Courts, Legislation and Delaware Corporate Law

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Delaware is widely regarded as the global capital of corporate law and the leader in attracting incorporations. Its dominance is often attributed by legal scholars to its expert judiciary and reliance on judicial decision-making to develop corporate norms. Indeed, for decades, the prevailing view has been that legislation plays a minimal role in shaping corporate law. However, after two recent high-profile legislative responses to court decisions, questions regarding the appropriate scope of legislative intervention took center stage in corporate legal debates. This Article situates these recent debates within a broader perspective by examining the interplay between the courts and legislation in Delaware over nearly six decades. We analyze amendments to the Delaware General Corporation Law (DGCL) from 1967 to 2025 and uncover a consistent pattern of legislative responses to judicial decisions. These responses, we argue, address critical challenges inherent in Delaware's reliance on judge-made law, including the tension between norm-setting and insulating corporate insiders from out-of-pocket liability, the limitations of fiduciary-based adjudication, and other institutional constraints of the judiciary. The interplay between courts and legislation also allows Delaware to adapt to stakeholder pressures and mitigate the risk of federal intervention or other threats to Delaware's dominance. However, too frequent or openly contentious legislative overrides could undermine Delaware's dominance by threatening judicial independence and raising concerns about the effect of interest groups on Delaware's corporate law. Uncovering the pattern of legislative responses raises important questions about the forces shaping Delaware's corporate law and the underlying interaction between its judiciary and legislative branches. This Article explores some of these questions and considers implications for future research.

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INTRODUCTION

In February 2025, Delaware's General Assembly released Senate Bill 21 (SB21), which proposed amendments to the Delaware General Corporation Law (DGCL). The bill was introduced in the aftermath of a series of court decisions that expanded judicial review of self-dealing transactions, Tesla's decision to reincorporate in Texas, and growing calls for other public companies to reincorporate outside Delaware.[1] Concerns about a "DExit"—mass departure of companies from Delaware[2]—were heightened by legislative

1. Will Oremus, *Delaware's Grip on Corporations Seemed Solid. Elon Musk Led a Revolt.*, WASH. POST (Mar. 4, 2025), https://www.washingtonpost.com/technology/2025/03/04/delaware-corporate-law-elon-musk/ [https://perma.cc/7DVB-VL8Z].

2. *See* Eric Talley, Sarath Sanga & Gabriel V. Rauterberg, *Delaware Law's Biggest Overhaul in Half a Century: A Bold Reform – or the Beginning of an Unraveling?*, CLS BLUE SKY BLOG (Feb. 18, 2025), https://clsbluesky.law.columbia.edu/2025/02/18/delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling/ [https://perma.cc/TN7T-FTQE] (discussing the possible imminency of "DExit").

efforts in Texas and Nevada to lure public corporations with more business-friendly corporate laws.[3] Against this backdrop, SB21 proposed to overhaul the judicial review of self-dealing transactions between public companies and their controlling shareholders.[4]

The proposed reform sparked significant controversy. While proponents argued that it was necessary to preserve Delaware's position as the premier jurisdiction for public companies,[5] critics warned that the proposed amendment would undermine investor protection and the delicate balance between statutory flexibility and judicial oversight.[6] The bill, however, was approved shortly after its release.[7]

This 2025 amendment came shortly after another controversial legislative response to court decisions.[8] In March 2024, the Corporation Law Section of the Delaware State Bar Association (the "DSBA" and "Section") proposed amendments to the DGCL,[9] which responded to three Chancery Court opinions. Two amendments addressed M&A-related questions— whether a target can sue on behalf of its shareholders for lost premium damages in a busted deal (*Crispo v. Musk*),[10] and whether a board can approve merger

3. *See* Kevin M. LaCroix, *Delaware Bill Meant to Stem Corporate Departures Enacted*, D&O DIARY (Mar. 26, 2025), https://www.dandodiary.com/2025/03/articles/director-and-officer-liability/delaware-house-passes-bill-meant-to-stem-corporate-departures/ [https://perma.cc/QE6D-YUNA] (discussing SB21 as a response to reincorporation in Texas and Nevada); Jonathan Macey & Roberta Romano, *Texas Is Disrupting Delaware's Dominance Through Innovation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 7, 2025), https://corpgov.law.harvard.edu/2025/03/07/texas-is-disrupting-delawares-dominance-through-innovation/ [https://perma.cc/6W75-CHBP] (discussing Texas's corporate law).

4. *See, e.g.*, Eric S. Klinger-Wilensky, William M. Lafferty & John P. DiTomo, *Thirty Years Later - Why Corporations Continue to Choose Delaware: General Perspectives and Thoughts on Proposed Amendment*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 20, 2025), https://corpgov.law.harvard.edu/2025/02/20/thirty-years-later-why-corporations-continue-to-choose-delaware-general-perspectives-and-thoughts-on-proposed-amendment/ [https://perma.cc/3R7B-65PV] (mentioning that SB21 also proposed to limit shareholders' enforcement rights by restricting access to corporate records).

5. *See infra* note 276 and accompanying text; *see generally* Stephen M. Bainbridge, *A Course Correction for Controlling Shareholder Transactions*, 49 DEL. J. CORP. L. 525 (2025) (arguing the necessity of course correction in Delaware courts).

6. *See, e.g.*, Talley, Sanga & Rauterberg, *supra* note 2; Lucian Bebchuk, *Delaware: The Empire Strikes Back*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 4, 2025), https://corpgov.law.harvard.edu/2025/03/04/delaware-the-empire-strikes-back/ [https://perma.cc/D8ZU-VM3K]; Jeff Mahoney, *Letter on Delaware Senate Bill 21*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 12, 2025), https://corpgov.law.harvard.edu/2025/03/12/letter-on-delaware-senate-bill-21/ [https://perma.cc/Y6TY-DAAU]; Joel Friedlander, *Don't Undermine Delaware's Judiciary at the Behest of Elon Musk*, CLS BLUE SKY BLOG (Mar. 6, 2025), https://clsbluesky.law.columbia.edu/2025/03/06/dont-undermine-delawares-judiciary-at-the-behest-of-elon-musk/ [https://perma.cc/9M3G-A8X8].

7. Within a month since SB21 was first introduced, the bill was approved by Delaware's House of Representatives and signed by Governor Meyer. *See* Mike Leonard, *Delaware Corporate Overhaul Signed into Law by Governor (1)*, BLOOMBERG L. (Mar. 25, 2025), https://news.bloomberglaw.com/esg/delaware-corporate-overhaul-passes-legislature-goes-to-governor/ (on file with the *Journal of Corporation Law*) (reporting on the passage of SB 21).

8. *See infra* Part IV.A. For recent articles addressing this debate, see generally Jonathan R. Macey, *Delaware Law Mid-Century: Far From Perfect but Not Leaving for Las Vegas Quite Yet*, 50 J. CORP. L. 1111 (2025); Joel E. Friedlander, *William Chandler's Unjust Criticism of Chancellor McCormick and Vice Chancellor Laster: What Does It Signify?*, 52 J. CORP. L. (forthcoming 2027).

9. PROPOSED AMENDMENTS TO THE DELAWARE GENERAL CORPORATION LAW, COUNCIL OF THE CORP. L. SECTION OF THE DEL. STATE BAR ASS'N 13 (2024).

10. *See* Crispo v. Musk, 304 A.3d 567 (Del. Ch. 2023).

agreements in a "substantially final" form (*Activision Blizzard*).[11] The third amendment responded to the *Moelis* decision, which invalidated governance provisions in an agreement between a corporation and its founding shareholder.[12]

Opponents argued that the anti-*Moelis* amendment was a "major surgery" to Delaware law that provided insiders a *carte blanche* to change critical corporate governance arrangements.[13] Scholars described this amendment as "the most consequential changes to Delaware corporate law of the 21st century."[14] However, less than three months after the proposal was published, and before the Supreme Court of Delaware had the chance to address the matter, Delaware's General Assembly approved the proposed amendments (SB 313).[15]

This Article argues that the 2024 and 2025 amendments are part of a broader story concerning the interplay between legislation and the courts in Delaware. Delaware's specialized Chancery Court, with its expert judges, plays a crucial role in the state's dominance in the market for incorporations.[16] Delaware leaves it to courts to set important corporate law norms through detailed opinions applying fiduciary principles to complex settings.[17] For example, Delaware courts—and not its legislature—determine whether management can fend off takeover attempts by adopting a poison pill or other defensive measures.[18]

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11. *See* Sjunde AP-fonden v. Activision Blizzard, Inc., 2024 WL 863290 (Del. Ch. Feb. 29, 2024) (corrected Mar. 19, 2024).

12. *See* West Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809 (Del. Ch. 2024).

13. *See Del. State Sen. Legis. Sess.*, 152d Gen Assemb., 37th Legis. Day, 2d Sess. (Del. June 13, 2024) (statement of Professor Usha Rodrigues), *transcribed in The Long Form – July 18, 2024*, CHANCERY DAILY, https://mailchi.mp/chancerydaily.com/2024-07-18-long-form-sb313-final [https://perma.cc/KZ4P-BSVT]; Sarath Sanga, Gabriel Rauterberg & Eric Talley, *Letter in Opposition to the Proposed Amendment to the DGCL*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 7, 2024), https://corpgov.law.harvard.edu/2024/06/07/letter-in-opposition-to-the-proposed-amendment-to-the-dgcl/ [https://perma.cc/H58Y-BPGW] (expressing opposition to the amendment); *see also* Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, to The Honorable John C. Carney, Governor of Delaware (July 10, 2024) [hereinafter the CII Letter] (on file with the Council of Institutional Investors).

14. Sanga, Rauterberg & Talley, *supra* note 13; *see also* Lucian A. Bebchuk, *The Perils of Governance by Stockholder Agreements*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 21, 2024), https://corpgov.law.harvard.edu/2024/05/21/the-perils-of-governance-by-stockholder-agreements/ [https://perma.cc/QM5H-B328] (claiming that the amendment would have "detrimental consequences" for investors); Marcel Kahan & Edward Rock, *Proposed DGCL § 122(18), Long-term Investors, and the Hollowing Out of DGCL § 141(a)*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 21, 2024), https://corpgov.law.harvard.edu/2024/05/21/proposed-dgcl-%C2%A7-12218-long-term-investors-and-the-hollowing-out-of-dgcl-%C2%A7-141a/ [https://perma.cc/Z4NU-28JB] (arguing that it undermines § 141(a)'s traditional limits on board delegation).

15. Some minor changes were made to the original proposal. S.B. 313, 152d Gen. Assemb. (Del. 2024); Jennifer Kay, *Delaware Corporate Law Amendments Signed Into Law by Governor*, BLOOMBERG L. (July 17, 2024), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/business-and-practice/BNA%2000000190-7966-d263-a79e-fbf6271a0001 (on file with the *Journal of Corporation Law*).

16. *See infra* notes 46–52 and accompanying text (discussing the role of courts in Delaware law).

17. *See* Rock, *infra* note 29 (discussing Delaware corporate law); Smith v. Van Gorkom, 488 A.2d 858, 866 (Del. 1985).

18. John Armour & David A. Skeel, Jr., *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, 1732 (2007); Marcel Kahan & Edward B. Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1591 (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.").

Indeed, until early 2024, the prevailing view has been that Delaware's legislature is passive on major corporate law issues,[19] focusing mainly on technical statutory amendments.[20]

We show that this conventional account is incomplete.[21] We examine Delaware's corporate legislation over the last 58 years and identify a *consistent pattern* of legislative responses to judicial decisions.[22] We further claim that legislative responses to court decisions are not only more prevalent than previously thought,[23] but also play an important role in Delaware's strategy for maintaining its dominance in the competition for corporate charter ("Delaware's competitive strategy").

Scholars have long debated how Delaware maintains its dominance despite its reliance on open-ended standards to guide corporate conduct, which inevitably introduce uncertainty.[24] Optimists argue that Delaware courts provide certainty and clarity through a vast set of precedents and informal judicial guidance.[25] Others suggest that Delaware's reliance on vague standards strengthens its competitive advantage by making it difficult for other states to replicate its model.[26]

We do not take a stance on this long-standing debate. Instead, based on our analysis of the history of interaction between Delaware courts and its legislature, we show that Delaware uses legislative responses to address the inevitable challenges of its judge-made law model along two related dimensions. First, legislation often supplements judicial rulings,

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19. Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1786 (2006).

20. *See* Kahan & Rock, *supra* note 18, at 1577 (explaining the legislative changes "address largely technical and noncontroversial matters").

