. In many important and diverse areas, courts essentially rely on their interpretation of *fiduciary duty* doctrines, comprising both the duty of loyalty and the duty of care,[[172]](#footnote-172) to promulgate rules. Indeed, fiduciary duties govern the conduct of directors and controlling shareholders and serve as a guiding principle for judicial decisions across a variety of corporate scenarios, including hostile takeovers, shareholder activism, friendly sales, related-party transactions and bylaw amendments.[[173]](#footnote-173)

The courts’ reliance on fiduciary duties introduces two significant limitations on their capacity to shape corporate law. *First*, fiduciary duties are mandatory: companies cannot contract around them. Courts lack the power to balance fiduciary obligations and private ordering - two major principles that underlie Delaware corporate law. Only the General Assembly has the power to move an issue from the realm of fiduciary duties to that of private ordering. *Second*, fiduciary duty doctrines have a *universal* application. This makes it difficult for courts to tailor these universal duties to specific contexts which require imposing some limitations on scope of the duty. Here again, a legislative intervention is required to overcome traditional fiduciary law principles.

1. Balancing Fiduciary Duties and Private Ordering

Delaware corporate law is characterized by the tension between fiduciary duties and private ordering.[[174]](#footnote-174) Delaware’s corporate law provides corporations a significant degree of freedom to adopt governance arrangements that meet their needs.[[175]](#footnote-175) Indeed, private ordering is often described as the “genius” of Delaware corporate law.[[176]](#footnote-176)

Delaware corporate law, however, also leaves many areas to be governed by fiduciary law. Fiduciary duties are mandatory in nature. In the absence of a legislative authority to do so, corporations cannot waive fiduciary duties, contract around them or modify their requirements to meet their business needs. This also means that courts cannot choose to prefer private ordering over fiduciary duties. It is solely within the purview of the General Assembly to transition a matter from the jurisdiction of fiduciary obligations to the domain of private ordering.[[177]](#footnote-177)

This power allocation limits Delaware courts’ ability to shape corporate law. Without permission in the statute, courts will not recognize charter provisions (or shareholder agreements) that purport to modify fiduciary duties. The General Assembly is required to act to determine the issues subject to private ordering.[[178]](#footnote-178) This action can be in response to court decisions that raise doubt about whether private ordering is permissible or demonstrate the need to allow parties to contract around fiduciary duties. We provide a couple of examples below.

*Corporate Opportunities Waivers.* The corporate opportunities doctrineis a key component of the duty of loyalty. [[179]](#footnote-179) This doctrine prohibits corporate fiduciaries from appropriating for themselves a business opportunity that belongs to the corporation unless they first present it to the corporation and receive authorization to pursue it personally.[[180]](#footnote-180) The question of what opportunities “belong” to the corporation is a complicated one, and has triggered considerable amount of litigation.[[181]](#footnote-181)

In June 2000, the General Assembly added new subsection 122(17) to the DGCL.[[182]](#footnote-182) This amendment provided companies with the power to renounce in advance, in their certificate of incorporation or by action of their board of directors, their interest or expectancy in specified business opportunities.[[183]](#footnote-183) Prior to the 2000 amendment, the DCGL did not address this question.[[184]](#footnote-184) In *Siegman v. Tri-Star Pictures, Inc*.,[[185]](#footnote-185) the Chancery Court addressed a challenge to an amendment of TriStar’s certificate of incorporation that purported to specify when two of TriStar’s shareholders (Coca-Cola and Time) and the directors that they appointed to Tri-Star’s board could engage in the same line of business as Tri-Star or pursue corporate opportunities that belong to it. The plaintiff contended that the amendments is invalid as a matter of law because it amounted to an impermissible waiver of the directors’ liability to the corporation for breaches of their fiduciary duty of loyalty.[[186]](#footnote-186) Then-Vice Chancellor Jacobs held that the amendment could be read as eliminating or limiting directors’ duty of loyalty.[[187]](#footnote-187)

The dot-com era of the 1990s led to a wave of new corporate structures that often resulted in overlapping board membership and partially overlapping lines of business, especially at tech firms.[[188]](#footnote-188) These new structures challenged the “undivided-loyalty” model of corporate opportunities,[[189]](#footnote-189) and required companies to provide certainty to directors by specifying in advance the type of opportunities that they could pursue through other entities. While at least in one case that followed *Tri-Star* the Delaware court expressed some support for the use of contractual provisions to limit the scope of the doctrine,[[190]](#footnote-190) considerable uncertainty remained over the validity of *ex-ante* waivers.[[191]](#footnote-191) As evident from the synopsis accompanying the 2000 amendment, it was intended to eliminate the uncertainty regarding use of these waivers raised in *Tri-Star*.[[192]](#footnote-192)

This amendment is an example of the need for the General Assembly to determine the scope of issues that could be governed by private ordering. The corporate opportunities doctrine is a core part of the fiduciary duty of loyalty. Without a legislative mandate, courts cannot allow companies to waive the duty of loyalty. The *Tri-Star* decision underscored the difficulty of drawing the line between the permissible *ex ante* renouncing of specific opportunities and the impermissible waiver of liability for breaching the duty of loyalty. Thus, legislative intervention was required to provide certainty about the scope of issues subject to private ordering.

*Other examples.* In August 2004, the General Assembly amended Section 17-1101(d) of the Delaware Revised Uniform Limited Partnership Act to specifically authorize the “elimination” of fiduciary duties of a general partner through contractual arrangements.[[193]](#footnote-193) This amendment was arguably the General Assembly’s response to the Delaware Supreme Court’s restrictive interpretation of the earlier version of that statute. In *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P*., the Court held that a limited partnership agreement could not “eliminate” the partner’s fiduciary duties.[[194]](#footnote-194) A legislative intervention was required to contract out of core fiduciary duties.

In other examples, companies used private ordering mechanisms either to limit the ability of shareholders to enforce fiduciary duty violations through litigation[[195]](#footnote-195) or by adopting bylaws permitting the use of indemnification and D&O insurance to protect insiders from personal liability imposed on them through successful derivative litigation.[[196]](#footnote-196) All of these cases raised the tension between the contractual freedom and the limits that a legal system should impose on the ability of shareholders to hold fiduciaries personally accountable for breaches of their fiduciary duties. And in all cases, a legislative intervention was required to set the appropriate limits and to clarify what measures are legally permissible.

1. Limiting the Universal Application of Fiduciary Duties

Another limitation on courts’ competence to shape corporate law arises from the *near-universal* scope of fiduciary duties. Delaware courts apply the same doctrines—the duty of care and the duty of loyalty—to a wide range of cases. This limits courts’ ability to tailor the legal interpretation of fiduciary duties to fit the nuanced realities of specific circumstances, new business developments or governance innovations. Moreover, the courts’ interpretation of fiduciary duties in one corporate setting may introduce uncertainty into other, even if unrelated, corporate settings. The General Assembly, in contrast, is not subject to these constraints. It can adopt statutory arrangements tailored to address specific business settings without the concern that these arrangements will affect the law that applies to other contexts.

Consider the common-law principle under which contractual arrangements cannot prevent fiduciaries from discharging their fiduciary duties.[[197]](#footnote-197) Delaware courts have invalidated bylaws and other contractual arrangements that purported to constrain directors from exercising their judgment as required by their fiduciary duties.[[198]](#footnote-198) This nearly universal rule can lead to suboptimal outcomes when precommitment is desirable. Courts, however, may struggle to deviate from this fundamental rule only because it would lead to undesirable consequences in some specific setting. We discuss a few examples below.

*Force the Vote*. In 1998, the DGCL was amended to permit merger agreements to require that the agreement be submitted to stockholder vote even if the board of directors determines that the agreement is no longer advisable and recommends that the stockholders reject it.[[199]](#footnote-199)  This amendment was in response to the Delaware Supreme Court’s insistence in *Smith v. Van Gorkom* that the board of directors must recommend a merger before submitting it to a stockholder vote. In the aftermath of this decision, one view was that “because directors owe fiduciary duties to stockholders, they must be able to change their minds prior to a stockholder vote and to recommend against a merger if they change their opinion as to its benefits.”[[200]](#footnote-200) The amendment was intended to add clarity to this area and to harmonize the legal requirement that directors take a position on the merits of a proposed merger with the business reality that some merger partners will not enter into a merger agreement which is not binding save for the statutory requirement of shareholder approval.[[201]](#footnote-201)

In other words, insisting that boards have an ongoing duty to consider a proposed merger might discourage some valuable merger transactions. Fiduciary duty principles, however, might limit courts’ ability to adopt a rule that would apply only to mergers. Moreover, as we explain below, parties to a merger agreement might be unwilling to take the risk that courts would invalidate an agreement that would require the board to submit a merger to shareholder vote even after the board believes the merger is no longer advisable. The General Assembly can easily address this market need in a manner that will also provide certainty.

*Proxy Access*. In 2008, the Delaware Supreme Court held in *CA v. AFSCME* that stockholder-adopted bylaws governing procedures and process related to director elections were generally valid under the DGCL*.*[[202]](#footnote-202)The court also held, however, that a bylaw provision requiring the corporation to reimburse expenses incurred by a stockholder in solicitation of proxies in support of dissident director nominees would be invalid if it did not include a provision allowing the board to deny reimbursement if the board determined that its *fiduciary duties* required it to do so.[[203]](#footnote-203)

In response to *AFSCME*, the General Assembly added Section 113 to the DGCL. That Section authorizes bylaws requiring a Delaware corporation to reimburse proxy solicitation expenses incurred by a stockholder nominating its own directors.[[204]](#footnote-204) Section 113 also identifies a nonexclusive list of conditions that the bylaws may impose on such a right to reimbursement.[[205]](#footnote-205) This nonexclusive list of conditions, however, does not include the explicit “fiduciary out” language required by the Delaware Supreme Court in *CA v. AFSCME*. This amendment, therefore, is another example of the General Assembly’s superior ability to tailor arrangements to corporate needs without the constraints associated with fiduciary duties.[[206]](#footnote-206)

*Majority Voting*. In 2006, the General Assembly amended Section 141(b) to clarify that a director may tender an irrevocable resignation that is effective upon a later date or upon the happening of a future event, such as a failure to receive a specified vote for reelection. The amendment provided directors a means by which they can give effect to so-called majority voting policies and bylaws that seek to unseat a director who fails to receive a majority vote in an election.[[207]](#footnote-207) Prior to the amendment, it was questionable whether a director, as a fiduciary, could irrevocably agree to resign if some future conditions are met.[[208]](#footnote-208) Again, fiduciary law created uncertainty over courts’ ability to endorse the legal arrangements that underlie effective majority voting policies that were strongly endorsed by institutional investors.[[209]](#footnote-209) The amendment resolved this uncertainty.

1. *Courts’ Institutional Limitations*

Our analysis thus far has focused on considerations that are unique to Delaware’s corporate law. Academic literature, however, has extensively examined the institutional constraints of courts and the comparative advantage of legislatures in producing legal norms.[[210]](#footnote-210) Courts are institutionally constrained by a range of limitations that limit their capacity for legal reform, including adherence to precedent, statutory law, the narrow scope of the legal dispute at hand, and procedural rules.[[211]](#footnote-211) Scholars have argued that Delaware is different. In Delaware, the argument goes, the Chancery Courts have expert judges who demonstrate flexibility and responsiveness akin to the legislative processes.[[212]](#footnote-212) This judicial activism is facilitated by the courts’ willingness to adapt legal doctrines in response to evolving business practices, thus playing a more proactive role in shaping corporate doctrine.[[213]](#footnote-213) Even Delaware courts, however, are subject to at least some of the judiciary’s institutional constraints.

We focus on three constraints that cannot be overcome even by expert judges with a deep understanding of the market-wide implications of their decisions: *first*, the courts’ inability to strike “political” bargains necessary to generate norms that reconcile competing interests across various constituencies; *second*, the need for courts to wait for a specific dispute to resolve uncertainty stemming from prior holdings. Thus, certain court-made rules might persist even if they are inefficient because market players are apprehensive about the risks involved in challenging them in court (“sticky rules”); *third,* limited authority to revise statutory rules prevents courts from responding to fast-changing M&A and litigation practices. Our analysis in this Section aims to systematically elucidate these three limitations within the context of a legal system that operates in a dynamic, complex business environment, as well as to exemplify how the Delaware legislature has handled these challenges.

1. “Political” Bargains

A clear constraint that arises from the courts’ limited toolkit is their inability to devise arrangements that require “political” compromises among different stakeholders. This constraint does not necessarily follow from the courts’ lack of competence to consider the market-wide implications of their decisions. As we discussed above, Delaware courts are experts on corporate law matters and are presumably competent to incorporate policy considerations into their analysis. Our account also differs from the conventional analysis of the dynamic between courts and legislatures under which legislatures are majoritarian institutions better positioned to address political concerns, whereas courts are designed to have different aims, such as protecting minorities.[[214]](#footnote-214) Our analysis also does not depend on the premise that the General Assembly and Delaware courts serve divergent objectives or face different incentives. Indeed, the literature on Delaware tends to assume that its courts and the General Assembly share the goal of ensuring that Delaware remains the leading venue for incorporations.[[215]](#footnote-215)

Our point is that the courts lack the toolkit required to adopt solutions that require hypothetical “bargains” among different stakeholders. Such solutions sometime require providing more than one group of stakeholders with at least some of what it desires. The General Assembly, in contrast, has the power to devise such mechanisms. To be clear, we do not claim that these legislative interventions will strike the optimal balance among different groups. Instead, we argue that the dynamic between the courts and the legislature is part of this balancing *attempt*.[[216]](#footnote-216)

Take, for example, the legal rules that affect *private* *litigation.* The regulation of private enforcement requires a delicate balance between two policy objectives: discouraging frivolous lawsuits on the one hand,[[217]](#footnote-217) and facilitating legitimate claims on the other hand.[[218]](#footnote-218) Our argument is that Delaware courts alone cannot always achieve this balance.[[219]](#footnote-219)

Consider the treatment of *fee-shifting bylaws* that require plaintiffs who unsuccessfully sue the company or its directors to pay the defendants’ legal costs and other expenses.[[220]](#footnote-220) Top of Form

In the 2014 ATP decision, the Delaware Supreme Court upheld, as facially valid, a fee-shifting bylaw.[[221]](#footnote-221) Although the case involved a Delaware nonstock membership corporation, its reasoning was sufficiently broad to raise the possibility that the ATP decision might also cover public corporations. Following the ATP ruling, there was immediate debate regarding whether fee-shifting clauses in public corporations were legally permissible, prompting considerable advocacy efforts from both supporters and opponents of these provisions.[[222]](#footnote-222) On the practical front, at least 70 public companies adopted fee-shifting provisions.[[223]](#footnote-223)

The General Assembly reacted quickly by amending Section 102 of the DGCL to forbid extending the holding of ATP to stock corporations.[[224]](#footnote-224) The amendment, which prohibited the use of a fee-shifting bylaw, was aimed “to preserve the efficacy of the enforcement of fiduciary duties in stock corporations.”[[225]](#footnote-225)

At the same time, the General Assembly adopted another amendment directly related to private enforcement. This amendment authorizes Delaware exclusive forum provisions for internal corporate claims, but expressly prohibits the use of charter and bylaw provisions of Delaware corporations that exclude Delaware as a forum for internal corporate claims.[[226]](#footnote-226) This amendment essentially confirms the Chancery Court ruling in *Boilermakers,*[[227]](#footnote-227)which upheld the validity of bylaws requiring that claims arising under the DGCL be brought only in Delaware courts. The amendment essentially overturns the Supreme Court decision in *First Citizens*,[[228]](#footnote-228) which upheld the validity of bylaws requiring that claims be brought outside Delaware.

These simultaneous legislative maneuvers work in opposite directions. The fee-shifting amendment removes the disincentive for filing lawsuits, hereby preserving the Delaware courts’ ability to set norms (and serving the interests of the plaintiff bar). However, it could be viewed as adversely affecting managers by potentially increasing frivolous lawsuits (as well as those with merit). Here, the forum selection amendment comes into play. To the extent that Delaware courts are more likely to screen frivolous lawsuits, this amendment was likely to cool off these lawsuits.[[229]](#footnote-229) It also ensures that the litigation “stays” in Delaware and reinforces both the interests of the Delaware bar and the state dominance in corporate law. A former Chancellor of the Delaware Chancery Court described that combined move as “a grand bargain” between Delaware’s legal community and its corporate citizens.[[230]](#footnote-230)

Our point is that Delaware’s courts were not in a position to strike such a bargain. *First*, since courts do not determine the issues that come before them and depend on the cases brought by parties, they are institutionally ill-equipped to establish a regulatory framework that balances the interests of different groups in manner the requires changing the rules while integrating distinct legal doctrines. *Second*, from a doctrinal standpoint, without statutory language, courts that rely on their interpretation of the general power of the board to adopt bylaws will struggle to hold that forum selection bylaws are valid only to the extent that they require litigation to take place in Delaware.[[231]](#footnote-231)

*Finally*, the General Assembly can swiftly provide certainty. Over time, the Delaware courts might have also arrived at a similar outcome without the fee-shifting legislative amendment. It has been suggested, for example, that had fee-shifting bylaws been subjected to prolonged scrutiny in Delaware courts, most of them would not survive.[[232]](#footnote-232) Yet, this process would likely be relatively slow and involve significant uncertainty, thereby failing to completely prevent the chilling effect of fee-shifting provisions. The legislative rule spared this lengthy decision-by-decision process, which would impose substantial costs on defendants, plaintiffs, and the courts.[[233]](#footnote-233)

1. Uncertainty, Passivity and Sticky Rules

Legislation can also overcome the uncertainty concerns that arise from the courts’ obligation to resolve the specific disputes presented to them, especially when judicial decisions are based on the application of open-ended standards. *First*, even expert judges cannot fully anticipate *how their decisions will be interpreted* within the business community.[[234]](#footnote-234) This is especially true for Delaware’s corporate decisions that apply open-ended standards to specific cases, and given that lawyers consider even comments made by judges to provide guidance. *Second*, the reliance on standards means that some uncertainty could remain whenever the court adopts a new norm.[[235]](#footnote-235) *Finally*, the reactive nature of the judiciary, which must wait for cases to be brought before it, further limits the courts’ ability to change rules or resolve the uncertainty over their interpretation. The upshot is that the creation of certainty by the courts, through a case-by-case approach, might take a long time.[[236]](#footnote-236) Certainty, however, is important for guiding behavior, and it is crucial within the business sphere.

Relatedly, a key concern is the potential emergence of undesirable *sticky rules:* legal norms or precedents that remain in place and continue to influence behavior long after their original rationale may have ceased to be relevant.[[237]](#footnote-237) Rules established by court decisions might remain prevalent even if there is a broad agreement that they are undesirable and would probably not be upheld in court. The reason is that market players are apprehensive about the risks associated with challenging them in court. As previously explained, courts must wait for parties to present legal issues for adjudication. This is the only opportunity for courts to formally refine, modify or correct previous rulings. Market players, however, do not internalize the benefits of associated with the refinement of Delaware’s law and would prefer to structure transactions or otherwise conduct their affairs in a manner that avoid uncertainty and the risk of liability.

Take, for example, the *Omnicare* case.[[238]](#footnote-238) Omnicare revolved around the fiduciary duties of directors during a merger process. The Delaware Supreme Court ruled that entering a merger without the possibility to consider superior bids was a breach of fiduciary duty. While some practitioners have found it too restrictive, the ruling still stands as good law in Delaware, and it has influenced the structuring of subsequent mergers.[[239]](#footnote-239) We believe that the reason this ruling was almost never challenged by market players, despite criticism, is that they feared taking the risk of designing a similar mechanism and being exposed to liability for breaching fiduciary duties.

Delaware legislature is free of these institutional constraints.[[240]](#footnote-240) It can amend the law swiftly, restore certainty and prevent rules from becoming sticky simply because parties lack incentives to challenge them in court.[[241]](#footnote-241)

Two cases we previously discussed well illustrate this issue. Market participants likely hesitated to challenge directly the view that *Von Gorkom* prohibited the use of *force the vote* provision. After all, why take the risk that a merger transaction does not meet the requirements set by the DCGL? The amendment to the DGCL provided certainty without requiring transaction planners to take the risks that their transaction be invalidated by courts. Second, in the *Tri-Star Pictures* case, then-Vice Chancellor Jacobs raised questions about companies’ power to waive in advance their right to corporate opportunities. Market players were probably also reluctant to adopt waivers that would challenge this ruling, which could lead to accusations of breaching fiduciary duties and personal liability for directors.

1. Modifying Statutory Provisions to Fit Market Practices and Judicial Developments

Courts are bound by the existing statutory framework. The Delaware legislature, in contrast, can modify mandatory provisions in order to respond to judicial or market developments. One set of such examples relates to new practices in M&A transactions*,* such as the increasing use of *top-up option* practice. In Delaware’s traditional legal framework governing a two-step merger transaction, the initial phase involves the acquirer tendering for shares of the target company, followed by a second-step merger that results in the acquirer owning all of the target’s shares. According to the then-existing law, if the acquirer did not secure at least 90% of the target’s shares, the second-step merger required a “long form” process, necessitating a shareholder meeting and approval vote, in contrast to the more streamlined “short form” merger.[[242]](#footnote-242) Many criticize this rule, arguing that when the acquirer holds between 50% and 90% of the target company’s shares, mandating a shareholder vote becomes redundant and unjustifiably costly, given the merger’s approval is virtually assured. To navigate around the vote requirement, the use of top-up options emerged. These options enable a buyer who has already acquired a majority stake to purchase additional shares to reach the 90% threshold, thereby qualifying for a short-form merger.[[243]](#footnote-243)

Although Delaware courts implied that they understood the lack of practical utility of requiring a costly stockholder vote when the acquirer already had the power to determine the vote’s outcome, they did not have the mandate to eliminate this requirement, but only to legitimize the practice of top-up options.[[244]](#footnote-244) Therefore, in 2013 the Delaware legislature stepped in and revised Section 251(h) of the DGCL, allowing a waiver for the stockholder vote if an acquirer secured a majority in a tender offer, under certain conditions.[[245]](#footnote-245) This case illustrates how Delaware’s courts were limited in their ability to efficiently respond to inefficient regulation. Within the existing legislative framework, they could only authorize or prohibit top-up options.

Top of Form

Another example relates to new litigation practices*,* such as trends in *appraisal litigation*. Appraisals are statutory remedies that allow shareholders to get the fair value of shares they were forced to sell in mergers or acquisitions.[[246]](#footnote-246) Top of Form

Bottom of Form

The Delaware legislature has repeatedly amended the appraisal statute,[[247]](#footnote-247) often in a response to court rulings. In 1976, as a reaction to the prevailing judicial method of calculating returns on appraisal funds, the legislature revised the statute on interest to give courts the power to consider “all pertinent factors,” including interest rates if a corporation sought external financing.[[248]](#footnote-248) Top of Form

Bottom of Form

This legislation granted the Court considerable leeway but offered no direction for selecting the appropriate interest rate or balancing different options. This lack of guidance turned the determination of a “fair rate” of interest into a notable aspect of trial proceedings. Such disputes consumed significant time and effort, frustrating the Court of Chancery, which suggested statutory rate fixing as a sensible resolution.[[249]](#footnote-249) In 2005, then-Vice Chancellor Strine noted that “the crafting of a specific legislative interest formula… for use in appraisal proceedings is both feasible and desirable for all affected constituencies.”[[250]](#footnote-250) Indeed, in 2007, the Delaware legislature amended the appraisal statute to establish a presumptive interest rate equal to 5% plus the prevailing federal funds rate.

Starting in 2011, there was a noticeable uptick in appraisal-related actions.[[251]](#footnote-251) Critics saw the above-market statutory interest rate as sparking a rise in appraisal actions by profit-seeking investors,[[252]](#footnote-252) and in 2015, the Section proposed an amendment to address this issue. The proposal suggested to permit a company to preemptively pay an amount it selects, stopping the accumulation of interest on the prepaid sum.[[253]](#footnote-253) This reform was ultimately passed into law in 2016,[[254]](#footnote-254) and at the same time the legislature conducted another amendment to limit appraisal rights for *de minimis* claims.[[255]](#footnote-255)

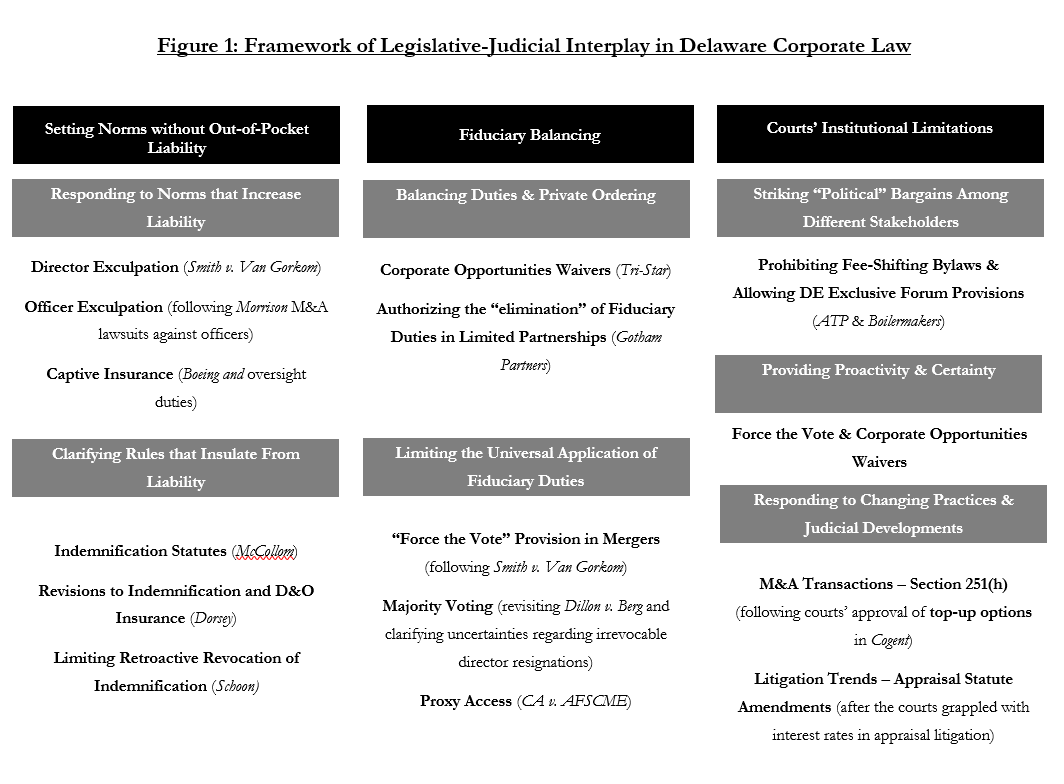
The appraisal example illustrates the ongoing interaction between judicial rulings and legislative actions, where Delaware legislature both expands and restricts court discretion based on market and court feedback. Initially, the Delaware legislature expanded judicial discretion for more accurate share valuation, reflecting market needs. However, this broad discretion eventually led to extensive litigation over interest rates, consuming considerable resources from all parties involved: plaintiffs, defendants, and the judiciary. Recognizing that courts could not unilaterally establish a presumptive interest rate, the legislature intervened to fix the rate by statute. When this adjustment triggered a significant rise in appraisal litigation, the legislature again stepped in, responding to practitioners’ concerns, by allowing companies to prepay an amount of their choosing to prevent the accumulation of interest and by limiting appraisal rights for minimal claims. Without legislative amendments, courts lacked the power to adjust their treatment of appraisal claims to the evolving market developments.

Top of Form

Bottom of Form

**\*\*\***

This Part provides a comprehensive framework of legislative interventions in Delaware, which is summarized in Figure 1 below. We have shown that these interactions allow Delaware to overcome some of the challenges associated with its reliance on courts for developing norms. But is it desirable? We turn to discuss this question and some other interesting normative and theoretical matters that our framework raises in the next Part.



# **Implications**

[**Note to readers**: this Part is very much a work in progress. We provide initial thoughts below].