21. After the 2024 Amendment, questions regarding the appropriate scope of legislative responses in court decisions took a more center stage. *See, e.g.*, Friedlander, *supra* note 8; Zohar Goshen & Tomer S. Stein, *Leaving Delaware? The Essential Role of Specialized Corporate Courts*, 125 COLUM. L. REV. 2077, 2087 (2025); Marcel Kahan & Edward B. Rock, *The New Political Economy of Delaware Corporate Lawmaking* 34–35 (Eur. Corp. Governance Inst., Working Paper No. 879, 2025); Dorothy S. Lund & Eric L. Talley, *Should Corporate Law Go Private?* 31–32 (Eur. Corp. Governance Inst., Working Paper No. 877, 2025); Macey, *supra* note 8, at 1123–24; Bobby V. Reddy & Brian R. Cheffins, *What Can Delaware Learn from the U.K.'s Moelis Moment?* 45–50 (U. Cambridge Fac. L., Research Paper No. 16, 2025); Greg Varallo, Andrew Blumberg & Ben Potts, *Optimizing Delaware's Corporate Law Amendment Process: Ideas for the Next 20 Years*, 50 DEL. J. CORP. L. (forthcoming 2026); Charles K. Whitehead, *Delaware's Agency Problem*, 79 VAND. L. REV. (forthcoming 2026); *see also* J. Travis Laster, *An Eras Tour of Delaware Corporate Law*, 50 J. CORP. L. 1189, 1259 (2025) (noting the increase in significant legislative interventions during the 2022–2025 period and describing it as "the Legislative Era").

22. 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. We discuss our methodology in *infra* Part III.A.

23. *See* Parts II–III; *see also* 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); Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491, 2510–11 (2005) (presenting a few legislative and judicial changes as examples of Delaware's responsiveness to Congress and federal agencies).

24. *See, e.g.*, Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1917 (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* Kahan & Rock, *supra* note 18; Douglas M. Branson, *Indeterminacy: The Final Ingredient in an Interest Group Analysis of Corporate Law*, 43 VAND. L. REV. 85, 108–09 (1990). Under this view, firms may incorporate in Delaware due to its other advantages, such as network benefits. Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 772–75 (1995); *see also* Sarath Sanga, *Network Effects in Corporate Governance*, 63 J.L. & ECON. 1, 7 (2020).

25. *See* the sources listed in *infra* note 56.

26. *See* the sources listed in *infra* note 74.

clarifies ambiguities, and even responds to invitations by judges themselves for legislative interventions.[27] Second, legislative responses allow Delaware to respond swiftly to stakeholder pressures and the threat of federal intervention or DExit, ensuring that its corporate law serves the state's interest in attracting incorporations. Delaware's interplay between its judiciary and legislative branches is also hard to mimic by competitors that wish to challenge Delaware's dominance, such as Nevada, Texas, or foreign jurisdictions.

More specifically, we analyze several related challenges that legislative amendments can address. The *first* challenge is the tension between the reliance on courts to establish corporate law norms and the reluctance to subject officers and directors to out-of-pocket liability for non-conflicted decisions.[28] Delaware relies on its prized judiciary to promulgate new norms that guide corporate behavior.[29] These new norms, however, may increase the real or perceived risk of personal liability for corporate officers and directors.[30] To address these concerns, Delaware has used legislation to ensure that court decisions that seem to expand insiders' liability do not leave directors and officers exposed to a meaningful risk of out-of-pocket liability. 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 *Smith v. Van Gorkom*.[31] But there are more recent and less known examples: a 2022 amendment authorized self-insurance (captive insurance) to protect directors against oversight claims following the *Boeing* air crash derivative settlement.[32] Another 2022 amendment allowed companies to extend the Section 102(b)(7) protection to officers (and not just directors) in response to developments in merger litigation.[33] These legislative amendments did not overturn the courts' decisions concerning the scope of insiders' duties. Rather, they expanded the set of arrangements that companies can deploy to shield insiders from out-of-pocket liability, and when necessary removed uncertainties around the use of these mechanisms.

The *second* challenge arises from the nature of the doctrinal toolkit that courts use. 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 as a basis for promulgating norms.[34] The nearly universal scope of fiduciary duties can make it difficult for courts to interpret them in a manner that is tailored to specific contexts. Consider, for example, the principle that fiduciaries cannot agree to arrangements that limit their discretion.[35] This principle could lead to undesirable outcomes in

27. *See* Goshen & Stein, *supra* note 21, at 2133 ("[I]t is important to acknowledge that legislative interventions in corporate law are a feature, not a bug . . . specialized courts do not act alone and never have.").

28. For a discussion, *see infra* Part III.B.1.

29. *See, e.g.*, Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1017 (1997); Charles M. Elson, *The Duty of Care, Compensation, and Stock Ownership*, 63 U. CIN. L. REV. 649, 677 (1995).

30. *See infra* notes 95–97, and accompanying text. 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.

31. *See infra* Part III.B.1.

32. *Id.*

33. *Id.*

34. *See infra* Part II.A.2.

35. See most recently, West Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809 (Del. Ch. 2024).

specific cases. For example, it led Delaware's Supreme Court to limit shareholders' ability to adopt certain bylaw amendments.[36] Recognizing the advantages of limiting directors' discretion in this setting, Delaware amended the DGCL and essentially carved out an exception to directors' fiduciary duties.

Moreover, one of the core features of Delaware's corporate law is its reliance on private ordering. An issue that becomes the subject of private ordering is no longer governed by directors' fiduciary duties. Only legislation, however, can move an issue from the realm of fiduciary duties to that of private ordering.[37] Consider the renunciation 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.[38] A legislative amendment expressly provided that private ordering governed this area.[39]

The *third* challenge is not unique to corporate law and arises from courts' institutional limitations as lawmakers. Additionally, judicial opinions can raise questions or otherwise create uncertainty within the corporate community, which relies on judicial decisions for guidance.[40] While courts can restore certainty by clarifying their position in a future ruling, they must wait for the right case to arrive.[41] At the same time, companies might be hesitant to adopt strategies that could be challenged in court. This can lead to *sticky norms*. Legislation, in contrast, can restore certainty and eliminate the sticky norms problem.

The *fourth* challenge is more directly related to Delaware's interest in preserving its position as the leader in the market for incorporations. Legislative responses can adopt arrangements that balance the interests of stakeholders across different legal questions—a task that courts, constrained by statutory provisions and required to adjudicate specific disputes, are ill-equipped to handle. Legislation can offer a swift response to the real or perceived concern of federal intervention or other threats to Delaware's dominance. Finally, the possibility of legislative responses can ensure Delaware's commitment to the forces that drive the incorporation race.

We then focus on the frequency of legislative amendments in recent years and the changing dynamic underlying them. Even when they addressed important legal questions, legislative reactions to court decisions were rarely controversial in the past. Indeed, the relatively harmonious nature of the interactions between Delaware's legislative and judicial branches can explain why this decades-long pattern has largely been overlooked by corporate law scholars. The 2024–25 amendments, however, took a different turn.

We identify a trend of legislative responses becoming more frequent and more likely to override courts' rulings, culminating with the 2024–25 amendments. We use our sample

36. *See* Skeel, *supra* note 23, at 12; CA, Inc. v. AFSCME Emp. Pension Plan, 953 A.2d 227, 239–40 (Del. 2008) (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).

37. *See* New Enter. Assocs. 14, L.P. v. Rich, 295 A.3d 520 (Del. Ch. 2023).

38. *See* Siegman v. Tri-Star Pictures, Inc., No. 9477, 1989 WL 48746, at *8 (Del. Ch. May 5, 1989) (revised May 30, 1989).

39. The statute does not require that these advanced renouncements be incorporated into the companies' charter.

40. *See* Rock, *supra* note 29, at 1060.

41. *See* Kahan & Rock, *supra* note 18, at 1603–04 (mentioning that Delaware judges promote their judicial philosophy outside the courtroom by writing articles, speaking at conferences, and lecturing to corporate directors).

to highlight the unusual dynamic underlying the 2024–25 amendments.[42] For example, the 2024 amendment overturned a Chancery Court decision before the Delaware Supreme Court had the opportunity to review it, and despite their far-reaching implications, these amendments were approved at an unprecedented pace. The 2024–25 amendments also defied the long-held assumption about the harmonious relationship between Delaware's legislative and judicial branches. Most importantly, they deviated from Delaware's tradition of refraining from amending the DGCL to alter the substance of directors' fiduciary duties or the scope of judicial review.

We then explain how the 2024–25 amendments can be viewed as part of Delaware's strategy of using legislation to address challenges arising from its reliance on standards and ex-post adjudication. The *Moelis* amendment underscores the tension between the reliance on courts to invalidate unlawful governance arrangements and the high costs of invalidating these arrangements *after* they become prevalent. Similarly, the 2025 amendment demonstrates that when a swift action is required to address a real or perceived threat of corporate exodus, Delaware might prefer legislation, as changing legal norms through case-by-case rulings can take considerable time.

Finally, we consider the implications of our article and discuss important questions that it raises for further research. Overall, our findings reinforce the need for additional research concerning the contemporary forces that shape Delaware's corporate law.

Before proceeding, two clarifications are in order. First, while our analysis explains how legislative responses can address the challenges facing a jurisdiction that relies on courts to develop corporate law norms, in this Article we do not take a position on the desirability of each amendment. Nor do we argue that this dynamic provides the optimal balance between the interests of managers, shareholders, and other constituencies.

Second, Delaware has a unique process of amending its corporate statute: the Council of the Corporation Law Section of the DSBA (the "Council"), which is composed of Delaware lawyers, identifies needed legislative changes and annually proposes DGCL amendments. The General Assembly approves these proposed amendments, usually without substantial changes.[43] Proponents of this architecture posit that it enables a professional and responsive legislative process and that it protects Delaware's corporate law from narrow, local interests.[44] Opponents believe that this process gives too much power to the practitioners who sit on the Council and to their clients at the expense of elected politicians.[45] For ease of exposition, we often refer to the "Delaware legislature" although we acknowledge the minimal role that the General Assembly normally plays in the legislative process of Delaware corporate law.

The Article proceeds as follows. Part I lays out the background to our discussion and presents the prevailing perspectives in the literature on the dominance of Delaware courts.

42. *See infra* Part IV.B.

43. *See infra* Part I.B.

44. Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 680 (2005) (explaining that "our state will not tilt its corporation law to favor a corporation that happens to have its headquarters here"); Ofer Eldar & Gabriel V. Rauterberg, *Is Corporate Law Nonpartisan?*, 2023 WIS. L. REV. 177, 181 (2023) ("The major arms of Delaware corporate law-making—the legislative process and the courts—have both been carefully immunized from the normal political fray.").

45. *See infra* notes 346–48, 353 and accompanying text.

Part II analyzes the activity of the Delaware legislature in response to judicial decisions, exposing the major factors that trigger legislative interventions and presenting a comprehensive framework of this phenomenon. Part III describes the key findings of our study of DGCL amendments enacted between 1967 and 2025 and provides detailed analyses of some examples of past legislative responses. Part IV explores the changing dynamics underlying legislative responses in recent years, with 2024–25 being a tipping point. Part V examines several implications and lessons of our study for institutional investors, lawyers and researchers.

I. The Prevailing Perspective on Delaware's Law

A. Delaware Dominance: The Role of Courts

Delaware is the global capital of corporate law and the leader in attracting incorporations, especially of publicly traded companies.[46] Its corporate laws inspire other states and serve as a benchmark for lawmakers around the world.[47] Some view Delaware as the winner in a "race to the top," attracting incorporations by offering laws that strike an optimal balance between management and shareholders.[48] Critics, however, contend that Delaware's dominance reflects a "race to the bottom," with laws that predominantly favor managers.[49] Others argue that Delaware faces little serious competition from other states,[50] and that it aims to provide "middle ground [rules] on the pro-manager/pro-shareholder dimension and otherwise focusing on maximizing quality."[51]

Despite this lack of consensus, there is general agreement that Delaware courts are a cornerstone of the state's success. The Court of Chancery—a specialized trial court for

46. *See, e.g.*, Lynn M. LoPucki, *Corporate Charter Competition*, 102 MINN. L. REV. 2101, 2102 (2018) ("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 (2020) ("Delaware accounts 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* JEFFREY W. BULLOCK, DELAWARE DIVISION OF CORPORATIONS: 2022 ANNUAL REPORT 1 (2022), https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2022-Annual-Report.pdf [https://perma.cc/9VSU-MJUW].

47. *See, e.g.*, Hamermesh, *supra* note 19.

48. *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).

49. *See, e.g.*, William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 685 (1974); Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1444 (1992); Lucian A. Bebchuk, Alma Cohen & Allen Ferrell, *Does the Evidence Favor State Competition in Corporate Law?*, 90 CALIF. L. REV. 1775, 1779 (2002). For a comprehensive review, see Marcel Kahan, *The State of State Competition for Incorporations Revisited* 3 (EUR. CORP. GOVERNANCE INST., Working Paper No. 724, 2023).

50. *See, e.g.*, Kahan & Kamar, *supra* note 46; Lucian A. Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 563–64 (2002).