This Part outlines the potential implications of our analysis on the long-standing and important debate about state competition for incorporations. It also raises some additional questions for future research. XXX

# **Conclusions**

The Article proposes a novel framework that explains why legislative interventions are crucial in Delaware, a legal system that heavily relies on courts for setting norms and operating in a complex and fast-evolving business environment. It documents a persistent trend over the past decades of legislative responses to judicial decisions, often aimed at (i) enabling courts to set norms without imposing out-of-pocket liability on directors and officers; (ii) balancing fiduciary duties and private ordering and providing tailored rules that might be in tension with fiduciary standards; and (iii) devising arrangements that require ‘political’ bargains across legal questions, providing certainty and addressing changing market practices. We show how these legislative interventions offer a deliberate *complement* to courts, often elevating external pressures when a judicial ruling creates shocks or uncertainties in the market. The Delaware model also inspired policymakers in the U.S. and around the world,[[256]](#footnote-256) who tried to replicate it. Our Article provides an important lesson on what it takes to be like Delaware.

**Appendix A: Methodology**

To characterize the relationship between the Delaware legislature and the court, particularly how it responds to judicial decisions, we examined legislative amendments made following court rulings over more than 55 years between 1967 and 2023. In each case, we analyzed the legal issue that triggered the legislature intervention and the characteristics and scope of the intervention. A list of these interventions appears in Appendix B.

Bottom of Form

Scrutinizing the legislative processes in Delaware is intricate and presents challenges because the Council’s work proceeds privately. For instance, the Council does not release detailed minutes of the discussions that precede legislative amendments, and the explanations provided by the Council regarding these amendments are often brief and lacking in detail.[[257]](#footnote-257)

To gain a more comprehensive understanding of the background of legislative amendments, specifically the relationship between judicial decisions and legislative amendments, we examined commentaries on amendments by two prominent Delaware firms, Young Conaway and Morris Nichols. As legislative amendments are almost an annual occurrence, these firms publish such commentaries on a yearly basis.[[258]](#footnote-258) Alongside this, in a minority of cases, we managed to find more comprehensive information about the legislative amendments. This was the case, for example, with the most significant amendments, such as the substantial amendment to the DGCL made in 1967, or exceptional instances when the Corporation Law Section Council decides to provide more information to third parties and publishes explanatory reportsfor the legislative amendment.

Our research, as mentioned, is focused on the legislature’s intervention against the backdrop of court rulings and how the legislature’s responsiveness to the judiciary as part of the interaction between these two institutions advances Delaware’s corporate law model. Therefore, our study does not include legislative amendments for which there is no indication of such a connection to the judiciary’s rulings. We focus on cases where a careful reading of legislative history through law firms’ analyses, the Corporate Law Section’s reports, or scholarly writing shows a clear indication that legislative intervention is a response to judicial decisions. Furthermore, for now, we have chosen to focus on amendments to Delaware’s primary piece of corporate legislation: the DGCL, which has received the most attention as the most critical legislative component in the Delaware system, from the courts, scholars, and practitioners.[[259]](#footnote-259) Top of Form

Bottom of Form

It is also essential to recognize the inherent limitations of our methodology in fully delineating the dynamics between legislative actions and judicial decisions. We cannot exclude the possibility that the judiciary’s awareness of potential legislative responses to their rulings could preemptively affect their judgments. For instance, courts might exercise caution, restricting the scope of their rulings to avoid prompting legislative intervention, or they may issue more assertive decisions, anticipating that the legislature may provide subsequent clarifications or adjustments. Such strategic judicial behavior is subtle and often unrecorded, thus eluding direct analysis through legislative amendments alone. Consequently, our study refrains from claiming to present a comprehensive depiction of this complex interplay.

**Appendix B: List of Legislative Interventions**

[To be added]