51. Kahan, *supra* note 49, at 26; *see also* William Magnuson, *The Race to the Middle*, 95 NOTRE DAME L. REV. 1183, 1198 (2020).

corporate matters[52]—adjudicates cases without a jury.[53] Delaware's judiciary is non-partisan, and judges are selected by a nominating commission based on merit and appointed for set terms.[54] The Court of Chancery's exclusive focus on business cases enables quicker hearings and timely decisions.[55]

Consequently, the Court of Chancery has built a substantial body of precedents that provide guidance for market participants.[56] Delaware judges are renowned for establishing corporate law norms by applying fiduciary duty standards across a broad spectrum of corporate contexts.[57]

Inspired by the Delaware model, other states, including Nevada and (now) Texas, have attempted to establish their own specialized courts.[58] The World Bank's 2012 "Doing Business" report noted that at least 23 economies established specialized courts.[59] However, none have matched Delaware's preeminence in corporate law or company incorporations.[60]

B. The Role of Legislation

Legal scholarship also examines, albeit to a lesser extent, Delaware's distinct process of corporate law legislation.[61] While the General Assembly approves amendments to the DGCL, substantive drafting is normally managed by the Council that governs the

52. *See, e.g.*, LoPucki, *supra* note 46, 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."); *see also* Randy J. Holland, *Delaware Corporation Law: Judiciary, Executive, Legislature, Practitioners*, 72 BUS. LAW. 943, 952–54 (2017); Kahan & Rock, *supra* note 18, at 1602.

53. Hamermesh, *supra* note 19, at 1759–62.

54. *See, e.g.*, Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1075 (2000) (mentioning how 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); Rock, *supra* note 29, at 1102 (explaining that Delaware's judges are "experienced and respected practitioners" who are selected based on merit).

55. Kaouris, *supra* note 54, at 975–77.

56. One observer argues that the unique combination of specialized judges, efficient case handling of M&A litigation, and a robust body of precedents allows the Delaware courts to recreate the policymaking toolbox of a modern regulatory agency. *See* William Savitt, *The Genius of the Modern Chancery System*, 2012 COLUM. BUS. L. REV. 570 (2012); *see generally* Omari S. Simmons, *Branding the Small Wonder: Delaware's Dominance and the Market for Corporate Law*, 42 U. RICH. L. REV. 1129 (2008) (discussing Delaware's branding and corporate regulatory competition); Stephen M. Bainbridge, *DExit Drivers: Is Delaware's Dominance Threatened?*, 50 J. CORP. L. 823, 867–73 (2025) (discussing determinacy in Delaware law).

57. Fisch, *supra* note 54, at 1074 ("Despite their statutory source, the majority of Delaware's important legal rules are the result of judicial decisions.").

58. *See* Sujeet Indap, *Texas is Throwing Down a Legal Challenge to Delaware*, FIN. TIMES (Jan. 28, 2024), https://www.ft.com/content/a02b96df-9ee1-4b3b-a31e-087b734840a1 (on file with the *Journal of Corporation Law*); Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935, 965 (2012).

59. *See* Yifat Aran & Moran Ofir, *The Effect of Specialized Courts over Time*, *in* TIME, LAW, AND CHANGE: AN INTERDISCIPLINARY STUDY 167, 171–72 (Sofia Ranchordás & Yaniv Roznai eds., 2020) (noting that in 2010, Israel joined the global movement by setting up an Economic Division within the Tel Aviv District Court).

60. *See* Bebchuk & Hamdani, *supra* note 50, at 563–64 (arguing that Delaware's dominant position imposes insurmountable barriers to entry).

61. *See, e.g.*, Simmons, *supra* note 56, at 1157–58 (arguing states replicating Delaware's statutes fail to attract corporations because "Delaware's Corporate Bar, an expert group, has unmatched authority in the corporation law amendment process compared to other states").

Corporation Law Section of the DSBA.[62] The Council is composed of Delaware corporate law practitioners offering a blend of litigation and transactional expertise, with some members of the plaintiff bar.[63] It considers proposed legislation in private sessions that are often prompted by the Council's members' interaction with their clients.[64] The Council identifies the need for legislative changes.[65] Once approved by the full Corporation Law Section, the proposals are advanced to the General Assembly, where they typically receive expedited attention and pass unanimously.[66] Proponents of this structure posit that it fosters a professional legislative process and well-informed policy formulation.[67] The Council's non-partisan nature arguably underscores Delaware's commitment to a professional approach to lawmaking.[68]

Until 2024, the common view has been that Delaware's legislature plays a largely passive role, focusing primarily on technical amendments.[69] The legislature has been described as a "little more than a bit player," with its contributions since the significant 1967 overhaul of the DGCL characterized as modest and incremental.[70] As noted, "[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."[71] For example, in their analysis of hostile takeover rules, Armour and Skeel observed

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62. *See, e.g.*, Roberta Romano, *Market for Corporate Law Redux*, *in* 2 THE OXFORD HANDBOOK OF L. AND ECON.: PRIV. AND COM. L. 358, 361–62 (Francesco Parisi ed., 2017) (explaining how the Delaware legislature responds to the bar by enacting its proposed initiatives).

63. Hamermesh, *supra* note 19, at 1752–59; Holland, *supra* note 52, at 947; ROMANO, *supra* note 48, at 37–38; *see* Ernest L. Folk, III, *Some Reflections of a Corporation Law Draftsman*, 42 CONN. B.J. 409, 411 (1968) (critiquing the composition of the committee, which consists chiefly of attorneys representing corporations); *see also Corporation Law Section*, DEL. STATE BAR ASSOC., https://www.dsba.org/sections-committees/sections-of-the-bar/corporation-law/ [https://perma.cc/SDE5-CBLQ] (stating the section includes "more than 500 Delaware attorneys, judges, and academics").

64. Holland, *supra* note 52, at 948.

65. Hamermesh, *supra* note 19, at 1756–57; Romano, *supra* note 62, at 363.

66. Kaouris, *supra* note 54, at 971–72; Romano, *supra* note 62, at 363.

67. Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 488–89 (1987) ("Delaware legislature's drafting committees historically have been staffed with attorneys experienced in corporate law."); Fisch, *supra* note 54, at 1089 ("[T]he Delaware legislature has traditionally been very responsive to corporate requests for rulemaking.").

68. Kahan & Rock, *supra* note 18, at 1600 ("[Delaware's] [l]egislators claim no expertise over corporate law, and partisan politics play no role in its formation."); Hamermesh, *supra* note 19, 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 52, at 949 ("[T]here is simply no political element to the development of corporation law.").

69. Brian R. Cheffins, *Delaware and the Transformation of Corporate Governance*, 40 DEL. J. CORP. L. 1, 6 (2015) ("Delaware courts have done much more to influence corporate governance than the Delaware legislature."); Simmons, *supra* note 56, at 1158 ("[A]ctual changes to the . . . 'DGCL' over the past forty years have been conservative. This conservatism results in deference to the judicial branch to incrementally sketch corporate law.") (internal citations omitted); LoPucki, *supra* note 46, at 2102 ("Delaware's competitive strategy is principally judicial, not legislative.").

70. Cheffins, *supra* note 69, at 17–18 ("[T]he Delaware legislature was destined to be little more than a bit player as corporate governance developed over the past forty years."); Simmons, *supra* note 56, at 1158 n.127 (arguing that "[m]any of the statutory changes have been technical, and very few have attracted any academic attention").

71. Kahan & Rock, *supra* note 18, at 1591.

that in the United States, "the principal decision makers . . . are Congress and the Delaware courts."[72]

Kahan and Rock suggest that Delaware's division of labor between its legislature and the judiciary is strategic: by delegating the task of refining corporate laws to the courts, Delaware avoids the perils of enacting confrontational laws that could provoke federal interference or public backlash.[73] Others posit that Delaware's preference for judge-made law fosters ambiguity, which benefits the state's legal professionals by increasing demand for their services.[74] Hamermesh, however, suggests that the deference to the judiciary reflects a preference for incremental legislation and broad statutory frameworks.[75] Other scholars have highlighted that Delaware's heavy reliance on judicial lawmaking enhances the political independence of corporate lawmaking,[76] which is essential for attracting incorporations.[77]

While scholars recognize that judicial decisions can spur legislative responses,[78] there has been limited research on the patterns underlying these interventions until the 2024 amendments. Skeel, for example, analyzes two instances in 2009 and 2015 where Delaware's General Assembly responded to court decisions.[79] He emphasizes the rarity of this legislative response and argues that it is unlikely to become commonplace, given the need to maintain the credibility of Delaware's judiciary.[80]

Only after the 2024 amendments, questions regarding the appropriate scope of legislative intervention took center stage in corporate legal debates.[81] The introduction of SB21 in February 2025 intensified these discussions, as critics condemned the unprecedented

72. Armour & Skeel, *supra* note 18, at 1751.

73. Kahan & Rock, *supra* note 18, at 1590.

74. *See, e.g.*, Kamar, *supra* note 24, at 1908 (explaining that the use of standards makes it harder for other states to replicate Delaware law); Macey & Miller, *supra* note 67, at 498 (examining the powerful role of lawyers as an interest group in Delaware and how they may lead to deviations from profit-maximizing strategies). Some argue that the courts' maintenance of vague standards aims to maintain their power and bolster their prestige. *See, e.g.*, Stephen M. Bainbridge, *Interest Group Analysis of Delaware Law: The Corporate Opportunity Doctrine as Case Study*, *in* CAN DEL. BE DETHRONED?: EVALUATING DEL.'S DOMINANCE OF CORP. L. 120, 120–21 (Stephen M. Bainbridge et al. eds., 2018).

75. Hamermesh, *supra* note 19, at 1777.

76. *See, e.g.*, Fisch, *supra* note 54, at 1099 (discussing Delaware courts aggressive lawmaking agenda); *see supra* note 44, and accompanying text (arguing that Delaware lawmaking is resistant to the "political fray").

77. *See, e.g.*, Eldar & Rauterberg, *supra* note 44, at 214 (noting that firms are attached to jurisdictions insulated from partisan pressures). For empirical evidence on the value investors attribute to the independence of the Delaware judiciary, see Brian D. Feinstein & Daniel J. Hemel, *The Market Value of Partisan Balance*, 119 NW. U.L. REV. 1201, 1249 (2025).

78. *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) (noting that Delaware's court decisions "provide feedback to policymakers that stimulates later amendments to the rules").

79. These cases will be discussed below. *See infra* notes 207–12, 242–47 (noting instances where the Delaware legislature has responded to judicial decisions).

80. Skeel, *supra* note 23, at 10–11; *see also* Bainbridge, *supra* note 74, at 120–44 (analyzing the corporate opportunity doctrine and 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").

81. *See, e.g.*, *supra* notes 14, 21 and accompanying text (contextualizing Delaware's legislative intervention and noting the historic interplay between the Council and Delaware's legislature).

speed and scope of the legislative response.[82] Despite the controversy around it, the bill was legislated by Delaware's General Assembly and approved by the Governor within a month of its introduction.[83]

Our analysis sheds new light on the role of legislation in Delaware's corporate law. We document a decades-long pattern of legislative responses to court decisions and show how Delaware systematically uses legislative amendments to address the potential challenges of a corporate law regime that relies heavily on courts to develop and enforce norms.[84]

II. Legislative Responses and Delaware's Competitive Strategy

This Part offers a framework, informed by our study of the history of legislative responses, that explains how legislative responses fit within Delaware's competitive strategy. We use the term "competitive strategy" to describe the method that Delaware uses to preserve its dominance in the face of competition over incorporations (whatever forces drive this competition) and the threat of federal intervention. We do not take a stand on whether the incorporation race leads Delaware to provide optimal corporate laws or to favor insiders over investors.[85]

Delaware's heavy reliance on expert judges is commonly viewed as a cornerstone of its strategy.[86] Some argue that expert courts employing flexible standards are better positioned than legislatures to adapt corporate norms to changing business needs,[87] and that reliance on judicial lawmaking increases political independence and enhances transparency.[88] Others argue that Delaware relies on courts and standards for strategic reasons: making it harder for other states to replicate the Delaware model or minimizing the threat of federal intervention.[89] Regardless of its advantages or underlying motivations, a regime

82. *See* Mahoney, *supra* note 6 (noting opposition to Delaware SB 21).

83. Some minor changes were made to the original proposal. *See Senate Substitute 1 for Senate Bill 21*, 153d Gen. Assemb. (Del. 2025).

84. *See* Bainbridge, *supra* note 56, at 854 (explaining how the swift legislative response of the 2024 amendments illustrates Delaware's advantage in maintaining a modern corporate law framework); Mark Lebovitch, *Soap Opera Summer: Five Predictions About Delaware Law's Response to New DGCL 122(18)*, 15 HARV. BUS. L. REV. COLUMNS 283, 286 (2025) (arguing that the Moelis amendment will alter the relationship among the Delaware Bench and Bar). None of these works, however, provide a systematic examination of legislative interventions in Delaware.

85. In two separate articles, both of us criticized several aspects of the 2025 Amendment. *See* Zohar Goshen, Assaf Hamdani & Dorothy Lund, *Fixing MFW: Fairness and Vision in Controller Self-Dealing*, 15 HARV. BUS. L. REV. 577, 600–01 (2025) (analyzing review of cleansing frameworks); Lucian A. Bebchuk & Kobi Kastiel, *How to Control Controller Conflicts*, 50 J. CORP. L. 1001, 1008 (2025) (critiquing several aspects of the 2025 Amendment).

86. *See supra* Part I.A. (discussing Delaware's relative position in the corporate law landscape).

87. *See, e.g.*, Frank B. Cross, *What Do Judges Want?*, 87 TEX. L. REV. 183, 222 (2008) (reviewing RICHARD A. POSNER, HOW JUDGES THINK (2008)) (arguing that the Chancery Court develops its law through judicial processes, which "allows space for the judiciary to pull back in future cases if a prior decision turns out . . . to have been unwise").

88. *See, e.g.*, Fisch, *supra* note 54, at 1099 (explaining how "Delaware's extensive reliance on judicial lawmaking offers several advantages over the legislative process, including greater and more balanced access to the lawmaking process, increased political independence, and enhanced decisionmaking transparency").

89. *See* Kahan & Rock, *supra* note 18.

that entrusts courts with producing corporate norms has its own inevitable limitations.[90] Our analysis shows that Delaware relies on a combination of specialized courts and legislative responses to address two related challenges: the institutional limitations of its "judge-made law" model and potential threats to its dominance.[91]

A. The Challenges of Judge-Made Corporate Law

Many legislative responses in our sample can be interpreted as addressing the inherent challenges that arise from Delaware's reliance on courts to establish corporate law norms. Some of these challenges are unique to corporate law. Others apply more broadly to other areas that rely on common law to develop norms. Our list of challenges is not mutually exclusive, and the examples of legislative amendments we discuss in the next Part could be understood as responding to more than one challenge.

1. Setting Norms vs. Out-of-Pocket Liability

The first challenge is closely related to corporate law's reluctance to subject insiders to out-of-pocket liability for business decisions. Delaware courts establish norms through the adjudication of specific disputes. Courts are both guided by indeterminate fiduciary standards and are continuously shaping these standards.[92] The development of Delaware's corporate law depends on private litigation.[93] Class actions and derivative lawsuits typically seek *monetary damages* for financial losses allegedly caused by directors' decisions. Shareholder litigation is largely driven by attorneys whose incentives are tied to fees they can secure, which are frequently proportional to the monetary compensation awarded by the court.[94]

However, a fundamental principle of 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.[95] Imposing liability for poor judgment could discourage qualified

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90. For a comprehensive institutional analysis of the relative competence of legislative and judicial law-making, including the strengths and weaknesses of each institution, see NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 53–97 (Univ. Chi. Press, 1st ed. 1994); *see also* Fisch, *supra* note 54, at 1088–96.

91. *See also* Bainbridge, *supra* note 56, at 50–60 (explaining that Delaware provides a vast repository of precedents, and Delaware judges provide guidance to attorneys outside of legal decisions).

92. Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PA. J. BUS. L. 675, 678 (2009) ("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.'"); *see also* Rock, *supra* note 29, at 1009 (explaining that the Delaware fiduciary law guides good and bad governance through precedents and providing standards for director conduct over time).

93. Holland, *supra* note 52, at 679. In some instances, other parties might bring a lawsuit. Some 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, 870 (1981).

94. *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).

95. *See, e.g.*, Bernard Black, Brian Cheffins & Michael Klausner, *Outside Director Liability*, 58 STAN. L. REV. 1055, 1077 (2006) ("[S]o long as an outside director has not engaged in self-dealing, the scope of potential out-of-pocket liability is very narrow.").

individuals from board service, encourage excessive risk aversion, and dissuade directors from pursuing risky initiatives that could benefit the corporation.[96]

The reliance on shareholder litigation for establishing norms is, therefore, in clear tension with the reluctance to subject directors to out-of-pocket liability for non-conflicted decisions.[97] The Delaware legislature has continuously addressed this tension. When judicial decisions are perceived as raising the bar of expectations for directors, they often lead to market-wide concerns about out-of-pocket exposure or the unavailability of mechanisms to insulate corporate leaders from such exposure. Legislation responds not by changing the standards for director conduct, but by providing new mechanisms for companies to shield insiders from out-of-pocket liability.

A related pattern is legislative amendments that remove uncertainties around the use of legal arrangements insulating insiders from out-of-pocket liability, such as indemnification and liability insurance. These amendments were prompted by court rulings that highlighted vulnerabilities in these protective mechanisms, rather than by courts establishing new norms.

This dynamic can be interpreted in different ways: as the capture of the Delaware legislature by managerial interests or as responding to investors' interest in attracting qualified directors and encouraging them to take calculated risks. We do not take a stand. Our objective here is largely descriptive—to illuminate (with examples provided in the next Part) how Delaware's intricate regime of protections against out-of-pocket liability has evolved through the ongoing interplay between Delaware's legislature and its judiciary.

2. *Fiduciary Tailoring*

Delaware courts principally use fiduciary duties as their doctrinal toolkit for shaping corporate law across a wide range of settings, including hostile takeovers, shareholder activism, friendly sales, related-party transactions, and bylaw amendments. Fiduciary duties—the duty of loyalty and the duty of care—govern the conduct of directors and controlling shareholders.[98] The courts' reliance on fiduciary duties imposes two limitations on their ability to shape corporate law.

First, courts lack the power to subject fiduciary obligations to private ordering. Delaware's corporate law provides corporations with significant flexibility to tailor governance

96. *See* Assaf Hamdani & Reinier Kraakman, *Rewarding Outside Directors*, 105 MICH. L. REV. 1677, 1689 (2007) (explaining that subjecting directors to liability might lead to "agency cost of risk-distorted decision-making by the board, and . . . a diminished pool of candidates from which to recruit new directors"); *see also* Holger Spamann, *Monetary Liability for Breach of the Duty of Care?*, 8 J. LEGAL ANALYSIS 337, 339 (2016) (explaining that the threat of full liability might make directors refuse to serve or demand a large risk premium).

97. As Kamar observes, this tension could explain the role of indemnification and D&O liability insurance. Ehud Kamar, *Shareholder Litigation Under Indeterminate Corporate Law*, 66 U. CHI. L. REV. 887, 888 (1999) (arguing that "insurance and indemnification can be a socially desirable mechanism that induces plaintiffs to sue yet keeps sanctions low"). 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.

98. 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. *See, e.g.*, Holland, *supra* note 52, at 678.

arrangements to their specific needs.[99] Fiduciary duties, however, are mandatory, creating tension with the principle of private ordering.[100]

Without legislative authorization, corporations cannot waive, contract around, or modify fiduciary duties to align with their business needs. Similarly, courts lack the authority to prefer private ordering over fiduciary duties. They will not uphold charter provisions or shareholder agreements that modify fiduciary duties without a basis in the statute. Only legislation can reassign an issue from the realm of fiduciary obligations to that of private ordering.[101] Legislative action in this area often responds to court decisions that either cast doubt on the permissibility of private ordering or highlight the need to allow parties to contract around fiduciary duties.

The second limitation on courts' ability to shape corporate law arises from the nearly *universal application* of fiduciary duties. Delaware courts apply the same doctrines—the duty of care and the duty of loyalty—across a wide range of cases. Courts are limited in their ability to tailor the legal interpretation of fiduciary duties to the nuanced realities of specific settings. This is because the courts' interpretation of the requirements entailed by fiduciary duties in one setting may affect other, even if unrelated, corporate settings. Consider the principle that contractual arrangements cannot prevent fiduciaries from discharging their fiduciary obligations.[102] Delaware courts have invalidated bylaws and other contractual arrangements seeking to constrain directors from exercising their judgment in accordance with their fiduciary duties.[103] This nearly universal rule can lead to suboptimal outcomes when precommitment is desirable. The legislature, in contrast, is not subject to these constraints. It can adopt statutory arrangements tailored to specific settings without the risk that these amendments will cause unintended consequences in other, unrelated areas of corporate law.

3. Courts' Institutional Limitations

Our analysis thus far has focused on considerations unique to Delaware's corporate law. Academic literature, however, has explored the broader constraints of courts and

99. New Enter. Assocs. 14, L.P. v. Rich, 295 A.3d 520, 565 (Del. Ch. 2023) ("To say that Delaware prides itself on the contractarian nature of its law risks understatement."); *see also* ROMANO, *supra* note 48, at 14–31; 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.").

100. *New Enter. Assocs. 14, L.P.*, 295 A.3d at 545 (describing the conflict between the "dual principles" of Delaware corporate law: private ordering and fiduciary accountability).

101. *Id.* at 542 ("[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."); *id.* at 541 ("[T]he constitutive agreements that govern an entity can only eliminate or modify fiduciary duties . . . to the extent expressly permitted by an affirmative act of the Delaware General Assembly."); *see also* 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).

102. *See, e.g.*, Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281, 1292 (Del. 1998) ("[T]o the extent that a contract . . . 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.").

103. Courts have also viewed such arrangements as inconsistent with Section 141(a) of the DGCL. See most recently, West Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809 (Del. Ch. 2024). Under this approach, such an arrangement can be valid only if expressly authorized in the company's articles of association.

comparative advantages of legislation in producing legal norms.[104] Courts face inherent limitations that restrict their capacity for legal reform, including adherence to statutory law and the need to address the specific legal disputes at hand.[105] The Delaware Chancery court benefits from expert judges who exercise flexibility and demonstrate responsiveness in ways that resemble legislative processes.[106] Even expert courts, however, are subject to the judiciary's institutional limitations. We focus on two constraints that courts cannot overcome.

First, courts must await a specific dispute to resolve errors or uncertainty arising from prior holdings. Practitioners in Delaware look to court decisions and judicial remarks for guidance. Courts' application of open-ended standards to specific settings can create uncertainty. Even expert judges cannot fully anticipate how their decisions will be interpreted by the business community. The reactive nature of the judiciary, which must wait for cases to be brought, limits its ability to proactively change rules, correct judicial errors, or resolve ambiguities in interpretation in a timely manner.[107]

A related concern is the potential emergence of undesirable *sticky rules*—legal norms that persist even after their original rationale has become obsolete.[108] Rules established through court decisions may remain in force even when there is consensus that they would likely not be upheld if challenged in court. This occurs because market participants are hesitant to incur the risks associated with contesting these rules in litigation. Courts can only refine or modify previous rulings when the relevant legal issues are brought before them. However, market participants prefer to structure transactions in ways that minimize litigation and uncertainty, rather than contribute to the incremental refinement of Delaware law. Legislation is free of these constraints.[109]

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104. *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*, *in* THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR (Lee Epstein & Stefanie A. Lindquist eds., 2017); MARK C. MILLER, THE VIEW OF THE COURTS FROM THE HILL: INTERACTIONS BETWEEN CONGRESS AND THE FEDERAL JUDICIARY 21 (2009).

105. *See* Fisch, *supra* note 54, at 1072–82; *see also* Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2036 (1996) (discussing stare decisis).

106. Fisch, *supra* note 54, at 1072–82.

107. Fisch, *supra* note 54, at 1072 ("Courts, unlike legislatures, generally cannot initiate legal change but must wait for litigants to commence an action."); Kahan & Rock, *supra* note 18, 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, e.g.*, Cross, *supra* note 87, at 222 ("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.'") (quoting Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 683 (2005)).

108. Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383, 383 (2007); Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 667 (2006).

109. *See generally* Peters, *supra* note 105, at 2081–83 (explaining legislative bodies have powers to address multiple different areas of law, all at one time, and 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 (2004) (discussing the role of the legislature in updating or revising statutes based on changing technology, science, and markets).

Finally, courts cannot revise statutory rules, and this may restrict their ability to adapt to rapidly evolving mergers and acquisitions (M&A) and litigation practices. The legislature, in contrast, can modify statutory provisions to respond to judicial or market developments.

To summarize, legislative amendments often *supplement* Delaware's expert courts. In several examples discussed in the next Part, judges themselves invited legislative action or highlighted vagueness in the statute, noting their lack of authority to deviate from existing law. Moreover, a regime in which the legislature regularly responds to judicial opinions can improve the quality of *judicial* decisions. After all, judges can faithfully apply existing law while identifying the need for legislative amendments, knowing that the legislature may accept the invitation to intervene. This strategy is bolstered by Delaware's distinct process for amending the DGCL, including its annual review of the need for legislative amendments.