1. \* Professor of Law, Tel Aviv University; Director, Fischer Center for Corporate Governance and Financial Regulation; Research Member, the European Corporate Governance Institute (ECGI). [↑](#footnote-ref-1)
2. \*\* Professor of Law, Tel Aviv University; Visiting Associate Professor of Law, New York University School of Law; Senior Research Fellow, Harvard Law School Program on Corporate Governance; Research Member, the European Corporate Governance Institute (ECGI). [↑](#footnote-ref-2)
3. In Re the Boeing Company Derivative Litigation C.A. No. 2019-0907-MTZ, 2021 WL 4059934 (Del.Ch. 2021). [↑](#footnote-ref-3)
4. In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996). Failure-of-oversight claims were considered difficult to plead because plaintiffs bear the high burden of showing that the directors acted in *bad faith*, by failing to implement any information system, or having implemented such a system, by ignoring “red flags” that the system brought to their attention. *See* Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006). [↑](#footnote-ref-4)
5. The court concluded that the pleaded facts described the directors’ “complete failure to establish a reporting system for airplane safety” and “their turning a blind eye to a red flag representing airplane safety problems.” *Supra* note 1, at 2. [↑](#footnote-ref-5)
6. *Id.,* at 44. [↑](#footnote-ref-6)
7. Kevin LaCroix, *Boeing Air Crash Derivative Lawsuit Settles for $237.5 Million*, The D&O Diary (2021). [↑](#footnote-ref-7)
8. For example, a search on Google News of the terms “Boeing” & “lawsuit” & “737” during the two months following the Boeing opinion yields 1,600 results, and a search of the terms “Boeing” & “Settlement” in the five months following the settlement yields 2,820 results. [↑](#footnote-ref-8)
9. Marchand v. Barnhill, 212 A.3d 805 (Del. 2019); In re Clovis Oncology, Inc. Derivative Litig*.*, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019)); Hughes v. Xiaoming Hu, 2020 Del. Ch. LEXIS 162; Teamsters Local 443 Health Servs. & Ins. Plan v. Chou,2020 WL 5028065 (Del. Ch. Aug. 24, 2020); In Inter-Mkt’ing Grp. USA v. Armstrong, 2020 WL 756965 (Del. Ch. Jan. 31, 2020). For analysis of this development, *see, e.g.,* Jennifer Arlen, *Evolution of Director Oversight Duties and Liability under Caremark: Using Enhanced Information-Acquisition Duties in the Public Interest* (Working Paper, 2023). [↑](#footnote-ref-9)
10. Skadden, Arps, Slate, Meagher & Flom, *The Risk of Overlooking Oversight: Recent Caremark Decisions From the Court of Chancery Indicate Closer Judicial Scrutiny and Potential Increased Traction for Oversight Claims* (Dec. 15, 2021). *See also* Wachtell, Lipton, Rosen & Katz, *Tectonic Forces To Watch In Corporate Litigation* (Jan. 23, 2020) (noting there is an expectation “to see a steady uptick in Caremark filings.”); Kevin LaCroix, *Boeing Air Crash Derivative Lawsuit Settles for $237.5 Million* THE D&O DIARY (Nov. 7, 2021) (warning that the recent Caremark decisions “had already raised alarm bells about the possible proliferation of further Caremark claims.”). Additionally, a search on Nexis provides 275 media articles and court decisions that refer to *Caremark* claims between June 2019 and June 2023, compared to just 82 articles in the preceding four-year period. Similarly, Harvard Law School Forum on Corporate Governance published 145 blog posts on *Caremark* between 2019–2023, compared to just 42 in the preceding four-years. [↑](#footnote-ref-10)
11. *See, e.g.,* Arlen, *supra* note 7 (noting that in Caremark 2.0, “Delaware imposes enhanced, and more specific, oversight duties on directors in certain circumstances”); John Armour, Jeffrey Gordon & Geeyoung Min, *Taking Compliance Seriously,* 37 Yale J. Reg. 1, 46 (2020) (asserting that “Marchand may open the door to much deeper judicial engagement with the particulars of how boards monitor … a company’s obligation to comply with law”); Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 Wash. U. L. Rev. 1857, 1866 (2021) (discussing “courts’ increased willingness to scrutinize directors’ conduct in [the Caremark] context” in the new Caremark era); Stephen M. Bainbridge, *After Boeing, Caremark is no longer “the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment”* (Sep. 8, 2021) (suggesting that “Caremark is no longer “the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.”). [↑](#footnote-ref-11)
12. LaCroix, *supra* note 8 (providing the following examples: the $300 million Renren derivative settlement (October 2021), the $310 million settlement in the Alphabet/Google #MeToo derivative suit (September 2020), and the $175 million McKesson opioid derivative settlement (February 2020), and noting these settlements have significant implications for companies and D&O insurers). [↑](#footnote-ref-12)
13. Skadden, Arps, Slate, *Meagher & Flom, Delaware General Corporation Law Amended To Authorize Use of Captive Insurance for D&O Coverage* (Feb. 9, 2022), https://www.skadden.com/insights/publications/2022/02/delaware-general-corporation-law. [↑](#footnote-ref-13)
14. <https://woodruffsawyer.com/do-notebook/do-captives-and-laser-dic/> (reporting an increase in D&O Side A coverage). [↑](#footnote-ref-14)
15. Richards, Layton & Finger, *Amendments to the DGCL Permit Captive D&O Insurance*, Harvard Law School Forum on Corporate Governance (August 4, 2023)**.** [↑](#footnote-ref-15)
16. Stephen M. Bainbridge, *Don’t Compound the Caremark Mistake by Extending It to ESG Oversight*, 77 Bus. Law. 651 (2021); Angela N. Aneiros and Karen E. Woody, *Caremark's Butterfly Effect*, 72 AM. U. L. Rev. 719, 770-771 (2023) (claiming that the higher possibility of holding directors liable for Caremark claims could have significant implications for D&O underwriters “who are concerned about large settlements for breaches of fiduciary duty and the cost of litigation”). In the background, there was also an insurance dispute in another high-profile *Caremark* lawsuit, where the insurance company refused to cover a $60 million settlement related to the deadly 2015 listeria outbreak in Blue Bell Creameries. *See* https://www.law360.com/articles/1265064/blue-bell-settles-shareholder-listeria-suit-staving-off-trial. [↑](#footnote-ref-16)
17. Section 145(j) of the DGCL. [↑](#footnote-ref-17)
18. https://www.morganlewis.com/pubs/2022/02/delaware-fully-embraces-captive-insurance-as-an-option-to-protect-directors-and-officers (“Indemnification by the corporation for a settlement or judgment in a derivative suit against an officer or director goes against public policy because the corporation effectively pays money damages to itself and does not benefit from the successful derivative action”). [↑](#footnote-ref-18)
19. *See* Section 145(b) of DGCL. The one exception to this prohibition was the indemnification against reasonable expenses if the director or officer has not been adjudged liable to the corporation. [↑](#footnote-ref-19)
20. When the Delaware legislature prohibited the indemnification of derivative claims back in 1967, it permitted (as a compromise) the use of D&O insurance to cover directors’ liability in derivative litigation. At that time, “D&O insurance was viewed as a self-policing mechanism.” *See* 1 Delaware Corp. L. & Prac. § 16.08 (2023). One could expect a third-party insurer to limit coverage or charge higher premiums for riskier companies. However, this will not be the case if the company is self-insured through captive insurance. For a discussion of the monitoring effect of insurance, *see* Tom Baker & Sean J. Griffith, *Ensuring Corporate Misconduct: How Liability Insurance Undermines Shareholder Litigation* 5 (2010). [↑](#footnote-ref-20)
21. Kevin LaCroix, *Delaware Legislature Passes Bill Allowing Use of Captives for D&O Insurance*, THE D&O DIARY (Jan. 30, 2022). *See also* <https://woodruffsawyer.com/do-notebook/delaware-legislature-blesses-captives-do/> (“while captive insurance is insurance, the concern is that using a parent company’s captive instead of buying commercial insurance arguably looks like the corporation is attempting to fund non-indemnifiable losses since it is the corporation itself that funds the captive”). [↑](#footnote-ref-21)
22. Large companies with existing captive insurance (to save costs of direct claims) could immediately take advantage of it. These companies are more likely to rely on captive insurance and were also the ones most concerned about plaintiffs’ incentive to pursue large derivative settlements in the aftermath of Boeing. *See* <https://woodruffsawyer.com/do-notebook/do-captives-and-laser-dic/>. [↑](#footnote-ref-22)
23. In addition, captive insurance cannot be used to pay for losses attributable to self-dealing or deliberate criminal or fraudulent acts, suggesting that the amendment was mostly aimed to address *Caremark* claims. *See* S. 203, 151st Gen. Assemb. (Del. 2022). These required exclusions only apply where such loss is established by a “final, non-appealable adjudication in the underlying proceeding in respect of the claim.” [↑](#footnote-ref-23)
24. The ability of the Delaware’s legislature to conduct fast interventions is facilitated by the state’s unique corporate law legislative process (see *infra* Section I.A.), which is different from the more traditional legislative process in other states. [↑](#footnote-ref-24)
25. *See, e.g.,* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. Rev. 1009 (1997); Charles M. Elson, *The Duty of Care, Compensation and Stock Ownership,* [63 U. Cin. L. Rev. 649 (1995)](https://plus.lexis.com/document?pdmfid=1530671&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A41S5-2WK0-00CW-50SH-00000-00&pdcontentcomponentid=7376&prid=ecafa0ed-a4c6-412f-8d10-9ad8b0f85b5c&crid=46ae6286-3873-4700-a866-d77a8a50eba2&pdisdocsliderrequired=true&pdpeersearchid=e0de2944-d720-4193-98cd-b9e8dd5e6849-1&ecomp=57ttk&earg=sr3) . [↑](#footnote-ref-25)
26. *See infra* notes xxx and accompanying text. To be clear, imposing personal liability can also enhance the enforcement of directors’ duties. In this Article, we do not take a stand on the appropriate level of out-of-pocket liability that should be imposed and whether the balance chosen by Delaware is socially optimal. [↑](#footnote-ref-26)
27. Our study includes only legislative amendments for which there is a *clear indication* of the connection to the judiciary’s rulings, either in the amendment documents or in law firms’ analysis of these amendments. As we will show, the legislative responses in our sample rarely involve a direct reversal of a court’s decision. More often, these responses are aimed at elevating market uncertainty by clarifying courts’ decision or solving issue that the courts did not have appropriate tools to address. Generally, the legal intervention occurs shortly after the rulings, though in a couple of cases the interventions occur later on due to a change in market practices that place stress on old rulings. For additional discussion of our methodology, *see* Appendix A. [↑](#footnote-ref-27)
28. Michal Barzuza presented evidence that Nevada competes for some firms, which seek extremely lax laws. *See* Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 99 Va. L. Rev. 935 (2012). However, this move is viewed as a “niche competition” for small firms. *See* Marcel Kahan, *The State of State Competition for Incorporations Revisited* 19 (Working Paper, 2023); Ofer Eldar & Lorenzo Magnolfi, *Regulatory Competition and the Market for Corporate Law*, 12 Am. Econ. J.: Microeconomics 60 (2020) (presenting empirical evidence on the firms that Nevada attracts). [↑](#footnote-ref-28)
29. See *infra* Part II. [↑](#footnote-ref-29)
30. See *infra* note 65. [↑](#footnote-ref-30)
31. See *infra* note 66. [↑](#footnote-ref-31)
32. See*, e.g.,* Mark J. Roe, *Delaware’s Competition*, 117 Harv. L. Rev. 588, 591–592 (2003); Mark J. Roe, *Delaware’s Politics*, 118 Harv. L. Rev. 2491 (2005). [↑](#footnote-ref-32)
33. *See infra* note 69. [↑](#footnote-ref-33)
34. David A. Skeel, *The Bylaw Puzzle in Delaware Corporate Law*, 72 Bus. Law. 1, 27 (2017) (noting the dearth of attention to the relationship between the courts and the legislature. According to him, “[e]ven Mark Roe, a particularly acute observer of Delaware institutions, treats Delaware’s legislature and courts as more or less interchangeable.”). Roe, *supra* note 30 (including both legislative and judicial changes as examples of Delaware’s responsiveness to Congress and federal agencies). *See also* Section I.B. [↑](#footnote-ref-34)
35. *See infra* notes 63-71, and accompanying text. [↑](#footnote-ref-35)
36. *See* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. Rev. 1009 (1997); *Smith v. Van Gorkom* 488 A.2d 858, 866 (Del. 1985). [↑](#footnote-ref-36)
37. John Armour & David A. Jr. Skeel, *Who Writes the Rules for Hostile Takeovers, and Why - The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 Geo. L.J. 1727 (2006); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 Vand. L. Rev. 1573, 1602 (2005) (“The most noteworthy trait of Delaware’s corporate law is the extent to which important and controversial legal rules are promulgated by the judiciary, rather than enacted by the legislature.”). [↑](#footnote-ref-37)
38. Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 Colum. L. Rev. 1749 (2006). [↑](#footnote-ref-38)
39. Kahan & Rock, *Symbiotic Federalism, supra* note 35, at 1577 (explaining the legislative changes “address largely technical and noncontroversial matters”). [↑](#footnote-ref-39)
40. *See* Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 Colum. L. Rev. 1908 (1998). This has led some scholars to suggest that Delaware law relies on open-ended standards to a greater extent than is optimal. *Id.* See also Kahan & Rock, *Symbiotic Federalism, supra* note 35; Douglas M. Branson, *Indeterminacy: The Final Ingredient in an Interest Group Analysis of Corporate Law*, 43 Vand. L. Rev. 85 (1990). Under this view, firms might incorporate in Delaware due to its other advanatges, such as network benefits. Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 Va. L. Rev. 757 (1995). *See also* the sources in infra notes 71-78. [↑](#footnote-ref-40)
41. For a discussion, *see infra* Section II.A. [↑](#footnote-ref-41)
42. In the *Boeing* case, for example, the parties agreed that the attorneys for the plaintiffs will get up to $29.7 million. *See* Kevin LaCroix*, Boeing Air Crash Derivative Lawsuit Settles for $237.5 Million,* The D&O Diary (Nov. 7, 2011), <https://www.dandodiary.com/2021/11/articles/shareholders-derivative-litigation/boeing-air-crash-derivative-lawsuit-settles-for-237-5-million/>. [↑](#footnote-ref-42)
43. See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 Tex. L. Rev. 469 (1987). [↑](#footnote-ref-43)
44. *See infra* Section II.A. [↑](#footnote-ref-44)
45. *See infra* Sections II.B-C. [↑](#footnote-ref-45)
46. *See infra* Section II.A. [↑](#footnote-ref-46)
47. For a discussion, *see infra* Section II.B. [↑](#footnote-ref-47)
48. *See infra* Subsection II.B.1. [↑](#footnote-ref-48)
49. *See* most recently, In West Palm Beach Firefighters’ Pension Fund v. Moelis & Co., No. 2023-0309-JTL (Del. Ch. Feb. 23, 2024). [↑](#footnote-ref-49)
50. *See* Skeel, *supra* note 32, at 12;CA, Inc. v. AFSCME Employees Pension Plan,953 A.2d 227, 239 (Del. 2018) (holding that shareholders cannot adopt bylaws that require directors to reimburse proxy expenses in a manner that essentially prevents directors from discharging their fiduciary duties). [↑](#footnote-ref-50)
51. *See infra* notes xx-xx, and accompanying text. [↑](#footnote-ref-51)
52. *See New Enterprise Associates 14, L.P. v. Rich*, 2023 WL 1857123 (Del. Ch. May 2, 2023). [↑](#footnote-ref-52)
53. *See Siegman v. Tri-Star Pictures, Inc.,* 1989 WL 48746, at \*8 (Del. Ch. May 5, 1989). [↑](#footnote-ref-53)
54. *See infra* notes xx-xx, and accompanying text. [↑](#footnote-ref-54)
55. See *infra Section* II.C. [↑](#footnote-ref-55)
56. *See infra* notes xx-xx, and accompanying text. [↑](#footnote-ref-56)
57. *See* Rock, *Saints and Sinners*, *supra* note 23. [↑](#footnote-ref-57)
58. Add a source explaining that DE judges try to do this by participating in conferences, etc. [↑](#footnote-ref-58)