This ongoing interaction between the legislature and the judiciary reduces indeterminacy concerns. By providing clarity where court decisions may leave ambiguity, legislative responses enhance the predictability of Delaware's corporate law. Interestingly, studies on Congressional overrides of Supreme Court decisions document a similar dynamic. As the authors of the studies summarized, "we were surprised at how often overrides clarified confusing rules and standards created by the Supreme Court and replaced the Court's holdings with clearer legal regimes."[110]

It could be argued that the three challenges discussed in this section reflect disagreements between Delaware's judiciary and legislature regarding the objective of Delaware corporate law, rather than institutional challenges, with the Delaware legislature pushing for more protections for insiders against out-of-pocket liabilities or for greater contractual freedom for insiders. Indeed, legislative responses could also be motivated by the need to address pressures from different constituencies and threats to Delaware's dominance. We explore this possibility in the next section. However, a significant number of legislative amendments in our sample do not lead to open conflict between Delaware's judiciary and legislature. In these situations, it is often the case that Delaware's judiciary and legislature share the same objective, or that legislative responses do not seem to involve conflicts between different corporate constituencies. In these cases, the interplay between the two branches represents instances in which legislation can overcome the courts' institutional limitations.

B. Addressing Threats to Delaware's Dominance

Thus far, we have explained how the interaction between Delaware's judiciary and legislature can overcome some of the drawbacks of a corporate law regime that relies on courts to produce norms. This interaction, however, also provides Delaware with other advantages that strengthen its competitive strategy.

First, legislation provides Delaware with flexibility to respond to pressures from different constituencies. Courts have limited ability to strike 'political' compromises that require reconciling competing interests across multiple legal questions. This limitation does

110. Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1414 (2014); *see* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

not stem from judges' lack of competence to consider the market-wide implications of their decisions. Delaware judges are widely regarded as experts on corporate law matters who are capable of incorporating policy considerations into their decisions. This argument also departs from the view that legislatures, as majoritarian institutions, are better equipped to address political concerns, while courts are designed to serve other purposes, such as protecting minority rights.[111] Rather, it is the requirement that courts address the specific dispute at hand that limits their ability to craft solutions that require the adjustment of arrangements across *multiple* legal issues. To be clear, we do not claim that legislation will achieve the optimal balance among stakeholder groups. Rather, we argue that the legislature has the tools to undertake this balancing effort.

For example, when managers or shareholders have a significant stake in the scope of director or officer liability, legislation can subject the matter to private ordering—leaving the final say to shareholders—without directly overturning the court's decision or its interpretation of fiduciary duties.

Second, legislative responses also enable Delaware to address the risk of federal intervention. As explained above, legislation can respond to the need to provide 'political' compromises. Moreover, even if they are able and willing to create norms that respond to the threat of federal intervention, courts must wait for the right dispute to arise. Legislation, in contrast, can swiftly respond to the threat of federal lawmaking. For example, a legislative amendment was introduced in the aftermath of the 2008 financial crisis, following statements by then SEC Chairwoman, Mary Schapiro, who indicated the Commission's intent to revisit federal proxy rules. While courts' adherence to fiduciary duties may have limited their ability to uphold bylaws reimbursing expenses incurred by a shareholder nominating its own directors in proxy fights, legislation has greater capacity to authorize such bylaws.[112] Similarly, the legislative extension of personal jurisdiction to officers can be viewed as Delaware's response to the corporate accountability scandals of Enron and WorldCom, which also led to the Sarbanes-Oxley Act and changes to Stock Exchange rules.[113]

Third, legislation enables Delaware to address real or perceived concerns of a mass exodus of companies in response to court decisions. Assume that a decision or several decisions trigger widespread threats by companies or their advisors to reincorporate outside Delaware. For our purposes, it does not matter whether these threats arise because the decision is erroneous and reduces company value or too restrictive of powerful corporate insiders.[114] For the reasons explained above, even if courts were as motivated as the legislature to overturn the decision, their inherent institutional constraints may prevent them from doing so quickly.[115]

111. *See, e.g.*, Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529 (2000).

112. *See* CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 239 (Del. 2008); H.B. 19, 145th Gen. Assemb. (Del. 2009); Black & Alexander, *infra* note 202; Skeel, Jr. et al., *infra* note 212 and accompanying text.

113. *See* Hamermesh et al., *infra* note 137 and accompanying text; *see also* Richards, Layton & Finger, *infra* note 137 (stating in 2003, in the wake of a series of corporate scandals, Section 3114 was amended to add executive officers).

114. Proponents of the race to the top view would support the first explanation. Proponents of the race to the bottom view would support the latter.

115. Our discussion in the text assumes that Delaware's judicial and legislative branches are equally responsive to the threat of exodus. As we explain in Part IV, however, our analysis calls for further research into this

Finally, this strategy is hard to mimic. Jurisdictions that wish to challenge Delaware's dominance, such as Nevada, Texas, or foreign jurisdictions, have formed specialized courts with expert judges. However, our analysis shows that the quality of Delaware's corporate law also depends on the interaction between its judiciary and legislature. A jurisdiction that would like to mimic Delaware's strategy will need to establish an ongoing process of reviewing judicial decisions to determine the need for a legislative response.

We have explained how the combination of judge-made law and legislative responses can strengthen Delaware's competitive strategy. This method of lawmaking, however, comes with its own risks. First, leaving courts to set norms while relying on legislation to respond to court decisions increases the risk of disagreement and tension between Delaware's judiciary and legislative branches. Second, our analysis above assumes that legislative responses do not lead to an open conflict between Delaware's judiciary and the legislature. Delaware's competitive strategy relies on its reputation for judicial independence and 'professional' lawmaking, free of political or interest group influence. However, legislative responses that spark open controversy could be viewed as undermining judicial independence. They also invite speculation about the effect of interest groups on Delaware's corporate law.[116] Somewhat surprisingly, almost all the legislative responses in our sample were not openly contentious.[117] This relatively harmonious interaction between Delaware's courts and its legislature could explain why this decades-long pattern has largely been overlooked by corporate law scholars.[118] The 2024–25 amendments, however, have shown that legislative responses can create tension between the judiciary and the legislature and invite questions about the forces shaping Delaware's corporate law.

III. Legislative Responses to Court Decisions: 1967–2025

This Part presents our study of DGCL amendments enacted in the past six decades in response to court decisions. Section A discusses the methodology we use to identify these amendments and describes our key findings. Section B provides detailed analyses of some examples of past legislative responses.

A. Methodology and Findings

We reviewed all amendments to the DGCL between 1967 and 2025 to identify legislation that responds to court rulings. For each amendment, we documented the court ruling that appeared to prompt the change as well as the nature (override, conform, clarify, other) and timing of the legislative response (the time between the court decision and legislation). A list of these amendments appears in Online Appendix A.[119]

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question. To the extent that the legislature is more responsive than courts to the threat of exodus, legislative responses can serve as a 'safety valve' to ensure that Delaware remains attractive as a venue for incorporation.

116. Recall that one of the purported advantages of Delaware's reliance on judge-made law is the fact that judges are presumably less susceptible to pressure by interest groups. *See e.g.*, Fisch, *supra* note 54, at 1092–95.

117. *Cf.* Christiansen & Eskridge, *supra* note 110, at 1414 (finding that 20% of Congressional overrides of Supreme Court decisions dealt with contentious issues).

118. *See supra* Part I (discussing the prevailing perspective on Delaware's Law).

119. *See* Assaf Hamdani & Kobi Kastiel, *Courts, Legislation and Delaware Corporate Law*, 1115–42 (Eur. Corp. Governance Inst., Working Paper No. 869, 2025) [hereinafter APPENDIX A], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5391963 (on file with the *Journal of Corporation Law*).

Identifying the amendments that responded to court rulings is challenging because the Council's work proceeds privately. The Council does not release detailed minutes of the discussions preceding legislative amendments, and the explanations it provides for these amendments are often very brief.[120] To better understand the background of legislative amendments and their relationship to judicial decisions, we examined commentaries on amendments to the DGCL published annually by two prominent Delaware law firms, Young Conaway and Morris Nichols.[121] In some instances, we managed to uncover additional information about the legislative amendments. This was the case, for example, with the substantial amendment to the DGCL in 1967, or the exceptional instances when the Council did publish explanatory reports on the legislative amendment.

We include in our sample only those amendments for which our reading of the legislative history through law firms' analyses, the Corporate Law Section's reports, or scholarly writing clearly indicates that legislation responded to court rulings. Moreover, we limit our sample to amendments to Delaware's Corporations statute, the DGCL. We did not study amendments to statutes governing other business entities, such as LLCs.

Our methodology has several limitations in capturing the full dynamics between courts and legislation. Due to the limited availability of legislative history, we may have overlooked some legislative amendments responding to court decisions. In addition, while we focus on legislative actions, we cannot discount the possibility that the courts' awareness of potential legislative responses influences their decisions. For example, courts may narrow the scope of their rulings to avoid prompting legislative reaction. Conversely, they may issue broader decisions although they may create difficulties for practitioners, expecting the legislature to provide clarifications or adjustments. We also do not examine how courts reacted to legislative interventions. Arlen, for example, demonstrates how Delaware courts developed the *Caremark* doctrine around the bad faith exception to Section 102(b)(7).[122]

How frequent are legislative responses to courts' decisions in Delaware? Have these interventions become more frequent over time? How fast does the legislature react? Are legislative amendments consistent with courts' position (for example, responding to judges' remarks calling for legislative amendments to clarify rules) or do they override court decisions?

Frequency. We find a pattern of legislative responses that is more common than previously recognized. During our study period (from 1967–2025), we find 43 legislative responses (an average of 0.72 per year). We also find that the frequency of legislative responses has increased in recent years. In the 2000s (2000–2025), the average rises to 1.00 per year, compared to 0.52 per year in the earlier period. In the past five years, we have documented eight legislative responses (an average of 1.6 per year).

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120. Hamermesh, *supra* note 19, at 1756 ("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.").

121. University of Pennsylvania Carey Law School, *Delaware Corporation Law Resource Center*, DEL. GEN. CORP. L. (2025), https://www.law.upenn.edu/delawarecorporatehistory/dgcl.php/ [https://perma.cc/377J-VU3X].

122. Jennifer H. Arlen, *The Story of Allis-Chalmers,* Caremark*, and* Stone*: Directors' Evolving Duty to Monitor*, *in* CORPORATE LAW STORIES 323 (J. Mark Ramseyer ed., 2009).

Timing. On average, legislative responses in our sample occurred 5.5 years after the court decision, with the median time gap being 1.5 years.[123] There has often been a notable gap between court decisions and legislative responses. Excluding the 2024–25 amendments (which are clear outliers), about 80% of the amendments in our sample occurred at least a year after the court decision. For instance, the enactment of Section 102(b)(7) arrived approximately 1.5 years after the *Van Gorkom* decision. Similarly, legislative action regarding fee-shifting bylaws occurred about 13 months after the court's decision.[124] The high-profile legislation involving Section 203 (Delaware antitakeover rule) underwent a rigorous review process that included about 150 comment letters, substantive revisions, and an additional round of circulation and comments.[125] In less pressing matters, legislative action sometimes occurred years later. For example, the amendment regarding corporate opportunities came a decade after the court decision.[126]

Type of Legislative Responses. For each amendment, we used our sources' description to determine whether the amendment aimed at overriding court decisions, conforming the statute to the rulings, clarifying them, or otherwise addressing their consequences. We realize the inherent limitations of this classification,[127] and we use it only to illustrate how contemporary commentators perceived the nature of the legislation. We found that 44% of the amendments clarified confusing rules or standards created by courts; 19% aligned the DGCL with existing case law; and 7% addressed the consequences of court decisions without directly challenging them. Only 30% of the responses in our sample directly override court decisions. When examining the period from 2000 to 2025, the rate of overrides increases to 38% (compared to the earlier period's 9%).

Voting Records. Data we manually collected on the voting records of the amendments to the DGCL from 1998 to 2025 show that the legislative process in the General Assembly is marked by a consensus on corporate legislation.[128] In most instances, these amendments were passed unanimously or with only one dissenting vote, highlighting the broad bipartisan support they typically receive. This also includes amendments that insulated insiders from liability. Until the 2024–25 amendments, only one substantive amendment that deals with a substantive corporate law issue—the *fee-shifting* amendment—encountered opposition from several (Republican) members who seemingly wanted stricter limitations on litigation.[129]

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123. *See* APPENDIX A, *supra* note 119.

124. *Id.*

125. This process included feedback from the Securities and Exchange Commission (SEC), corporate lawyers, and various stakeholders. *See* Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 906 (1990); Hamermesh, *supra* note 19, at 1778 ("[S]ection 203 is unique in its adoption: It was intentionally exposed for public comment, received plenty, and was the subject of extensive legislative hearings.").

126. *See* APPENDIX A, *supra* note 119.

127. For example, the synopsis may state that the amendment is clarifies existing case law while a careful reading may suggest that the amendment overrides the ruling.

128. Data is on file with the authors.

129. Two other amendments (related to annual fee increases) faced some resistance, but they did not pertain to substantive corporate law issues. *See* H.B. 519, 144th Gen. Assemb. (Del. 2008); H.B. 267, 142d Gen. Assemb. (Del. 2003). Moreover, in 2023, State Representative Madinah Wilson-Anton challenged proposed changes to the DGCL that "allowed corporations to dilute the voting power of retail investors in corporate decision-making" by changing the standard by which votes are counted. In an attempt to block the proposed bill, Wilson-Anton proposed another amendment that was defeated in an 11–29 vote in the House. *See* Jordan Howell, *Special Interests*

B. Examples

1. Out of Pocket Liability

Director and Officer Exculpation. Perhaps the most famous legislative response to a court ruling in corporate law is the enactment of the director exculpation provision in the aftermath of *Smith v. Van Gorkom*.[130] In that seminal 1985 case, 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 information.[131] By applying and arguably shaping fiduciary duties, the decision transformed the norms concerning M&A practices.[132]

This change, however, came with the perceived cost of increased exposure to out-of-pocket liability. The decision sparked concern that it had weakened the protection directors previously enjoyed under the "business judgment rule." D&O insurance premiums surged, fueling fears of an insurance crisis.[133] There were also claims about "an exodus of talented directors and potential directors from corporations" due to the enhanced litigation risk and the threat of liability.[134]

Delaware responded by enacting Section 102(b)(7) of the DGCL in 1986.[135] The new provision did not provide a statutory definition of the duty of care or the business judgment rule. Rather, it allowed companies to adopt charter amendments to exempt directors from monetary liability for breaches of duty of care.[136] In the year following this enactment, thousands of companies changed their charters to adopt the exculpation provision.[137]

The officer exculpation amendment is a more recent example of a legislative response to court developments that heightened the risk of liability for corporate insiders. Originally,

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Pull Back on Delaware Corporate Law Changes After Wilson-Anton Amendment, DEL. CALL (Jan. 22, 2024), https://delawarecall.com/2024/01/22/special-interests-pull-back-on-delaware-corporate-law-changes-after-wilson-anton-amendment/ [https://perma.cc/9YMQ-FWMH].

130. Smith v. Van Gorkom, 488 A.2d 858, 866 (Del. 1985).

131. *Id.* at 864.

132. *See, e.g.*, Rock, *supra* note 29; *see also* Elson, *supra* note 29, at 677 (explaining that "[Van Gorkom] served to create a number of new and important guideposts to 'informed' [Board] decisionmaking").

133. *See* Dennis J. Block, Nancy E. Barton & Alan E. Garfield, *Advising Directors on the D&O Insurance Crisis*, 14 SEC. REGUL. L.J. 130 (1986); *see also* Romano, *supra* note 62, at 361–62 (stating *Van Gorkom* "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").

134. *Id.*; *see also* Stephen P. Lamb & Joseph Christensen, *Duty Follows Function: Two Approaches to Curing the Mismatch Between the Fiduciary Duties and Potential Personal Liability of Corporate Officers*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 45, 53 n.31 (2012) (noting that difficulty of finding D&O insurance could lead to "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").

135. S.B. 533, 133d Gen. Assemb. (Del. 1986); Lewis S. Black, Jr. & A. Gilchrist Sparks, III, *Analysis of the 1986 Amendments to the Delaware Corporation Law*, PRENTICE-HALL INC. 311, 312 (July 1986).

136. *See* Lamb & Christensen, *supra* note 134, at 46 (explain that 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").

137. *See* 1 DEL. CORP. L. & PRAC. § 6.02 n.55 (2023) (providing that over 13,000 charter amendments were filed in the year following the enactment of Section 102(b)(7)).

Section 102(b)(7) applied only to directors.[138] Perhaps it was deemed unnecessary to exculpate officers because, until the 2003 amendment to Section 3114 of the DGCL, Delaware courts generally lacked personal jurisdiction over officers.[139] Even after 2003, fiduciary litigation targeting officers remained relatively uncommon.[140]

However, developments in merger litigation have increased officers' exposure to duty of care claims. In *Morrison v. Berry*, for instance, the court declined to dismiss claims against the target's general counsel and chief executive officer, finding it reasonably plausible that these officers were grossly negligent in preparing the disclosure documents.[141] In *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.[142] In *In re Baker Hughes Inc.,* the court found that the CEO may be subject to liability with respect to his signing the company's proxy statement.[143] And the court in *Roche* sustained claims against the CEO for an allegedly misleading proxy because she was involved in preparing the proxy.[144]

Critics portrayed these claims as nuisance claims that lead to expensive and time-consuming discovery that gave the plaintiffs leverage to extract a settlement.[145] Supporters of these claims, in contrast, contended that they often involved duty of loyalty violations (and not just due care claims) and that access to discovery made it easier to substantiate the loyalty claims.[146] We do not take a stand. Regardless of the reasons underlying these

138. Lamb & Christensen, *supra* note 134; *2022 Proposed Amendments to the General Corporation Law of the State of Delaware*, RICHARDS, LAYTON & FINGER (Apr. 21, 2022), https://www.rlf.com/2022-proposed-amendments-to-the-general-corporation-law-of-the-state-of-delaware [https://perma.cc/F3CP-WQCJ]; 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).

139. 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 could not be named as defendants in Delaware. Section 3114 was amended only in 2003 to include executive officers. Hamermesh, Jacobs & Strine, *supra* note 138, at 365.

140. In 2009, the Delaware Supreme Court held that officers owe the same fiduciary duties as directors. *See* Gantler v. Stephens, 965 A.2d 695, 708–09 (Del. 2009). That decision led a prominent Delaware judge to claim that "[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 & Christensen, *supra* note 134, at 47.

141. *See* Morrison v. Berry, No. 12808, 2019 Del. Ch. LEXIS 1412 (Del. Ch. Dec. 31, 2019).

142. *See In re* Mindbody, Inc., No. 2019-0442, 2020 WL 5870084 (Del. Ch. Oct. 2, 2020).

143. *See In re* Baker Hughes Inc., Merger Litig., No. 2019-0638, 2020 WL 6281427 (Del. Ch. Oct. 27, 2020).

144. *See* City of Warren Gen. Emps.' Ret. Sys. v. Roche, No. 2019-0740, 2020 WL 7023896 (Del. Ch. Nov. 30, 2020).

145. Hamermesh, Jacobs & Strine, *supra* note 138, 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* Edward B. Micheletti, *Recent Trends in Officer Liability*, SKADDEN (Dec. 18, 2020), https://www.skadden.com/insights/publications/2020/12/insights-the-delaware-edition/recent-trends-in-officer-liability [https://perma.cc/W5PT-XDN8] (discussing increased officer exposure for duty of care breaches); RICHARDS, LAYTON & FINGER, *supra* note 138.

146. 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 employment). *See* Joel E. Friedlander, Partner, Friedlander & Gorris, P.A., Transcript of Speech delivered at Harry Radzyner Law School, Reichman University, in Herzliya, Israel on December 26, 2023, *Thoughts of a Jewish-American Plaintiffs' Lawyer on the Past and Present of*

developments or their merits, they raised the specter of significant personal liability for officers—for whom the Section 102(b)(7) exculpation was unavailable.

In 2022, Delaware amended Section 102(b)(7) to allow corporations to include provisions in their certificate of incorporation exculpating officers from monetary liability for duty of care claims.[147] Officer exculpation applies only to *direct* (and not derivative) claims—the type of claims that are typical in M&A litigation.[148] Within less than two years, over 440 Delaware companies proposed amendments to their certificates of incorporation to exculpate their officers, and most of these proposals (88%) were successful.[149]

It should be noted that after *Van Gorkom*, several states adopted "self-executing" arrangements that automatically apply to all corporations, without requiring a shareholder vote.[150] Delaware did not follow that path; instead, it conditioned exculpation of directors and officers on shareholder approval.

Captive Insurance. In September 2021, the Delaware Chancery Court denied a motion to dismiss a derivative lawsuit against the Boeing Company's directors.[151] The court signaled its willingness to accept the allegations that Boeing's directors had failed to fulfill their oversight responsibilities, known as "*Caremark* duties,"[152] by neglecting to monitor

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Stockholder Litigation (Jan. 3, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4683104 (on file with the *Journal of Corporation Law*).

147. Ethan Klingsberg & Oliver Board, *DGCL Amendment Merits Amending Charters and Engagement with Institutional Shareholders*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 4, 2022), https://corpgov.law.harvard.edu/2022/09/04/dgcl-amendment-merits-amending-charters-and-engagement-with-institutional-shareholders/ [https://perma.cc/8YLG-CS4V].

148. A related amendment allowed the company to define which officers would be subject to the definition of "officer" in those sections of the DGCL that grant indemnification and reimbursement rights. That clause allows companies to cover a wider group of officers. H.B. 341, 150th Gen. Assemb. (Del. 2020).

149. Even failed proposals received an average support of 83% of the shares present; however, such support is insufficient if the corporation's charter required a supermajority vote 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/ [https://perma.cc/45JB-TZ3V]; Andrew J. Noreuil & Andrew J. Stanger, *Developments and Trends in Delaware Officer Exculpation Charter Amendments*, MAYER BROWN (June 25, 2024), https://www.mayerbrown.com/en/insights/publications/2024/06/developments-and-trends-in-delaware-officer-exculpation-charter-amendments [https://perma.cc/YW9V-X9XZ]; *see also* Jens Frankenreiter & Eric L. Talley, *Sticky Charters? The Surprisingly Tepid Embrace of Officer-Protecting Waivers in Delaware* (EUR. CORP. GOVERNANCE INST., Working Paper No. 762, 2024) (showing that adoption of exculpatory provisions has not notably affected the companies' share prices).

150. For states that adopted a self-executing arrangement, see FLA. STAT. ANN. § 607.1645 (1989); IND. CODE ANN. § 23-1-35-1 (2009); WIS. STAT. ANN. § 180.307 (1988). An 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 (2021) (as amended by H.B. No. 902, Laws of 1986). For an analysis of default arrangement in corporate law, see generally Lucian A. Bebchuk & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution*, 96 NW. U. L. REV. 489 (2002).

151. *See In re* Boeing Co. Derivative Litig., No. 2019-0907, 2021 WL 4059934 (Del. Ch. Sept. 7, 2021).

152. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996). 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).

the safety of the company's 737 Max airplanes.[153] That oversight lapse was linked to the Lion Air and Ethiopian Airlines crashes that resulted in the loss of 346 lives.[154] Not long afterward, the Boeing directors settled for $237.5 million, marking one of the largest settlements in the history of derivative lawsuits.[155]

This case received significant attention from the business press and the legal community.[156] 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.[157] 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.[158] Corporate law scholars argued that this line of decisions marked a "new era" in which Delaware would impose enhanced duties on directors.[159]

The *Boeing* settlement followed other large settlements of derivative litigation where directors and officers (D&O) insurers made a significant contribution.[160] Practitioners

153. *See In re* Boeing Co. Derivative Litig., 2021 WL 4059934, at *2.

154. *Id.* at 44.

155. Kevin LaCroix, *Boeing Air Crash Derivative Lawsuit Settles for $237.5 Million*, D&O DIARY (Nov. 7, 2021), https://www.dandodiary.com/2021/11/articles/shareholders-derivative-litigation/boeing-air-crash-derivative-lawsuit-settles-for-237-5-million/ [https://perma.cc/4UMN-LD9S].

156. 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.

157. *See* Marchand v. Barnhill, 212 A.3d 805 (Del. 2019); *In re* Clovis Oncology, Inc. Derivative Litig., No. 2017-0222, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019); Hughes v. Xiaoming Hu, No. 2019-0112, 2020 WL 1987029 (Del. Ch. Apr. 27, 2020); Teamsters Local 443 Health Servs. & Ins. Plan v. Chou, No. 2019-0816, 2020 WL 5028065 (Del. Ch. Aug. 24, 2020); Inter-Mktg. Grp. USA, Inc. v. Armstrong, No. 2017-0030, 2020 WL 756965 (Del. Ch. Jan. 31, 2020). For analysis of this development, see, for example, Jennifer H. Arlen, *Evolution of Director Oversight Duties and Liability Under Caremark: Using Enhanced Information-Acquisition Duties in the Public Interest*, *in* RESEARCH HANDBOOK ON CORPORATE LIABILITY 194 (Martin Petrin & Christian A. Witting eds., 2023).

158. Edward B. Micheletti, *The Risk of Overlooking Oversight: Recent Caremark Decisions from the Court of Chancery Indicate Closer Judicial Scrutiny and Potential Increased Traction for Oversight Claims*, SKADDEN (Dec. 15, 2021), https://www.skadden.com/insights/publications/2021/12/insights-the-delaware-edition/the-risk-of-overlooking-oversight [https://perma.cc/9NKB-Y3L4]; *see also Tectonic Forces to Watch in Corporate Litigation*, WACHTELL, LIPTON, ROSEN & KATZ (Jan. 23, 2020), https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.26750.20.pdf [https://perma.cc/FB2F-PAAH] (noting there is an expectation "to see a steady uptick in *Caremark* filings"); *see also* LaCroix, *supra* note 155 (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.