59. *See supra* notes 50-51, and accompanying text. [↑](#footnote-ref-59)
60. For a discussion, see *infra* Part IV. [↑](#footnote-ref-60)
61. See *infra* note xx. [↑](#footnote-ref-61)
62. *See, e.g.*, Lynn M. LoPucki, *Corporate Charter Competition*, 102 Minn. L. Rev. 2101, 2102 (2019) (“Delaware’s competitors have lagged so far behind that some scholars have declared the competition to be over and Delaware the winner.”); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 Stan. L. Rev. 679, 684 (2002) (“Other than Delaware, no state is engaged in significant efforts to attract incorporations of public companies.”); Marcel Kahan, *Delaware’s Peril*, 80 Md. L. Rev. 59, 61 (2021) (“Delaware acocunts for the bulk of incorporations.”). As of 2022, nearly 70% of the Fortune 500 companies are incorporated in Delaware, and the state attracted about 80% of the IPOs in that year. See https://corp.delaware.gov/stats/. [↑](#footnote-ref-62)
63. *See, e.g.*, Hamermesh, *supra* note 36. [↑](#footnote-ref-63)
64. *See, e.g.*, Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. Legal Stud. 251, 254–58 (1977); Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law, 212–27 (1991); Roberta Romano, The Genius of American Corporate Law 14–31 (1993). [↑](#footnote-ref-64)
65. *See, e.g.,* William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 Yale L.J. 663 (1974). Lucian Bebchuk and others have pointed to the limitation of market forces when it comes to the legal protections that states offer. *See, e.g.,* Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 Harv. L. Rev. 1435 (1992); Lucian A. Bebchuk, Alma Cohen & Allen Ferrell, *Does the Evidence Favor State Competition in Corporate Law?*, 90 Cal. L. Rev. 1775 (2002); Oren Bar-Gill, Michal Barzuza & Lucian A. Bebchuk, *The Market for Corporate Law*, 162 J. Instit. & Theoretical Econ. 134, 134–38 (2006). For a comprehensive review of the scholarly debates on the topic, *see* Kahan, *The State of State Competition, supra* note 26. [↑](#footnote-ref-65)
66. *See, e.g.,* Kahan & Kamar, *supra* note 63; Lucian A. Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Re-considering the Competition over Corporate Charters*, 112 Yale L. J. 553, 563–64 (2002). [↑](#footnote-ref-66)
67. Kahan, *The State of State Competition, supra* note 26, at 26. *See also* William Magnuson, *The Race to the Middle*, 95 Notre Dame L. Rev. 1183 (2020). [↑](#footnote-ref-67)
68. *See, e.g.*, Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 Colum. L. Rev. 1908 (1998) (explaining that the use of standards and an expert court makes it harder for other states to replicate Delaware law); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 Tex. L. Rev. 469 (1987) (examining the powerful role of lawyers as an important interest group in Delaware and how they may lead to deviations from profit-maxmizing strategis). *See also* William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. Ill. L. Rev. 1 (2009); William J. Moon, *Delaware's Global Competitiveness*, 106 Iowa L. Rev. 1683 (2021). [↑](#footnote-ref-68)
69. *See, e.g.*, Stephen M. Bainbridge, *Interest Group Analysis of Delaware Law: The Corporate Opportunity Doctrine as Case Study*, *in* Can Delaware Be Dethroned?: Evaluating Delaware’s Dominance of Corporate Law 120 (Stephen M. Bainbridge, Iman Anabtawi, Sung Hui Kim & James Park eds., 2018); Moon, *supra* note 69. [↑](#footnote-ref-69)
70. *See, e.g.*, LoPucki, *supra* note 63, at 2102 (“The Delaware Court of Chancery, which interprets and enforces the Delaware General Corporation Law, is the American court most specialized in corporate law. Delaware’s judicial strategy has been highly successful.”). *See also* Randy J. Holland, *Delaware Corporation Law: Judiciary, Executive, Legislature, Practitioners*, 72 Business Lawyer 943, 952–54 (2017); Kahan & Rock, *Symbiotic Federalism, supra* note 35, at 1602; and *infra* notes 73-74. [↑](#footnote-ref-70)
71. Hamermesh, *supra* note 36, at 1759­–762. [↑](#footnote-ref-71)
72. *See, e.g.,* Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 Nw. U. L. Rev. 542, 589­-90 (1990) (“My explanation [to Delaware’s prominence] depends primarily on Delaware’s expert judges.”); *See* Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. Cin. L. Rev. 1061 (2000) (Delaware judges “enjoy a high degree of political independence”); Demetrios G. Kaouris, *Is Delaware Still a Haven for Incorporation*, 20 Del. J. Corp. L. 965, 975–77 (1995). [↑](#footnote-ref-72)
73. Hamermesh, *supra* note 36, at 1759­–62; Rock, *Saints and Sinners*, *supra* note 23 (explaining that Delaware’s judges are “experienced and respected practitioners” who are selected based on merit). [↑](#footnote-ref-73)
74. Kaouris, *supura* note 73, at 975–77. [↑](#footnote-ref-74)
75. William Savitt, *The Genius of the Modern Chancery System*, 2012 Colum. Bus. L. Rev. 570, 501 (2012). *See also* Omari Scott Simmons, *Branding the Small Wonder: Delaware’s Dominance and the Market for Corporate Law*, 42 U. Rich. L. Rev. 1129 (2008). [↑](#footnote-ref-75)
76. Fisch, *supra* note 73, at 1074 (“[D]espite their statutory source, the majority of Delaware’s important legal rules are the result of judicial decisions.”). [↑](#footnote-ref-76)
77. *See* Rock, *Saints and Sinners*, *supra* note 23, at 1098–99*.* [↑](#footnote-ref-77)
78. *See* Sujeet Indap, *Texas is throwing down a legal challenge to Delaware*, Financial Times (Jan. 29, 2024), https://www.ft.com/content/a02b96df-9ee1-4b3b-a31e-087b734840a1; Barzuza, *supra* note 26. [↑](#footnote-ref-78)
79. For example, in 2010, Israel joined this global movement by setting up an Economic Division within the Tel Aviv District Court. *See* Yifat Aran & Moran Ofir, *The Effect of Specialised Courts over Time*, *in* Time, Law, and Change: an Interdisciplinary Study 167 (Sofia Ranchordás & Yaniv Roznai eds.,2020). [↑](#footnote-ref-79)
80. LoPucki, *supra* note 63, at 2102, n. 4 (describing Nevada’s and New York’s challenges in establishing business courts); Black, *supra* note 73, at 589­-90 (describing how New York considered competing with Delaware, and concluded that the effort was futile. According to him, to compete “New York needed a business court with knowledgeable judges. That avenue, however, was seen as politically impractical because it required a state constitutional amendment.”); Kahan, *Delaware’s Peril*, *supra* note 63, at 66 (describing the special political constraints other states face); Kahan, *The State of State Competition, supra* note 26. [↑](#footnote-ref-80)
81. *Id*.; Kahan & Kamar, *supra* note 63 (arguing that no state competes with Delaware); Lucian A. Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Re-considering the Competition over Corporate Charters*, 112 Yale L.J. 553, 563–64 (2002) (arguing that Delaware’s dominant position imposes insurmountable barriers to entry). [↑](#footnote-ref-81)
82. *See, e.g.*, Simmons, *supra* note 76, at 1157–58 (contends that one reason states replicating Delaware’s statutes fail to attract corporations as effectively is that “Delaware’s Corporate Bar, an expert group, has unmatched authority in the corporation law amendment process compared to other states”). [↑](#footnote-ref-82)
83. *See, e.g.*, Roberta Romano, *Market for Corporate Law Redux,* *in* The Oxford Handbook of Law and Economics: Private and Commercial Law 358, 361­­–62 (Francesco Parisi ed., 2017) (explaining how the Delaware legislature responds to the bar by enacting its proposed initiatives). [↑](#footnote-ref-83)
84. Holland, *supra* note 71, at 947; The Corporation Law Section consists of “more than 500 Delaware attorneys, judges and academics” (*Corporation Law Section, About the Section*, https://www.dsba.org/sections-committees/sections-of-the-bar/corporation-law/). [↑](#footnote-ref-84)
85. Hamermesh, *supra* note 36, at 1752–59; Holland, *supra* note 71, at 947; Roberta Romano, The Genius of American Corporate Law 37–38 (The AEI Press 1993). For a famous critique of the composition of the committee, which is consisted chiefly of pro-management corporation attorneys, and the concerns that it represents primarily management interests, *see* Ernest Folk, *Review of the Delaware Corporation Law: Some Reflections of a Corporation Law Draftsman*, 42 Conn. B.J. 409 (1968). [↑](#footnote-ref-85)
86. Hamermesh, *supra* note 36*,* at 1756–57; Holland, *supra* note 71, at 948. [↑](#footnote-ref-86)
87. Hamermesh, *supra* note 36*.,* at 1756–57; Romano, *supra* note 84. [↑](#footnote-ref-87)
88. *See supra* note 87. [↑](#footnote-ref-88)
89. Kaouris, *supura* note 73, at 971–72; Romano, *supra* note 84. [↑](#footnote-ref-89)
90. Macey and Miller, *supra* note 41, at 488-89 (explaining that “Delaware legislature’s drafting committees historically have been staffed with attorneys experienced in corporate law”). [↑](#footnote-ref-90)
91. Kahan & Rock, *Symbiotic Federalism, supra* note 35, at 1600 (“[Delaware’s] legislators claim no expertise over corporate law, and partisan politics play no role in its formation.”); Hamermesh, *supra* note 36, at 1753 (“[T]he Delaware General Assembly has not perceived the content of the DGCL as an appropriate subject for partisan controversy.”); Holland, *supra* note 71, at 949 (“[T]here is simply no political element to the development of corporation law.”). [↑](#footnote-ref-91)
92. Hamermesh, *supra* note 36, at 1752–59; Holland, *supra* note 71, at 949. *See also* Fisch, *supra* note 73, at 1089 (“[T]he Delaware legislature has traditionally been very responsive to corporate requests for rulemaking.”). [↑](#footnote-ref-92)
93. Holland, *supra* note 71, at 949*.* [↑](#footnote-ref-93)
94. Brian R. Cheffins, *Delaware and the Transformation of Corporate Governance*, 40 Del. J. Corp. L. 1, 23 (2015) (describing Chief Justice Strine’s “Delaware Model,” where “judges were more likely than its legislators to contribute to the development of corporate governance,” and stating that “Delaware courts have done much more to influence corporate governance than the Delaware legislature”); Simmons, *supra* note 76, at 1158 (“Despite the ability to respond, actual changes to the General Corporation Law (“DGCL”) over the past forty years have been conservative. This conservatism results in deference to the judicial branch to incrementally sketch corporate law through the judicial process.”); LoPucki, *supra* note 63, at 2102 (“Delaware’s competitive strategy is principally judicial, not legislative.”); Bainbridge, *supra* note 70, at 136 n. 57–58. Top of Form [↑](#footnote-ref-94)
95. Cheffins, *supra* note 95, at 17–18 (“The basic organization and content [of the DGCL] has remained unchanged, even in the wake of the Enron and WorldCom scandals…Correspondingly, the Delaware legislature was destined to be little more than a bit player as corporate governance developed over the past forty years.”). *See also* the sources in *infra* note 95 and *supra* notes 99–100. [↑](#footnote-ref-95)
96. Simmons, *supra* note 76, at 1158 n. 127 (“Looking back over the forty years since the landmark 1967 general revision of the Delaware General Corporation Law, one of course observes many statutory changes. What appears on further reflection, however, is just how few of those changes have involved any dramatic effect on the governance of publicly held corporations. Many of the statutory changes have been technical, and very few have attracted any academic attention.”). [↑](#footnote-ref-96)
97. Cheffins, *supra* note 95, at 22 (“The treatment of independent directors under Delaware law illustrates the division of labor. While independent directors are a crucial element of corporate governance, the DGCL does not refer once to them. Hence, to the extent that Delaware law has shaped the role of independent directors, it has been due to judicial action.”). [↑](#footnote-ref-97)
98. *See* Kahan & Rock, *Symbiotic Federalism, supra* note 35, at 1591. [↑](#footnote-ref-98)
99. John Armour & David A. Jr., Skeel, *Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of US and UK Takeover Regulation*, 95 Geo. L. J. 1727, 1751 (2007). *See also* Simmons, *supra* note 76, at 221 (“Delaware’s key contribution to U.S. corporate governance is the production of substantially *judge-made* corporate law – a public good providing dynamic guidance to multinational firms and practitioners as well as a deterrent for wayward business behavior.”) (emphasis added). [↑](#footnote-ref-99)
100. *See, e.g.,* William B. Chandler, III & Leo E. Strine, Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. Pa. L. Rev. 953, 982 (2003) (suggesting that Delaware’s court decisions “provide feedback to policymakers that stimulates later amendments to the rules”). [↑](#footnote-ref-100)
101. Kahan & Rock, *Symbiotic Federalism, supra* note 35. [↑](#footnote-ref-101)
102. Hamermesh, *supra* note 36, at 1777. [↑](#footnote-ref-102)
103. These two cases, which are related to use of proxy access bylaws and fee-shifting bylaws, will be discussed below. *See infra* notes XX. [↑](#footnote-ref-103)
104. Skeel, *supra* note 32, at 10­–11. *See also* Stephen M. Bainbridge, *Interest Group Analysis of Delaware Law: The Corporate Opportunity Doctrine as Case Study*, *in* Can Delaware Be Dethroned?: Evaluating Delaware’s Dominance of Corporate Law 120, 120–44 (Stephen M. Bainbridge, Iman Anabtawi, Sung Hui Kim & James Park eds., 2018) (analyzing the corporate opportunity doctrine as another instance of Delaware legislature’s intervention, describing it as “one of those rare cases in which the Delaware legislature has intervened to provide greater predictability and certainty than the courts have offered”); Jonathan Rohr*, Corporate Governance, Collective Action, and Contractual Freedom: Justifying Delaware’s New Restrictions on Private Ordering*, 41 Del. J. Corp. L. 803 (2017) (describing the DGCL’s amendment in 2016 regarding appraisal—which permits early payment to shareholders to stop interest accrual—as a case where the legislature responded to a trend noted in court’s proceedings, where hedge funds and investors leveraged high interest rates). For an expanded discussion of all these examples, *see* Section II. [↑](#footnote-ref-104)
105. Skeel, *supra* note 32, at 10–11. [↑](#footnote-ref-105)
106. Kamar, *supra* note 38. [↑](#footnote-ref-106)
107. *See, e.g.,* Rock, *Saint and Sinners, supra* note 23. [↑](#footnote-ref-107)
108. Ramishah Maruf, *Elon Musk doubles down on his promise to ditch Delaware, SpaceX is headed for Texas incorporation*, CNN Business (Feb. 14, 2024). [↑](#footnote-ref-108)
109. *See* *supra* note 38. [↑](#footnote-ref-109)
110. *See* *supra* note 96 and accompanying text. [↑](#footnote-ref-110)
111. [Discuss courts’ attempt to address this tension by decisions, such as *Corwin*, that make it easier for plaintiffs seeking an injunction instead of post-closing damages]. [↑](#footnote-ref-111)
112. Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. Pa. J. Bus. L. 675, 678 (2009) (“For more than a century, Delaware courts have tempered law with equity by recognizing that the directors’ exercise of this statutory power to manage ‘carries with it certain fundamental fiduciary obligations to the corporation and its shareholders.”); Rock, *Saints and Sinners, supra* note 23, at 1009 (suggests that Delaware fiduciary law illustrates the roles of directors as akin to moral tales, guiding good and bad governance through precedents and providing standards for director conduct over time). [↑](#footnote-ref-112)
113. Holland, *supra* note 71, at 679 (“Stockholders can enforce directors’ fiduciary duties through either a direct suit on behalf of that stockholder, where there is damage personal to that stockholder, or through a derivative suit to enforce the directors’ duties on behalf of the corporation.”) In some instances, other parties might bring a lawsuit. Some hostile takeover cases, for example, were initiated by the bidder. *See, e.g.,* Ronald J. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 Stan. L. Rev. 819 (1981). [↑](#footnote-ref-113)
114. *See, e.g.*, Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1 (1991). [↑](#footnote-ref-114)
115. *See, e.g.,* Bernard Black, Brian Cheffins & Michael Klausner, *Outside Director Liability*, 58 Stan. L. Rev. 1055, 1077 (2006) (“[S]o long an outside director has not engaged in self-dealing, the scope of potential out-of-pocket liability is very narrow.”). Where directors are named and held responsible via settlement offers or court decisions, it is typically the corporation, not the directors who ultimately bear those costs. *See* Martin Petrin, *Assessing Delaware's Oversight Jurisprudence: A Policy and Theory Perspective*, 5 Va. L. & Bus. Rev. 433, 466 (2011) (explaining corporations incur these costs either by settling the case on the directors’ behalf, indemnifying the directors, or paying insurance premiums to cover directors’ non-indemnified losses). [↑](#footnote-ref-115)
116. *See* Assaf Hamdani & Reinier Kraakman, *Rewarding Outside Directors,* 105 Mich. L. Rev. 1677, 1689 (2007) (“If directors were unable to shift liability risk, however, companies would face additional costs that might far exceed the direct risk-bearing costs to their directors. One of these costs is the agency cost of risk-distorted decision-making by the board, and another is a diminished pool of candidates from which to recruit new directors.”); Holger Spamann, *Monetary Liability for Breach of the Duty of Care?* 8 J. Legal Analysis 337, 339 (2016) (“With full liability, even the most diligent and loyal decision would carry the risk of ruinous liability if courts make errors, as they surely do. Faced with this threat, directors and managers might simply refuse to serve . . . . Or if they did serve, they would demand a risk premium that would likely be much larger than any benefit that shareholders obtain from improved incentives.”). Also, in an era of increasingly powerful shareholders, they can initiate or support measures to remove a CEO or directors if directors are beging grossly negligent, and use voting rights as an alternative displanry mechanism. [↑](#footnote-ref-116)
117. *Id*. Following existing literature, our analysis assumes that out-of-pocket liability is not required for courts to set norms. One could argue, however, that new norms would be more effective if they were accompanied by out-of-pocket liability. [↑](#footnote-ref-117)
118. As Kamar observes, this tension could explain the role of indemnification and D&O liability insurance, which enable norms setting without imposing out-of-pocket liability. Ehud Kamar, *Shareholder Litigation under Indeterminate Corporate Law*, 66 U. Chi. L. Rev. 887, 888 (1999) (argues that “[I]nsurance and indemnification can be a socially desirable mechanism that induces plaintiffs to sue yet keeps sanctions low”). [↑](#footnote-ref-118)
119. *Smith v. Van Gorkom* 488 A.2d 858, 866 (Del. 1985). [↑](#footnote-ref-119)
120. *Id.*, at 864. Eventually, the parties settled the case for $23.5 million. Approximately $10 million was covered by Trans Union’s D&O insurance. Jay Pritzker, the investor behind the leveraged buy-out of Trans Union, paid most of the remaining $13.5 million, and the directors paid the rest. *See* James E. Kaye, *Corporate Law: Statutory Developments in Directors’ Liability—State Responses to Smith v. Van Gorkom*, 1988 Ann. Surv. Am. L. 429, 438 (1988). [↑](#footnote-ref-120)
121. *See, e.g.,* Rock, *Saints and Sinners*, *supra* note 23; Charles M. Elson, *The Duty of Care, Compensation and Stock Ownership,* [63 U. Cin. L. Rev. 649, 677 (1995)](https://plus.lexis.com/document?pdmfid=1530671&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A41S5-2WK0-00CW-50SH-00000-00&pdcontentcomponentid=7376&prid=ecafa0ed-a4c6-412f-8d10-9ad8b0f85b5c&crid=46ae6286-3873-4700-a866-d77a8a50eba2&pdisdocsliderrequired=true&pdpeersearchid=e0de2944-d720-4193-98cd-b9e8dd5e6849-1&ecomp=57ttk&earg=sr3) (explaining that Delaware Supreme Court’s decision in [Van Gorkom](https://plus.lexis.com/document?pdmfid=1530671&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A41S5-2WK0-00CW-50SH-00000-00&pdcontentcomponentid=7376&prid=ecafa0ed-a4c6-412f-8d10-9ad8b0f85b5c&crid=46ae6286-3873-4700-a866-d77a8a50eba2&pdisdocsliderrequired=true&pdpeersearchid=e0de2944-d720-4193-98cd-b9e8dd5e6849-1&ecomp=57ttk&earg=sr3) “served to create a number of new and important guideposts to ‘informed’ [Board] decisionmaking”). [↑](#footnote-ref-121)
122. *Id*. [↑](#footnote-ref-122)
123. *See generally* Dennis J. Block et al., *Advising Directors on the D & O Insurance Crisis*, 14 Sec. Reg, L. J. 130 (1986). *See also* Romano, *Market for Corporate Law Redux*, *supra* note 84, at 361­­–62 (“This decision [the Van Gorkem decision], no doubt, exacerbated managers—and investors—anxiety over the market trend: difficulty in obtaining insurance for directors who were confronted with heightened potential liability would render more difficult retention or recruitment of quality outside directors.”). [↑](#footnote-ref-123)
124. *Id.* *See also* Stephen P. Lamb, *Duty follows Function: Two Approaches to Curing the Mismatch between the Fiduciary Duties and Potential Personal Liability and Corporate Officers*, 26 Notre Dame J.L. Ethics & Pub. Pol’y 45, 53 (2012) (“Few corporate governance issues are more important than the availability of sufficient insurance at affordable prices. Without sufficient insurance, qualified individuals may decline service as corporate directors because the potential for liability is so vastly disproportionate to the benefits directors typically receive in return for their service. The result could be an exodus of talented directors and potential directors from corporations unable to secure sufficient insurance – a phenomenon that was reported at the height of the D&O [directors and officers] crisis of the mid-1980s”). [↑](#footnote-ref-124)
125. S.B. 533, Gen. Assemb. 133rd, Reg. Sess. (Del. 1986); Lewis S. Black, Jr. & A. Gilchrist Sparks, III, *Analysis of the 1986 Amendments to the Delaware General Corporation Law*, 311, 312 (July 1986). [↑](#footnote-ref-125)
126. Lamb, *Duty follows Function, supra* note 125 (the exculpation provision “was an attempt to restore protection that most corporate commentators, scholars, and practitioners understood to exist prior to the Delaware Supreme Court’s decision in Smith v. Van Gorkom, rendered in 1985”). [↑](#footnote-ref-126)
127. 1 Delaware Corp. L. & Prac. § 6.02 n.55 (2023). [↑](#footnote-ref-127)
128. Lamb, *Duty follows Function, supra* note 125; Richards, Layton & Finger, *2022 Proposed Amendments to the General Corporation Law of the State of Delaware* (Apr. 21, 2022), https://www.rlf.com/2022-proposed-amendments-to-the-general-corporation-law-of-the-state-of-delaware; Lawrence A. Hamermesh, Jack B. Jacobs & Leo E. Strine, Jr., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 Bus. Law. 321, 364 (2022). [↑](#footnote-ref-128)
129. When Section 102(b)(7) was adopted, directors were deemed to consent to service of process in the State of Delaware, but not officers. Therefore, non-resident officers, other than those who served as directors, could not be named as defendants in Delaware court proceedings. Section 3114 was amended only in 2003 to include executive officers. Hamermesh et al., *id.*, at 365. This amendment shows that the General Assembly sometimes acts to increase insiders’ exposure to liability. [↑](#footnote-ref-129)
130. In 2009, the Delaware Supreme Court held that officers owe the same fiduciary duties as directors, included among them the duty of care. *See* *Gantler v. Stephens*, 965 A.2d 695, 708-09 (Del. 2009). That decision led a prominent Delaware judge to claim: “[t]he exclusion of officers from exculpation has so far been a sleeping dog, but, if and when it wakes, we believe it would be destructive to the rational incentive structures reclaimed and rebuilt after Van Gorkom.” Lamb, *Duty follows Function, supra* note 125. [↑](#footnote-ref-130)
131. *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015) (aff’ing In re KKR Financial Holdings LLC, 101 A.3d 980 (Del. Ch. 2014)). [↑](#footnote-ref-131)
132. *Id.* [↑](#footnote-ref-132)
133. *Morrison v. Berry*, No. 12802-VCG, 2019 Del. Ch. LEXIS 1412 (Del. Ch. Dec. 31, 2019). [↑](#footnote-ref-133)
134. *In re* Mindbody, Inc. S’holders Litig., No. 2019-0442-KSJM, 2020 WL 5870084 (Del. Ch. Oct. 2, 2020). [↑](#footnote-ref-134)
135. *In re* Baker Hughes Inc., Merger Litig., No. 2019-0638-AGB, 2020 WL 6281427 (Del. Ch. Oct. 27, 2020). [↑](#footnote-ref-135)
136. *City of Warren Gen. Emps. Ret. Sys., v. Roche*, No. 2019-0740-PAF, 2020 WL 7023896 (Del. Ch. Nov. 30, 2020). [↑](#footnote-ref-136)
137. *In re* Coty S’holder Litig., No. 2019-0336-AGB, 2020 Del. Ch. LEXIS 269 (Del. Ch. Aug. 17, 2020); Voigt v. Metcalf, No. 2018-0828-JTL, 2020 Del. Ch. LEXIS 55 (Del. Ch. Feb. 10, 2020). [↑](#footnote-ref-137)
138. Under this view, when officers have no exculpation, courts may feel obliged to let such cases proceed to the discovery stage even if the legal grounds seemed weak on its face because a claim based on breach of the duty of care could still be won at the end of the day. [↑](#footnote-ref-138)
139. *Id.* at 368–69 (arguing that “due care claims targeting officers are the latest result of the shareholder plaintiffs’ bar’s efforts to develop litigation tactics that offer potentially lucrative fee awards in the M&A field.”). *See also* <https://www.skadden.com/insights/publications/2020/12/insights-the-delaware-edition/recent-trends-in-officer-liability>; Richards, Layton & Finger, *supra* note 129. [↑](#footnote-ref-139)
140. These cases often involved claims regarding duty of loyalty violations either because an officer acted under the influence of a controlling shareholder or because the officer had an interest in the sale of a company to a third party (for example, by securing continuing her employment). Mindbody resulted in a post-trial damages judgment of $1 per share against the former CEO and the buyer, plus a $27 million partial settlement against two other defendants. The other three cases resulted in settlements of $35 million (*Coty*), $29.5 million (*Roche*), and $27.5 million (*Berry*). Joel Friedlander, *Thoughts of a Jewish-American Plaintiffs’ Lawyer on the Past and Present of Stockholder Litigation*, 23 M&A J. 1, 4 (Nov./Dec. 2023). [↑](#footnote-ref-140)
141. Ethan Klingsberg & Oliver Board, *DGCL Amendment Merits Amending Charters and Engagement with Institutional Shareholders*, Harv. L. Sch. F. on Corp. Governance (Sep. 20, 2022) <https://corpgov.law.harvard.edu/2022/09/04/dgcl-amendment-merits-amending-charters-and-engagement-with-institutional-shareholders/>. [↑](#footnote-ref-141)
142. Another related amendment allowed the company to explicitly define which senior officers would be subject to the definition of “officer” in those sections of the DGCL that grant indemnification and reimbursement of expenses to officers. That clause allows companies to cover a wider group of officers. This additional amendment was also motivated by the increased litigation risk that officers faced, which according to market participants necessitated clarifying the uncertainty surrounding the definition of “officer” and the legal protections provided to officers. [H.B. 341, 150th Gen. Assemb., Reg. Sess. (Del. 2020)](https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocument?legislationId=48122&legislationTypeId=1&docTypeId=2&legislationName=HB341). [↑](#footnote-ref-142)
143. An average of 88% of shares present at the meeting voted “for” the proposal. Mayer Brown, *Recent Developments in Delaware Officer Exculpation Charter Amendments* (Feb. 6, 2024), https://www.mayerbrown.com/en/insights/publications/2024/02/recent-developments-in-delaware-officer-exculpation-charter-amendments. In many of these cases, there was sufficient shareholder support to even overcome negative recommendations from proxy advisors. [↑](#footnote-ref-143)
144. In 2023, failed proposals received an average support of 83% of the shares present at the meeting; however, such support is insufficient if the corporation’s charter required a supermajority threshold for approval or stockholder turnout was low. *See* Brian V. Breheny, Allison L. Land & Ryan J. Adams, *Officer Exculpation Under Delaware Law—Encouraging Results in Year One*, Harv. L. Sch. F. on Corp. Governance (June. 1, 2023) <https://corpgov.law.harvard.edu/2023/06/01/officer-exculpation-under-delaware-law-encouraging-results-in-year-one/>. [↑](#footnote-ref-144)
145. For states that adopted a self-executing arrangement, *see,* Fla. Stat. Ann. § 607.1645(1) (West Supp. 1988); Ind. Code Ann. § 23-1-35-1 (Bums Supp. 1987); Wis. Stat. Ann. § 180.307 (West Supp. 1988). Ohio statute had an "opt-out" provision; that is the statute is self-executing unless rejected by the corporation. Ohio Rev. Code Ann. § 1701.59 (Anderson 1986) (as amended by H.B. No. 902, Laws of 1986). For a comprehensive analysis of default arrangement in corporate law, *see* Lucian Arye Bebchuk & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution*, 96 Nw. U. L. Rev. 489 (2002). [↑](#footnote-ref-145)
146. Hamermesh, *supra* note 36. [↑](#footnote-ref-146)
147. In derivative claims, sharheolders either have to demand that the board initiate litigation or prove that such a demand would be futile (because a majority of the board is not independent or has personal interests). *See* *United Food & Com. Workers Union & Participating Food Indus. Empls. Tri-State Pension Fund v. Zuckerberg*, 250 A.3d 862, 876 (Del. Ch. 2020), aff’d, 262 A.3d 1034 (2021). It is challenging for plaintiffs to demonstrate that the demand is futilite, mainly when the board comprises a majority of impartial, unbiased directors. *See, e.g.,* *City of Coral Springs Police Officers' Pension Plan v. Dorsey*, 2023 WL 3316246 (Del. Ch. May 9, 2023). [↑](#footnote-ref-147)
148. Under Nevada’s exculpation statute, directors and officers are subject to personal liability only if their breach of a duty involves “intentional misconduct, fraud or a knowing violation of law.” NRS 78.138(7)(B)(2). For a detailed analysis, *see* Michal Barzuza, *Nevada v. Delaware: The New Market for Corporate Law* (ECGI Working Paper, 2024), https://ssrn.com/abstract=4746878. [↑](#footnote-ref-148)
149. Lamb, *Duty follows Function, supra* note 125 (“[t]here are drawbacks to relying solely on a [court’s] refined fiduciary analysis as to officers… it would take a relatively long time to settle the law and in the meantime officers remain exposed to inefficient personal liability.”). [↑](#footnote-ref-149)
150. *In re* ProAssurance Corp. S’holder Derivative Litig., 2023 Del. Ch. LEXIS 385; [*Segway Inc. v. Hong Cai*, 2023 Del. Ch. LEXIS 643](https://plus-lexis-com.eu1.proxy.openathens.net/api/document/collection/cases/id/69W5-4K71-FBN1-24MB-00000-00?cite=2023%20Del.%20Ch.%20LEXIS%20643&context=1530671) (“liability can only attach in the rare case where fiduciaries knowingly disregard this oversight obligation and trauma ensues.”); [*Constr. Indus. Laborers Pension Fund v. Bingle*, 2022 Del. Ch. LEXIS 223](https://plus-lexis-com.eu1.proxy.openathens.net/api/document/collection/cases/id/66BH-DYB1-DY33-B1R1-00000-00?cite=2022%20Del.%20Ch.%20LEXIS%20223&context=1530671) (stating that Caremark remains “one of the most difficult claims” to sustain”). [↑](#footnote-ref-150)
151. Before *Marchand*, approximately 82% of Caremark related-lawsuits did not pass the motion to dismiss stage. *See* Armour, Gordon & Min, *supra* note 9*,* at 45–46. We found that 74% these lawsuits did not pass that preliminary screening stage in the new Caremark era (data is on file with the authors). [↑](#footnote-ref-151)
152. Robert T. Miller, *Smith v. Van Gorkom and the Kobayashi Maru: The Place of the Trans Union Case in the Development of Delaware Corporate Law*, 9 Wm. & Mary Bus. L. Rev. 65 (2017). [↑](#footnote-ref-152)
153. Jennifer Arlen, The Story of Allis-Chalmers, Caremark and Stone: Directors' Evolving Duty to Monitor, in Corporate Law Stories 323 (J. Mark Ramseyer ed., 2009). [↑](#footnote-ref-153)
154. *New York Dock Co. v. McCollom*, 173 Misc. 106, 16 N.Y.S.2d 844 (Sup. Ct. 1939); Joseph F. Johnston, Jr., *Corporate Indemnification and Liability Insurance for Directors and Officers*, 33 Bus. Law. 1993, 1994–95 (1978). [↑](#footnote-ref-154)