159. *See, e.g.*, Arlen, *supra* note 157, at 194 (noting that in Caremark 2.0, "Delaware imposes enhanced, and more specific, oversight duties on directors in certain circumstances"); *see also* John Armour, Jeffrey Gordon & Geeyoung Min, *Taking Compliance Seriously*, 37 YALE J. ON REG. 1, 58 (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"); *see also* Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1860 (2021) (discussing "courts' increased willingness to scrutinize directors' conduct in [the Caremark] context" in the new Caremark era).

160. *See* LaCroix, *supra* note 155 (discussing the $300 million Renren 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 D&O coverage).

started describing rising challenges for corporations seeking D&O coverage, including premium hikes and less favorable coverage terms.[161] Experts estimated that the large derivative settlements had driven up the cost of D&O insurance by 300–500% for most companies,[162] and that existing insurance policies, which typically include carveouts for loyalty claims, might not suffice to cover directors' potential liability,[163] and that the perceived liability risk "can reduce their willingness to serve" as directors.[164]

In February 2022, just four months after the *Boeing* settlement, Delaware amended the DGCL to permit companies to establish subsidiaries to insure officers and directors against amounts paid in derivative claims.[165] This seemingly technical amendment overturns a fundamental principle of corporate law: a company cannot cover damages imposed on directors in a derivative lawsuit brought on the company's behalf.[166] On its face, the amendment contradicts the longstanding prohibition on indemnifying officers and directors for payments made to the company in settlement of such claims.[167]

To clarify, Section 145(g) of the DGCL explicitly permits corporations to *insure* a director or officer 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,[168] and corporations were reluctant to

161. Peter D. Luneau & Edward B. Micheletti, *Delaware General Corporation Law Amended to Authorize Use of Captive Insurance for D&O Coverage*, SKADDEN (Feb. 9, 2022), https://www.skadden.com/insights/publications/2022/02/delaware-general-corporation-law [https://perma.cc/4DVE-TS6V].

162. *See* Lauri Floresca, *D&O Captives Have Arrived: Laser DIC Fills the Gaps*, JD SUPRA (Mar. 7, 2023), https://www.jdsupra.com/legalnews/d-o-captives-have-arrived-laser-dic-8198856/ [https://perma.cc/5H3M-45AG] (reporting an increase in D&O Side A coverage).

163. John Mark Zeberkiewicz, *Amendments to the DGCL Permit Captive D&O Insurance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 24, 2022), https://corpgov.law.harvard.edu/2022/02/24/amendments-to-the-dgcl-permit-captive-do-insurance/ [https://perma.cc/P76R-6WTP]; *see also* Marchand v. Barnhill, 212 A.3d 805, 824 (Del. 2019) (holding that a failure to meet directors' Caremark duties constitutes a breach of the duty of loyalty).

164. Stephen M. Bainbridge, *Don't Compound the Caremark Mistake by Extending It to ESG Oversight*, 77 BUS. LAW. 651, 667–70 (2022); *see also* Angela N. Aneiros & Karen E. Woody, *Caremark's Butterfly Effect*, 72 AM. U. L. REV. 719, 770–71 (2022) (the rise of Caremark claims could have significant implications for D&O underwriters "who are notably concerned about the large breach of fiduciary duty suit settlements and cost of litigation").

165. DEL. CODE ANN. tit. 8, § 145(j).

166. Daniel E. Chefitz & Lauren S. Burke, *Delaware Fully Embraces Captive Insurance as an Option to Protect Directors and Officers*, MORGAN, LEWIS & BOCKIUS LLP (Feb. 4, 2022), https://www.morganlewis.com/pubs/2022/02/delaware-fully-embraces-captive-insurance-as-an-option-to-protect-directors-and-officers [https://perma.cc/4FVT-RPN3] ("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.").

167. DEL. CODE. ANN. tit. 8, § 145(b). The one exception to this prohibition was the indemnification against reasonable expenses if the director has not been adjudged liable to the corporation.

168. When Delaware prohibited the indemnification of derivative claims in 1967, it permitted 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 DEL. 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 (2011).

use captive insurance as protection from *derivative* claims.[169] The amendment removed this uncertainty, responding to the concern that the apparent expansion of directors' oversight duties would increase their exposure to out-of-pocket liability.

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 unexculpable under Section 102(b)(7), 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).[170]

The exculpation and captive insurance examples have a couple of reoccurring features. *First*, the Delaware legislature did not interfere directly with the norms promulgated by courts. Rather, it devised a new mechanism to shield insiders from out-of-pocket liability for non-conflicted decisions. For example, Delaware could have responded to *Boeing* by limiting *Caremark* claims altogether, but it did not follow this path.[171] This strategy both preserves the courts' prominent role as the authority on fiduciary norms and lowers the political salience of these legislative interventions. Narrowing the scope of boards' fiduciary duties following high-profile cases, such as Boeing, is a politically risky move that could generate a public backlash.[172] *Second*, the amendments were tailored to address specific litigation risks. For example, officer exculpation applies only to *direct claims*, which are relevant to the specific merger litigation risk that officers faced.[173]

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169. *See* Kevin LaCroix, *Delaware Legislature Passes Bill Allowing Use of Captives for D&O Insurance*, D&O DIARY (Jan. 30, 2022), https://www.dandodiary.com/2022/01/articles/d-o-insurance/delaware-legislature-passes-bill-allowing-use-of-captives-for-do-insurance/ [https://perma.cc/Y5MX-WKNJ]; *see also* Priya C. Huskins & Evan Hessel, *D&O Game Changer: Delaware Approves Using Captives for D&O Insurance*, A.B.A. (Feb. 8, 2022), https://www.americanbar.org/groups/business_law/resources/business-law-today/2022-february/d-o-game-changer/ (on file with the *Journal of Corporation Law*) ("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.").

170. 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 at addressing *Caremark* claims. *See* S.B. 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 such claim." *Id.*

171. Nevada, for example, exculpates directors and officers from any act that does not amount to a conscious violation of the law. Under Nevada's 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." NEV. REV. STAT. § 78.138(7)(b)(2) (2025). For a detailed analysis, see Michal Barzuza, *Nevada v. Delaware: The New Market for Corporate Law* (EUR. CORP. GOVERNANCE INST., Working Paper No. 761, 2024).

172. *See* Jennifer H. Arlen, *Countering Capture: A Political Theory of Corporate Criminal Liability*, 47 J. CORP. L. 861, 882–84 (2022) (showing how companies do not lobby against respondent superior as it is too politically salient. Instead, they lobby to cut the budgets of enforcement agencies because the public is less aware to these issues).

173. A broader exculpation provision that would also cover derivative lawsuits is not required due to the demand requirements. In derivative claims, plaintiffs either must 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 v. Zuckerberg, 250 A.3d 862, 876 (Del. Ch. 2020), *aff'd*, 262 A.3d 1034 (Del. 2021). It is challenging for plaintiffs to demonstrate that the demand is futile when the board comprises a majority of impartial directors. *See, e.g.*, City of Coral Springs Police Officers' Pension Plan v. Dorsey, No. 2022-0091, 2023 WL 3316246 (Del. Ch. May 9, 2023).

Indemnification. Indemnification statutes were introduced to address concerns raised by the 1939 New York case *New York Dock Co. v. McCollom*.[174] In *McCollom*, the court ruled that a corporation lacked the authority to pay the legal expenses of its directors in a derivative lawsuit, even when the directors were vindicated on the merits. Although this ruling was rejected by several courts, it caused significant alarm among executives.[175] In response, Delaware adopted Section 122(10),[176] granting corporations the power to indemnify directors or officers for expenses incurred, unless the director was "adjudged to be liable" for negligence or misconduct in the performance of duty.[177]

Ambiguity persisted regarding the application of the new provision to settlements of derivative lawsuits. A 1962 decision, *Essential Enterprises Corp. v. Dorsey Corp*,[178] urged the legislature to clarify whether it was permissible to indemnify directors' legal expenses in a derivative lawsuit settled with court approval.[179] Another question concerned a corporation's ability to purchase an insurance policy covering directors' and officers' liability.[180] This uncertainty arose from the public policy against insuring misconduct, even when the director personally pays the premium.[181] It was also argued that D&O insurance is unlawful when the statute explicitly prohibits indemnification.[182] The new corporations statute in 1967 resolved these uncertainties, striking the following compromise: insiders could be indemnified for legal expenses in derivative litigation but not for payments made pursuant to a judgment or settlement.[183] The statute also authorized corporations to purchase D&O insurance, regardless of whether indemnification was permissible.[184]

A more recent example occurred in 2008. The Court of Chancery held in *Schoon v. Troy Corp.* that the right to indemnification under a bylaw does not vest and can therefore be revoked prior to the filing of a lawsuit against directors.[185] While the decision could be

174. *See* New York Dock Co., v. McCollom, 16 N.Y.S.2d 844 (N.Y. Sup. Ct. 1939); Joseph F. Johnston, Jr., *Corporate Indemnification and Liability Insurance for Directors and Officers*, 33 BUS. LAW. 1993, 1994–95 (1978).

175. Joseph W. Bishop, Jr., *New Cure for an Old Ailment: Insurance Against Directors' and Officers' Liability*, 22 BUS. LAW. 92, 97 (1966). In the cases following *McCollom*, it was held that the corporations should indemnify directors who prevail on the merits in derivative litigation, "perceiv[ing] 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, 19 A.2d 344 (N.J. Ch. 1941); *In re* E.C. Warner Co., 45 N.W.2d 388 (Minn. 1950).

176. *See* Bishop, *supra* note 175, at 98 (discussing Delaware's legislation).

177. *See* DEL. CODE ANN. tit. 8, § 145(b).

178. Essential Enter. Corp. v. Dorsey Corp., 182 A.2d 647, 652–53 (Del. Ch. 1962). In that case, the settlement terms did not impose any personal liability on the individual defendants.

179. 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 175, at 99.

180. The ambiguity resulted from the words: "[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." 44 Del. Laws Ch. 125 (1943) (amending Del. Rev. Code ch. 65 § 1 (1935)). Directors and their advisors argued that the non-exclusivity clause should enable the use of insurance through a contractual arrangement.

181. Bishop, *supra* note 175, at 107–08.

182. *Id.*

183. *See* DEL. CODE ANN. tit. 8, § 145(b); S. Samuel Arsht & Walter K. Stapleton, *Analysis of the New Delaware Corporation Law*, PRENTICE-HALL INC. 321, 327 (1967).

184. DEL. CODE ANN. tit. 8, § 145(g).

185. Schoon v. Troy Corp., 948 A.2d 1157, 1165–66 (Del. Ch. 2008).

well justified in light of the unique facts of this case, it received significant attention within the legal community.[186] Prominent attorneys cautioned that the ruling "may leave former directors, in particular, vulnerable to bylaw amendments affecting their right to advancement of expenses."[187] 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."[188] In response, Delaware amended Section 145(f) to establish a default rule clarifying when indemnification and advancement rights vest. The amendment assures directors that indemnification or advancement rights cannot be revoked retroactively.[189]

2. *Fiduciary Duties and Private Ordering*

Corporate Opportunities. The corporate opportunities doctrine is part of the duty of loyalty.[190] It prohibits fiduciaries from exploiting business opportunities that belong to the corporation unless they first present the opportunity to the corporation and obtain authorization to pursue it.[191] Determining which opportunities "belong" to the corporation is a complex issue that has been the subject of litigation.[192]

In 2000, Delaware added new subsection 122(17),[193] granting companies the authority to renounce, in advance, their interest or expectancy in specified business opportunities.[194] Before this amendment, the DGCL did not address the permissibility of such

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186. Michal Barzuza, *Interlocking Board Seats and Protection for Directors after Schoon*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 13, 2014), https://corpgov.law.harvard.edu/2014/01/13/interlocking-board-seats-and-protection-for-directors-after-schoon/ [https://perma.cc/D9A9-2A24].

187. David A. Katz & Laura A. McIntosh, *Corporate Governance Update: Delaware Decision Highlights Need for Director Protection*, WACHTELL, LIPTON, ROSEN & KATZ 4 (July 24, 2008), https://corpgov.law.harvard.edu/wp-content/uploads/2008/08/delaware-decision-highlights-need-for-director-protection.pdf [https://perma.cc/Y4LG-ESSL].

188. *Id.* In the aftermath of *Schoon*, numerous Delaware firms adopted additional indemnification protections for their directors. *See* Barzuza, *supra* note 186 (finding that many firms that did not already have individual indemnification contracts in place acted to adopt some form of protection, and most firms did so within eight months of the opinion).

189. Amended Section 145(f) permits a corporation to opt out of the new default rule by adopting a certificate of incorporation or bylaw provision to allow the elimination of indemnity or advancement rights even after an act or omission occurs. *See* JEFFREY R. WOLTERS & JAMES D. HONAKER, ANALYSIS OF THE 2009 AMENDMENTS TO THE DELAWARE GENERAL CORPORATION LAW 5 (2009).