155. Joseph W. Bishop, Jr.*, New Cure for an Old Ailment: Insurance Against Directors' and Officers' Liability Insurance*, 22 Bus. Law. 97 (1966). In the cases following McCollom, it was held that the corporations should indemnify directors who prevail on the merits in derivative litigation, “perceiving that the indemnification was essentially part of the directors’ compensation and that the real benefit to the corporation was the obtaining of their services.” *See* *Solimine v. Hollander*, 129 N.J. Eq. 264, 19 A.2d 344 (1941); *In re* E.C. Warner Co., 232 Minn. 207, 45 N.W. 2d 388 (1950). [↑](#footnote-ref-155)
156. Bishop*, supra* note 153, at 98. [↑](#footnote-ref-156)
157. Title 8, section 122(10) of the Delaware Code (1943). [↑](#footnote-ref-157)
158. *Essential Enterprises Corp. v. Dorsey Corp.*, 40 Del. Ch. 343, 348, 182 A.2d 647, 652–53 (1962). In that case, the settlement terms did not impose any personal liability on the individual defendants. [↑](#footnote-ref-158)
159. The court admitted that such indemnification might be permissible under the Delaware statute because the settlement “might not be tantamount to an “adjudication” of negligence or misconduct within the meaning of the statutory exclusion.” Bishop*, supra* note 153, at 99. [↑](#footnote-ref-159)
160. The ambiguity resulted from the words of section 122(10): “[s]uch indemnification shall not be deemed exclusive of any other rights to which those indemnified may be entitled, under any by-law, agreement, vote of stockholders, or otherwise.” Title 8, section 122(10) of the Delaware Code (1943). Directors and their advisors argued that the non-exclusivity clause should enable the use of insurance through a contractual arrangement. [↑](#footnote-ref-160)
161. Bishop*, supra* note 153, at 107. [↑](#footnote-ref-161)
162. *Id.* [↑](#footnote-ref-162)
163. Ernest L. Folk, III, *Review of the Delaware Corporation Law*, 76–77 (1967). [↑](#footnote-ref-163)
164. Section 145(b); Samuel Arsht & Walter K. Stapleton, *Analysis of the New Delaware Corporation Law*, 327 (1967). [↑](#footnote-ref-164)
165. Section 145(c). [↑](#footnote-ref-165)
166. Section 145(g). [↑](#footnote-ref-166)
167. *Schoon v. Troy Corp.*, 948 A.2d 1157, 1165-66 (Del. Ch. 2008). [↑](#footnote-ref-167)
168. Michal Barzuza, *Interlocking Board Seats and Protection for Directors after Schoon*, Harv. L. Sch. Forum on Corp. Governance (Jan. 13, 2014), https://corpgov.law.harvard.edu/2014/01/13/interlocking-board-seats-and-protection-for-directors-after-schoon/. [↑](#footnote-ref-168)
169. David A. Katz & Laura A. McIntosh, *Corporate Governance Update: Delaware Decision Highlights Need for Director Protection* (July 24, 2008), https://corpgov.law.harvard.edu/wp-content/uploads/2008/08/delaware-decision-highlights-need-for-director-protection.pdf. [↑](#footnote-ref-169)
170. *Id.* Indeed, in the aftermath of *Schoon* numerous Delaware firms adopted additional indemnification protections for their directors. Barzuza, *supra* note 26 (hand-collecting data for 268 Fortune 500 firms incorporated in Delaware, and finding that of 158 firms that did not already have individual indemnification contracts in place (the most effective post-Schoon protection), 65 acted to adopt some form of protection, and most firms did so within eight months of the opinion). [↑](#footnote-ref-170)
171. Amended Section 145(f) permits a corporation to opt out of the new default rule, i.e., to permit a certificate of incorporation or bylaw provision to allow the elimination of indemnity or advancement rights even after an act or omission attributed to an indemnitee occurs. However, the opt out will apply only to acts or omissions that occur after the opt out language is adopted in the certificate of incorporation or bylaws. *See* Lewis S. Black, Jr. & Frederick H. Alexander, *Analysis of the 2009 Amendments to the Delaware General Corporation Law*, 5 (Aug. 2009). [↑](#footnote-ref-171)
172. The duty of loyalty obliges directors to prioritize the interests of the corporation and its shareholders above their own, thereby preventing conflicts of interest and self-dealing. The duty of care requires directors to act with the diligence and prudence that a reasonably careful person would exercise in comparable circumstances. Holland, *supra* note 71, at 678. *See also Totta V. CCSB Financial Corp*., 2022 WL 1751741, at \*15; Kahan & Rock, *Symbiotic Federalism, supra* note 35, at 1598 (“A typical Delaware opinion reads as if the specific facts, combined with long-standing and universally accepted fiduciary principles, clearly dictate the outcome of the case.”). [↑](#footnote-ref-172)
173. *Id.* [↑](#footnote-ref-173)
174. *New Enter. Assocs. 14 v. Rich*, 295 A.3d 520 (Del. Ch. 2023) (Describes the conflict between the “dual principles” of Delaware corporate law: private ordering and fiduciary accountability, and suggests that “For different types of fiduciaries, the law may balance the policies differently.”). [↑](#footnote-ref-174)
175. *New Enter. Assocs. 14 v. Rich*, 295 A.3d 520 (Del. Ch. 2023) (“To say that Delaware prides itself on the contractarian nature of its law risks understatement.”); David Rosenberg, *Making Sense of Good Faith in Delaware Corporate Fiduciary Law: A Contractarian Approach*, 29 Del. J. Corp. L. 491, 491 (2004) (“Delaware is the most contractarian jurisdiction.”). [↑](#footnote-ref-175)
176. Romano, *The Genius of American Corporate Law*, *supra* note 65, at 14–31; Mohsen Manesh, *The Corporate Contract and the Internal Affairs Doctrine*, 71 Am. L. Rev. 501, 526–34 (2021). [↑](#footnote-ref-176)
177. *See New Enterprise Associates 14, L.P. v. Rich*, 2023 WL 1857123 at \* 28 (Del. Ch. May 2, 2023) (“[I]f the General Assembly has authorized provisions in the constitutive documents of an entity that eliminate or modify the fiduciary duty regime, then a court will enforce them. Otherwise, practitioners cannot use the constitutive documents of an entity for that purpose.”); *Totta v. CCSB Financial Corp.*, 2022 WL 1751741 at \*2 (Del. Ch. May 31, 2022) ([T]he constitutive agreements that govern an entity can only eliminate or modify fiduciary duties and the attendant judicial standards of review to the extent expressly permitted by an affirmative act of the Delaware General Assembly.”). [↑](#footnote-ref-177)
178. *Id*. *See also* Lyman P.Q. Johnson, *Delaware's Non-Waivable Duties*, 91 B.U. L. Rev. 701 (2011) (explaining, regarding LLCs fiduciary duties, that, “[T]he General Assembly acted to permit contracting parties themselves to eliminate or modify fiduciary duties, notwithstanding that those duties originated in equity.”); Henry N. Butler & Larry E. Ribstein, *Opting out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 Wash. L. Rev. 1, 6, 19, 28 (1990). [↑](#footnote-ref-178)
179. Bainbridge, *Interest Group Analysis of Delaware Law*, *supra* note 70. [↑](#footnote-ref-179)
180. For prominent cases, *see, e.g.,* [*Guth v. Loft*, Inc., 5 A.2d 503](https://plus-lexis-com.eu1.proxy.openathens.net/api/document/collection/cases/id/3XT0-X6S0-003C-K231-00000-00?cite=5%20A.2d%20503&context=1530671); *Broz v. Cellular Info. Sys*., 673 A.2d 148 (ruling that Corporate officer or director may not take a business opportunity for his own if: (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation’s line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position unamicable to his duties to the corporation). [↑](#footnote-ref-180)
181. Gabriel Rauterberg & Eric Talley, Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers, 117 Colum. L. Rev. 1075, 1086 (2017). [↑](#footnote-ref-181)
182. [Delaware Bill Summary, S. 363, 140th Gen. Assembly (Del. 2000);](https://legis.delaware.gov/billdetail/10399) 72 Del. Laws, c. 343, § 3 (2000). [↑](#footnote-ref-182)
183. [Del. Code Ann. tit. 8, § 122(17).](https://delcode.delaware.gov/title8/c001/sc02/index.html) [↑](#footnote-ref-183)
184. Before the enactment of 122(17), Section 102 (b)(1) provides that the certificate of incorporation may include “any provision creating, defining, limiting and regulating the powers of the directors, and the stockholders…; if such provisions are not contrary to the laws of this State”. Once a director breach her duty of loyalty, Section 102(b)(7) makes it clear that a director cannot be relieved of that liability. However, that section still leaves open whether the corporation may, on incorporation, circumscribe the conduct that generates liability under the duty of loyalty. [↑](#footnote-ref-184)
185. [*Siegman v. Tri-Star Pictures, Inc.*, 1989 Del. Ch. LEXIS 56](https://plus-lexis-com.eu1.proxy.openathens.net/api/document/collection/cases/id/3RRT-8NM0-003C-K2FM-00000-00?cite=1989%20Del.%20Ch.%20LEXIS%2056&context=1530671). [↑](#footnote-ref-185)
186. *Id.*, at 23. [↑](#footnote-ref-186)
187. *Id.*, at 24­–27. [↑](#footnote-ref-187)
188. Rauterberg & Talley, *supra note* 180, at 1093. [↑](#footnote-ref-188)
189. *Id.* [↑](#footnote-ref-189)
190. *U.S. WEST, Inc. v. Time Warner Inc.*, 1996 Del. Ch. LEXIS 55. In this case, the Chancery Court noted broadly: “There is modernly great flexibility in the corporate form. The corporate charter may…particularize director and officers’ duties. Thus, there is no reason why corporate charters cannot contain provisions dealing with corporate opportunities or dealing with the ability of officers or directors to compete with the corporation.” In two other cases, courts narroewed the scope of corporate opportunities claims involcing controlled subsidiaries. *See In re* Digex S'holders Litig., 789 A.2d 1176 (2000); *Thorpe by Castleman v. CERBCO*, 676 A.2d 436 (1996). As Rauterberg & Talley observed, “both opinions recognized the generic and intractable challenges posed by corporate opportunities claims in cases involving ownership–board–industry overlap.” *See supra* note 180, at 1094–95. [↑](#footnote-ref-190)
191. Lewis S. Black, Jr. & Frederick H. Alexander, *Analysis of the 2000 Amendments to the Delaware General Corporation Law*, 2-3 (Aug 2000). [↑](#footnote-ref-191)
192. *Id*. As Black and Alexander noted, “such a provision would enable the parent corporation to sell minority interests in the subsidiary without concern that its continuing majority stock ownership would restrict its own ability to grow. Similarly, an investor could be induced to serve on a corporation’s board with a provision permitting him or her to pursue other investments, even investments in competing businesses.” *Id.* *See also* Rauterberg & Talley, *Supra* note 180 (noting that “the amendment specifically permits enforceable [corporate opportunities waivers] under Delaware law, a position that—both before and after Siegman—most had considered untenable.”). [↑](#footnote-ref-192)
193. Del. Code Ann. tit. 6, § 17-1101(b)-(d) (2005) (as amended by 74 Del. Laws, c. 265). [↑](#footnote-ref-193)
194. 817 A.2d 160, 167-68 (Del. 2002). The Delaware Supreme Court decision reversed the decision of the chancery court. *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 795 A.2d 1, 31 (Del. Ch. 2001). It also criticized it for its expansive interpretation of the statute and for giving “maximum effect to the principle of freedom of contract announced clearly in the statute.” Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 Del. J. Corp. L. 1, 11 (2007). [↑](#footnote-ref-194)
195. For example, by adopting a fee-shifting bylaw that imposes liability on plaintiff shareholders for certain legal expenses if they were not successful in the litigation. For a discussion, *see* Section II.C.1. [↑](#footnote-ref-195)
196. For a discussion, *see* Section II.A. [↑](#footnote-ref-196)
197. *See, for example, Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1291 (Del. 1998) (“to the extent that a contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable.”). [↑](#footnote-ref-197)
198. Courts have also viewed such arrangements as inconsistent with Section 141(a) of the DCGL. *See* most recently, In *West Palm Beach Firefighters’ Pension Fund v. Moelis & Co.*, 2024 WL 747180 (Del. Ch. Feb. 23, 2024). Under this approach, such arrangement can be valid only if expressly authorized in the company’s articles of association. [↑](#footnote-ref-198)
199. Lewis S. Black, Jr. & Frederick H. Alexander, *Analysis of the 1998 Amendments to the Delaware General Corporation Law*, 4 (1998). [↑](#footnote-ref-199)
200. *Id.*, at 4. *Forcing a Stockholder Vote After the Board Changes its Recommendation*, LexisNexis, https://bit.ly/3vHp1Jd (“A force-the-vote provision is a type of lock-up provision that requires the board of directors to submit a merger proposal to a stockholder vote even if the board no longer recommends the merger transaction because of an alternative proposal or intervening event. From an acquirer’s perspective, a force-the-vote provision can enhance closing certainty in a merger transaction.”). [↑](#footnote-ref-200)
201. *Id*. [↑](#footnote-ref-201)
202. *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227 (Del. 2008). [↑](#footnote-ref-202)
203. [*Id*](https://legis.delaware.gov/SessionLaws/Chapter?id=16738)*.* [↑](#footnote-ref-203)
204. [H.B 19, 145th Gen. Assemb., Reg Sess (Del. 2009)](https://legis.delaware.gov/SessionLaws/Chapter?id=16738); Black & Alexander, *supra* note 170. [↑](#footnote-ref-204)
205. [H.B 19, 145th Gen. Assemb., Reg Sess (Del. 2009)](https://legis.delaware.gov/SessionLaws/Chapter?id=16738)*.* [↑](#footnote-ref-205)
206. This amendment was initiated in the wake of 2008 financial crisis, following statements made by then SEC Chairwoman Mary Schapiro who indicated the Commission’s intention to revisit federal proxy rules. David A. Skeel, Jr. et al., *Inside-Out Corporate Governance*, 37 Iowa J. Corp. L. 147, 158­–160 (2011). [↑](#footnote-ref-206)
207. Director resignations are an essential complement to a majority voting bylaw because, pursuant to another provision of Section 141(b), even if an incumbent director fails to receive the required vote under a majority voting bylaw, he or she would hold over in office until a successor is elected and qualified. *See* Stephen J.Choi, Jill E.Fisch, Marcel Kahan & Edward B. Rock, *Does Majority Voting Improve Board Accountability?*, 83 U. Chi. L. Rev. 1119, 1122 (2016). [↑](#footnote-ref-207)
208. *See* *Dillon v. Berg*, 326 F. Supp. 1214, 1225, (D. Del.), aff’d, 453 F.2d 1876 (3d Cir. 1971) (a secret, undated resignation letter executed by one director and given to the CEO of the corporation was ineffective under Delaware law because it would effectively permit the CEO to remove a director). [↑](#footnote-ref-208)
209. David C. McBride & Rolin P. Bissell, *Delaware's Flexible Approach to Majority Voting for Directors*, 10 Wall St. Law. 1 (June 2006), https://www.youngconaway.com/content/uploads/2018/06/WallStreetLawyer.pdf. The amendment was passed in the wake of the corporate scandals in the beginning of this Century, and in the face of increasing pressures from institutional investors to give stockholders more power to discipline and motivate boards of directors, including through the adoption of effective majority voting policies. In 2005, the CII and the California Public Employees Retirement System wrote nearly identical letters requesting that the DGCL be amended to provide majority voting as the default rule for the election of directors. *Id.* [↑](#footnote-ref-209)
210. *See, e.g.*, Michael A. Bailey, Forrest Maltzman & Charles R. Shipan, *The Amorphous Relationship between Congress and the Courts*, *in* The Oxford Handbook of the American Congress (Eric Schickler & Frances E. Lee. eds., 2011); Thomas M. Keck, *The Relationship Between* [*Courts and Legislatures*](https://academic.oup.com/edited-volume/40222/chapter/345894240)(2017); Mark C. Miller, The View of the Courts from the Hill: Interactions between Congress and the Federal Judiciary 21 (University of Virginia Press, 2009). [↑](#footnote-ref-210)
211. *See* Fisch, *supra* note 73, at 1072–82; Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 Yale L.J. 2031, 2036 (1996). [↑](#footnote-ref-211)
212. Fisch, *supra* note 73, at 1072–82. [↑](#footnote-ref-212)
213. *Id.* [↑](#footnote-ref-213)
214. *See, e.g.*, Top of Form

     Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 Cornell L. Rev. 1529 (2000). Bottom of Form [↑](#footnote-ref-214)
215. *See, e.g.,* Bebchuk & Hamdani, *supra* note 67, at 603 (suggest that Delaware courts use indeterminate standards in order to reduce the risk of federal intervention in state corporate law). But, *see* *also* Bainbridge, *supra* note 70, at 138–140 (arguing that “Delaware judges are concerned neither with maximizing the number of Delaware incorporations or promoting the interests of the Delaware bar” and that their use of indeterminate standards is driven by the Delaware courts’ self-interest in maximizing their reputation). [↑](#footnote-ref-215)
216. *See, e.g.*, Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate* Law, 65 Tex. L. Rev. 469, 506 (1987) (“The model of interest-group politics [. . . ] posits that the rules adopted by a given legislature will reflect the underlying equilibrium of pressures from competing political interest groups.”). *See* William J. Moon, *Delaware’s Global Competitiveness*, 106 Iowa L. Rev. 1683, 1695 (2021), citing Macey & Miller, *id* (examining the ways in which an interest-group theory could shed light on the Delaware corporate legal structure that often places lawyers in a powerful role); Douglas M. Branson, *Indeterminacy: The Final Ingredient in an Interest Group Analysis of Corporate Law*, 43 Vand. L. Rev. 85 (1990) (agreeing with Professors Macey and Miller and further discussing the various interest groups involved). As previously described, extensive literature exists on which interest groups truly benefit from the “Delaware model.” We do not take a position on this question. [↑](#footnote-ref-216)
217. Minor Myers, *Do the Merits Matter: Empirical Evidence on Shareholder Suits from Options Backdating Litigation*, 164 U. Pa. L. Rev. 291, 298 (2016) (“The principal procedural hurdles in stockholder litigation, for both derivative and securities suits, have been shaped by the desire to inhibit meritless lawsuits.”). [↑](#footnote-ref-217)
218. E. Norman Veasey & Michael P. Dooley, *The Role of Corporate Litigation in the Twenty-First Century*, 25 Del. J. Corp. L. 131 (2000) (“[T]he representative action is vitally important to the well-being and growth of the Delaware corporate law. Such litigation should be encouraged so as to bring to the Delaware court system important issues.”). [↑](#footnote-ref-218)
219. *Id.,* at 133 (“There's not much the courts can do to shape the future of litigation except in a procedural way and except to advocate reforms to streamline the process. We take the cases as they come to us.”). [↑](#footnote-ref-219)
220. Jessica Erickson, *The Lost Lessons of Shareholder Derivative Suits*, 77 Wash. & Lee L. Rev. 1131 (2020). [↑](#footnote-ref-220)
221. *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014). [↑](#footnote-ref-221)
222. Mayer Brown, *Delaware Amends its General Corporation Law to Authorize Exclusive Forum Provisions and Prohibit Fee-Shifting Provisions* 2 (June 25, 2015), https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2015/06/delaware-amends-its-general-corporation-law-to-aut/files/get-the-full-report/fileattachment/150625-update-cs.pdf. [↑](#footnote-ref-222)
223. *Id*, at 2. [↑](#footnote-ref-223)
224. Norman M. Powell & John J. Paschetto, *Delaware Transactional & Corporate Law Update*, 4 (Sep. 2015), https://www.law.upenn.edu/live/files/9921-business-and-tax-section-update-sept-2019pdf. [↑](#footnote-ref-224)
225. The new subsection was not intended, however, to prevent the application of such provisions under a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced. *See* S.B 75, 148th Gen. Assemb., Reg. Sess (Del. 2015). [↑](#footnote-ref-225)
226. William B. Chandler III & Anthony A. Rickey, *The Trouble with Trulia: Re-Evaluating the Case for Fee-Shifting Bylaws as a Solution to the Overlitigation of Corporate Claims*, Harv. L. Sch. Forum on Corp. Governance (May 11, 2017), https://corpgov.law.harvard.edu/2017/05/11/the-trouble-with-trulia-re-evaluating-the-case-for-fee-shifting-bylaws-as-a-solution-to-the-overlitigation-of-corporate-claims/#8b. [↑](#footnote-ref-226)
227. In *Boilermakers Local 154 Retirement Fund v. Chevron Corporation*, 73 A.3d 934 (Del. Ch. 2013). [↑](#footnote-ref-227)
228. *See City of Providence v. First Citizens BancShares, Inc.,* 99 A.3d 229, 239 (Del. Ch. 2014) (“The DGCL does not express any preference of the General Assembly one way or the other on whether it is permissible for boards of directors to require stockholders to litigate intra-corporate disputes in the courts of foreign jurisdictions.”). [↑](#footnote-ref-228)
229. Following the *Trulia* decision, which imposed stringent standards on disclosure-only settlements in Delaware, there was concern that such lawsuits were increasingly filed elsewhere, potentially bypassing Delaware's efforts to curb frivolous litigation and preserve judicial resources for meritorious cases. *See* Chandler & Rickey, *supra* note 225. [↑](#footnote-ref-229)
230. *Id*. (“Some saw fees-shifting bylaws as a threat to Delaware’s legal community, and others—including the Delaware State Bar Association (“DSBA”) and the plaintiffs’ bar—considered their likely effect on stockholder lawsuits to be “throwing the baby out with the bathwater.” In the course of promoting this legislation, the DSBA explicitly encouraged greater scrutiny of intracorporate litigation by the judiciary, and the adoption of forum selection bylaws by corporations, as an alternate means of reducing the incidence of socially wasteful litigation.” These amendments were also tied to an important court ruling issued a few months later—the *Trulia* decision. It was argued that this combined solution rested on the premises: “that forum selection bylaws would constrain merger litigation to Delaware; that the Delaware Courts would thus be able to divide the wheat of socially valuable cases from the chaff of meritless lawsuits; and that Delaware’s sister courts would follow the Court of Chancery’s lead in discouraging the sue-on-every-merger model of stockholder litigation.” *Id*. [↑](#footnote-ref-230)
231. *See City of Providence v. First Citizens BancShares, Inc.,* 99 A.3d 229, 239 (Del. Ch. 2014) (“The DGCL does not express any preference of the General Assembly one way or the other on whether it is permissible for boards of directors to require stockholders to litigate intra-corporate disputes in the courts of foreign jurisdictions.”) [↑](#footnote-ref-231)
232. Michael J. Kaufman and John M. Wunderlich, *Paving the Delaware Way: Legislative and Equitable Limits On Bylaws After ATP*, 93 Wash. U. L. Rev. 335, 377 (2015) )suggesting that “Under ATP and the Delaware Way, as properly understood and followed by courts relying upon Delaware corporate law, the only fee-shifting bylaws that will survive equitable review are those that shift reasonable fees to the other party (be they plaintiffs or defendants) in cases of frivolous lawsuits or litigation tactics.”). [↑](#footnote-ref-232)
233. *Id*. [↑](#footnote-ref-233)
234. Consider also the *Schoon* decision discussed above, which permitted the board to alter indemnification arrangements for a former director retroactively. While the decision could be well justified in light of the unique facts of this case and the ongoing legal battle between the corporation and one of its former directors, it had some negative market-wide implications and prominent lawyers warned that the decision may leave former directors vulnerable to retroactive changes to their indemnification policies. *See supra* notes xx-xx. [↑](#footnote-ref-234)
235. Fisch, *supra* note 73, at 1073 (“A variety of doctrinal constraints limit the ability of courts to apply new legal rules in a purely prospective manner. […] Forward-looking aspects of judicial opinions may also be characterized as dicta, a characterization that allows subsequent courts to disregard such statements as authoritative rulemaking. These constraints effectively limit the extent to which judicial rulemaking can focus on the regulation of future transactions.”). [↑](#footnote-ref-235)
236. Fisch, *supra* note 73, at 1072 (“Courts are also limited in the scope of the legal change that they can effect due to limitations on control of their agendas.  Courts, unlike legislatures, generally cannot initiate legal change but must wait for litigants to commence an action.”); Kahan & Rock, *Symbiotic Federalism, supra* note 35, at 1576 (Suggesting that Delaware’s “classical model of lawmaking entails some intrinsic limitations, including that legal change is slow, standard-based, and incremental.”). The slow evolution of law in Delaware also has its advantages. *See*, for example, Frank B. Cross, *Book Review: What Do Judges Want? How Judges Think. By Richard A. Posner. Cambridge, Mass.: Harvard University Press, 2008*. 87 Tex. L. Rev. 183, 222–24 (2008) (“The Chancery Court incrementally develops its law through judicial processes, which leaves “some residual uncertainty” that is valuable because it “allows space for the judiciary to pull back in future cases if a prior decision turns out, in the wake of experience, to have been unwise.” This is essentially the formula for pragmatic decision making, and the Delaware experience demonstrates its value.”). [↑](#footnote-ref-236)
237. Brett McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 S.M.U. L. Rev. 383 (2007); Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 Fla. St. U. L. Rev. 651 (2006). [↑](#footnote-ref-237)
238. *Omnicare, Inc. v. NCS Healthcare, Inc*., 818 A.2d 914 (Del. 2003). [↑](#footnote-ref-238)
239. Piotr Korzynski, “*Forcing the Offer”: Considerations for Deal Certainty and Support Agreements in Delaware Two-Step Mergers*, Harv. L. Sch. Forum on Corp. Governance (Apr. 2, 2018) https://corpgov.law.harvard.edu/2018/04/02/forcing-the-offer-considerations-for-deal-certainty-and-support-agreements-in-delaware-two-step-mergers/; Adi Libson & Guy Firer, *Out with Fiduciary Out?* J. Corp. L. 8–10 (Forthcoming), https://ssrn.com/abstract=4424619. [↑](#footnote-ref-239)
240. *See, generally*, Peters, *supra* note 210, at 2081–83 (legislative bodies have plenary and supersessive powers to address multiple different areas of law, all at one time, and with the authority to replace an outdated or obstructive statutory scheme, producing more just, coherent, and effective law). Jeb Barnes, Overruled? Legislative Overrides, Pluralism, and Contemporary Court-Congress Relations 34 (Stanford University Press, 2004) (discussing the role of the legislature in updating or revising statutes based on changing technology, science, and markets that render statutes incomplete, incompatible with other legislations, or lead to undesirable policy outcomes—a role for which the courts are ill-suited and unable to fill). [↑](#footnote-ref-240)
241. *Peters*, *supra* note 210, at 2081–83 (Judges area more passive decision-makers, while legislators have the freedom to choose when, how, and what issues to address). Ariel Yehezkel, *Delaware General Corporation Law Amended to Speed Up the Consummation of Two-Step Merger Transactions*, Sheppard, Mullin – Corp. & Sec. Law Blog (Aug. 27, 2013), https://www.corporatesecuritieslawblog.com/2013/08/delaware-general-corporation-law-amended-to-speed-up-the-consummation-of-two-step-merger-transactions/. [↑](#footnote-ref-241)
242. *Id*. If the acquirer was able to purchase at least 90 percent of the target, it could consummate the second-step merger immediately following the closing of the tender offer, through a short form merger under Section 253 of the DGCL, without incurring the costs associated with a shareholder vote. [↑](#footnote-ref-242)
243. [*Id*.](https://www.corporatesecuritieslawblog.com/2013/08/delaware-general-corporation-law-amended-to-speed-up-the-consummation-of-two-step-merger-transactions/) (“To use a top-up option, the target must have a sufficient number of authorized but unissued shares and treasury shares to allow it to issue the number of shares required to be issued upon the exercise of the top-up option.”). [↑](#footnote-ref-243)
244. Top-up options have been commonly used in two-step transactions and generally approved as a viable option by Delaware courts. *See, e.g., In re* Cogent, Inc. Shareholder Litigation, 7 A.3d 487 (Del. Ch. 2010); *Olson v. ev3, Inc.*, No. 5583-VCL, 2011 Del. Ch. LEXIS 34, at \*2-5 (Del. Ch. Feb. 21, 2011).  
     Norman M. Powell & John J. Paschetto, *Recent Amendments to Delaware’s Corporation Law: Two-Step Corporate Takeovers Are Simplified and Public Benefit Corporations Are Permitted Among Other Changes*, Young Conaway Stargatt & Taylor, LLP—Delaware Transactional & Corporate Law Update (2013), https://www.youngconaway.com/content/uploads/2017/08/DETransUpdateSummer2013.pdf [↑](#footnote-ref-244)
245. Yehezkel, *supra* note 240. [↑](#footnote-ref-245)
246. David F. Marcus & Frank Schneider, *Appraisal Litigation in Delaware: Trends in Petitions and Opinions (2006-2018)*, Harv. L. Sch. Forum on Corp. Governance (Mar. 1, 2019), https://corpgov.law.harvard.edu/2019/03/01/appraisal-litigation-in-delaware-trends-in-petitions-and-opinions-2006-2018/. [↑](#footnote-ref-246)
247. Charles K. Korsmo & Minor Myers, *Interest in Appraisal*,42 J.Corp. L. 109, 113 (2016). [↑](#footnote-ref-247)
248. During the 1970s, Delaware's judiciary employed an approach for appraising funds that averaged yields from a diverse array of financial instruments, ranging from varying maturities of U.S. Treasury securities to commercial bank savings and from investment-grade bonds to stock market indices like the Dow Jones. This broad method prompted the legislature to revise the approach to interest calculation in such cases. *See Id.*, at 115. [↑](#footnote-ref-248)
249. *Id.*, at 118–119. [↑](#footnote-ref-249)
250. *Id.*, at 119 (then-Vice Chancellor Strine also criticized the extensive and costly legal discussions regarding pre- and post-judgment interest rates as inefficient and discouraging. Echoing this sentiment, Chancellor Chandler observed that although the idea of a statutory interest rate is appealing, it has historically led to exhaustive and detailed legal debates over the precise rate to be applied). [↑](#footnote-ref-250)
251. *Id.*, at 122. [↑](#footnote-ref-251)
252. *Id*., at 111–12. Some stockholders, it has been observed, may strategically slow litigation or push for extended trial schedules to leverage the statutory interest rates in appraisal cases. This behavior caught the attention of Vice Chancellor Glasscock, who voiced concerns that the current interest rates might actually encourage such tactics. He pointed out the need for the issue to be reviewed by the legislative bodies in Delaware due to the potential it has to foster undesirable litigation incentives, which could affect the overall equity of the appraisal litigation process. [↑](#footnote-ref-252)
253. *Id*., at 111–112. [↑](#footnote-ref-253)
254. Lewis S. Black, Jr. & A. Gilchrist Sparks, III, *Analysis of the 2007 Amendments to the Delaware General Corporation Law* (2007). [↑](#footnote-ref-254)
255. This amendment was intended to prevent stockholders from exercising their appraisal rights to gain leverage in settlement negotiations in instances where the number of shares or value of the shares in question is small, but the desire to avoid litigation costs may encourage a corporation to settle an appraisal claim. Garrett A. DeVries & Ashton Barrineau Butcher, *2016 Changes to Delaware Law Go into Effect*, Akin (Aug 18, 2016), https://www.akingump.com/en/insights/blogs/ag-deal-diary/2016-changes-to-delaware-law-go-into-effect. [↑](#footnote-ref-255)
256. See *infra* note 80. [↑](#footnote-ref-256)
257. Hamermesh, *supra* note 36, at 1755-56 (“There is a strongly held tradition that preliminary or potential legislative proposals are not to be discussed with or disseminated to persons outside the firms represented on the Council.”). [↑](#footnote-ref-257)
258. University of Pennsylvania Carey Law School, The Delaware General Corporation Law, <https://www.law.upenn.edu/delawarecorporatehistory/dgcl.php/>. *See, e.g.*, <https://www.morrisnichols.com/insights-2021-amendments-to-the-dgcl-and-delawares>, <https://www.law.upenn.edu/live/files/11658-young-conaway-client-alert-sept-2021>. [↑](#footnote-ref-258)
259. We intend to broaden our scope in the future to include amendments related to LLCs/LPs as well. [↑](#footnote-ref-259)