190. Bainbridge, *supra* note 74, at 13.

191. S*ee, e.g.*, Guth v. Loft, Inc., 5 A.2d 503 (Del. 1939) (discussing that corporate officers and directors may not exploit their positions of trust and confidence for personal gain); Broz v. Cellular Info. Sys., 673 A.2d 148 (Del. 1996) (explaining that under the corporate opportunity doctrine, an officer or director may not take a business opportunity for personal gain when the corporation is able to pursue it, has an interest in it, and doing so would conflict with fiduciary duties).

192. Gabriel Rauterberg & Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075, 1075–87 (2017).

193. S.B. 363, 140th Gen. Assemb. (Del. 2000); 72 Del. Laws, ch. 343, § 3 (2000).

194. DEL. CODE ANN. tit. 8, § 122(17) (2000).

provisions.[195] In the 1989 case *Siegman v. Tri-Star Pictures, Inc.*,[196] the Chancery Court addressed a challenge to an amendment of Tri-Star's certificate of incorporation. The amendment specified when two of Tri-Star's shareholders (Coca-Cola and Time) and their appointed directors could engage in the same line of business as Tri-Star or pursue corporate opportunities belonging to Tri-Star.[197] The plaintiff contended that the amendment was invalid because it amounted to an impermissible waiver of the directors' duty of loyalty.[198] The Court agreed, holding that the amendment could be read as eliminating or limiting directors' duty of loyalty.[199]

In the dotcom era of the 1990s, corporate structures of tech firms often involved overlapping board membership and partially overlapping lines of business.[200] These structures challenged the "undivided loyalty" model of corporate opportunities,[201] and increased demand for clarity for directors by specifying, in advance, the type of opportunities that they could pursue through other entities. While at least one post-*Tri-Star* case suggested some judicial support for the use of contractual provisions to limit the scope of the doctrine,[202] considerable uncertainty persisted regarding the validity of these provisions.[203] The 2000 legislative amendment aimed to resolve this uncertainty.[204]

The amendment illustrates the need for legislation to determine the scope of issues that can be governed by private ordering. The *Tri-Star* decision underscored the difficulty of distinguishing between the permissible *ex ante* renunciation of specific opportunities and the impermissible waiver of liability for breaching the duty of loyalty.[205] Market players were probably reluctant to adopt provisions that would challenge this ruling and could

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195. Before the enactment of Section 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 corporation, the directors, and the stockholders . . . if such provisions are not contrary to the laws of this State . . ." DEL. CODE. ANN. tit. 8, § 102(b)(1). Once a director breaches her duty of loyalty, Section 102(b)(7) makes it clear that a director cannot be relieved of that liability. DEL. CODE ANN. tit. 8, § 102(b)(7). However, that section still leaves open whether the corporation may, on incorporation, circumscribe the conduct that generates liability under the duty of loyalty.

196. Siegman v. Tri-Star Pictures, Inc., No. 9477, 1989 WL 48746 (Del. Ch. May 5, 1989).

197. *Id.* at *1–2.

198. *Id.* at *7.

199. *Id.* at *8.

200. Rauterberg & Talley, *supra* note 192, at 1093.

201. *Id.*

202. U.S. WEST, Inc. v. Time Warner Inc., No. 14555, 1996 Del. Ch. LEXIS 55, at *71 (Del. Ch. June 6, 1996) ("[T]here 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 other cases, courts narrowed the scope of corporate opportunities claims involving controlled subsidiaries. *See In re* Digex S'holders Litig., 789 A.2d 1176 (Del. Ch. 2000) (holding the subsidiary had no cognizable corporate interest in selling its own stock, since the opportunity to obtain the highest price belonged to individual shareholders, not the corporation); Thorpe by Castleman v. CERBCO, Inc., 676 A.2d 436 (Del. 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* Rauterberg & Talley, *supra* note 192, at 1094–95.

203. LEWIS S. BLACK, JR. & FREDERICK H. ALEXANDER, ANALYSIS OF THE 2000 AMENDMENTS TO THE DELAWARE GENERAL CORPORATION LAW, 2–3 (Aug. 2000).

204. *Id.*; *see also* Rauterberg & Talley, *supra* note 192, at 1096 (noting that "the amendment specifically permits enforceable [advanced renouncements of corporate opportunities] under Delaware law, a position that—both before and after Siegman—most had considered untenable").

205. *See* Siegman v. Tri-Star Pictures, Inc., No. 9477, 1989 WL 48746 (Del. Ch. May 5, 1989).

lead to lawsuits and the imposition of personal liability on directors. The amendment clarified the scope of issues that can be subject to private ordering.

A related legislative intervention in the context of limited partnership occurred a few years later, arguably as a response to the Delaware Supreme Court's restrictive interpretation of an earlier version of the Delaware Revised Uniform Limited Partnership Act.[206] That amendment authorized the elimination of fiduciary duties of a general partner through contractual arrangements.[207]

Governance Arrangements. In 2008, the Delaware Supreme Court held in *CA, Inc. v. AFSCME* that shareholder-adopted bylaws related to director elections were generally valid under the DGCL.[208] The court also held, however, that a bylaw provision requiring the corporation to reimburse expenses incurred by a shareholder soliciting 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.[209]

In response to *AFSCME*, Delaware added Section 113 that authorizes bylaws requiring a corporation to reimburse proxy solicitation expenses incurred by a stockholder nominating its own directors.[210] Section 113 also identifies a nonexclusive list of conditions that the bylaws may impose on such a right to reimbursement.[211] This list, however, does not include the "fiduciary out" language required by the Delaware Supreme Court in *AFSCME*.[212] This amendment, therefore, illustrates legislation's power to enact arrangements that overcome the constraints associated with fiduciary duties.[213]

In 2006, Delaware amended Section 141(b) of the DGCL to clarify that a director may tender an irrevocable resignation that is effective upon a later date or contingent on the occurrence of a future event.[214] The amendment provides shareholders a means for implementing majority voting arrangements that seek to unseat a director who fails to receive a majority vote in an election.[215] Before the amendment, it was questionable whether a director, as a fiduciary, could irrevocably agree to resign based on future conditions

206. *See* DEL. CODE ANN. tit. 6, § 17-1101(b)–(d) (2005) (as amended by 74 Del. Laws, ch. 265).

207. *See* Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 817 A.2d 160, 167–68 (Del. 2002) (holding that a legislative amendment is required to allow a limited partnership agreement to eliminate a partner's fiduciary duties); *see also* Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1, 11 (2007) (explaining that Delaware courts should focus on enforcing clearly negotiated contractual terms and statutory mandates for unincorporated entities, rather than defaulting to common-law fiduciary concepts).

208. CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 239 (Del. 2008).

209. *Id.*

210. H.B 19, 145th Gen. Assemb. (Del. 2009); WOLTERS & HONAKER, *supra* note 189.

211. *Id.* at 3.

212. *Id.*

213. This amendment was initiated in the wake of the 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 J. CORP. L. 147, 158–60 (2011).

214. DEL. CODE ANN. tit. 8, § 141(b) (2006).

215. Director resignations are an essential complement to a majority voting bylaw because, pursuant to another provision of Section 141(b), even if incumbent directors fail to receive the required vote under a majority voting bylaw, they would remain in office until a successor is elected. *See* Stephen J. Choi et al., *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119, 1122 (2016).

(including the failure to receive a specified majority for reelection).[216] Fiduciary law had created uncertainty regarding the courts' ability to uphold the legal framework that supports majority voting policies.[217] The amendment resolved this uncertainty.

3. *Sticky Rules*

Force the Vote. In 1998, the DGCL was amended to permit merger agreements to require that the merger be submitted to stockholder vote even if the board of directors determines that it is no longer advisable.[218] This amendment was enacted in response to the Delaware Supreme Court's ruling in *Van Gorkom* that the board must recommend a merger before submitting it to a stockholder vote.[219] 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."[220] Yet, parties to a merger might not enter into a merger agreement without the certainty that it will be submitted to a shareholder vote.[221]

Market participants likely hesitated to directly challenge the prevailing view that *Van Gorkom* prohibited the use of *force the vote* provisions. After all, why take the risk that the court would hold that a merger transaction did not meet the DGCL requirements? The amendment provided certainty without requiring transaction planners to incur the risk that their transaction would be invalidated by courts.

4. *Addressing Litigation Developments and Market Practices*

Appraisal litigation. Appraisal is a statutory remedy that allows shareholders to obtain the fair value of shares they were forced to sell in mergers or acquisitions.[222] Delaware has repeatedly amended the appraisal statute,[223] often in response to court rulings.

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216. *See* Dillon v. Berg, 326 F. Supp. 1214, 1225 (D. Del. 1971), *aff'd*, 453 F.2d 876 (3d Cir. 1971) (holding that an 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).

217. David C. McBride & Rolin P. Bissell, *Delaware's Flexible Approach to Majority Voting for Directors*, 10 WALL ST. L. 1 (June 2006). The amendment was passed in the wake of the Enron-era scandals, in the face of increasing pressure from institutional investors to give stockholders more power to discipline boards of directors. 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.*

218. LEWIS S. BLACK, JR. & FREDERICK H. ALEXANDER, ANALYSIS OF THE 1998 AMENDMENTS TO THE DELAWARE GENERAL CORPORATION LAW 4 (1998).

219. Smith v. Van Gorkom, 488 A.2d 858, 888 (Del. 1985).

220. BLACK & ALEXANDER, *supra* note 218; *Forcing a Stockholder Vote After the Board Changes its Recommendation*, LEXISNEXIS (Dec. 5, 2023), https://www.lexisnexis.com/community/insights/legal/b/practical-guidance/posts/forcing-a-stockholder-vote-after-the-board-changes-its-recommendation [https://perma.cc/T3PJ-57BU] ("From an acquirer's perspective, a force-the-vote provision can enhance closing certainty in a merger transaction.").

221. *Id.*

222. David F. Marcus & Frank Schneider, *Appraisal Litigation in Delaware: Trends in Petitions and Opinions (2006-2018)*, HARV. L. SCH. F. 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/ [https://perma.cc/CY4G-R5EZ].

223. Charles K. Korsmo & Minor Myers, *Interest in Appraisal*, 42 J. CORP. L. 109, 113 (2016); *see also* Laster, *supra* note 21, at 1230.

In 1976, reacting to the prevailing judicial method of calculating interest on appraisal funds, Delaware revised the statute to give courts the power to consider "all pertinent factors," including interest rates.[224] This legislation did not provide courts with guidance on selecting the appropriate interest rate. As a result, the determination of a "fair rate" of interest became the subject of litigation that consumed significant time, frustrating the Court of Chancery, and leading it to suggest statutory rate fixing as a sensible resolution.[225] 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."[226] In 2007, Delaware amended the appraisal statute to set a presumptive interest rate of 5% plus the prevailing federal funds rate.

Starting in 2011, there was a noticeable increase in appraisal-related actions.[227] Critics argued that the above-market statutory interest rate sparked a rise in appraisal lawsuits by profit-seeking investors.[228] In 2015, an amendment was proposed to permit a company to preemptively pay an amount it chooses, thereby halting the accumulation of interest on the prepaid sum.[229] This reform was ultimately passed into law in 2016,[230] and at the same time, the legislature enacted another amendment to limit appraisal rights for *de minimis* claims.[231]

The appraisal example illustrates the ongoing interaction between judicial rulings and legislation, whereby the Delaware legislature expands and restricts court discretion based on market and court feedback. Initially, the Delaware legislature expanded judicial discretion to allow for more accurate calculation of interest on appraisal funds. When this led to extensive litigation over interest rates, the legislature intervened to fix the rate by statute. When this adjustment triggered a significant rise in appraisal litigation, the legislature again stepped in. This time, legislation allowed companies to prepay an amount of their choosing to prevent the accumulation of interest and limited appraisal rights for minimal claims.[232]

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224. 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. This broad method prompted the legislature to revise the approach to interest calculation in such cases. *See* Korsmo & Myers, *supra* note 223, at 115.

225. *Id.* at 118–19.

226. *Id.* at 119 (stating that 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).

227. *Id.* at 122.

228. *Id.* at 111–12. Some stockholders, it has been observed, may strategically slow litigation to leverage the statutory interest rates in appraisal cases. This behavior caught the attention of Vice Chancellor Glasscock, who pointed out the need for the issue to be reviewed by the legislative bodies in Delaware.

229. *See* Korsmo & Myers, *supra* note 223, at 111–12.

230. JEFFREY R. WOLTERS & JAMES D. HONAKER, ANALYSIS OF THE 2007 AMENDMENTS TO THE DELAWARE GENERAL CORPORATION LAW (Aug. 2007).

231. 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 B. 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 (on file with the *Journal of Corporation Law*).

232. *See* Korsmo & Myers, *supra* note 223, 112–13.

Without legislative amendments, courts lacked the power to adjust their treatment of appraisal claims to meet these developments.

Lost premium damages. A recent example of an amendment that is aimed to conform the DGCL to market practices is one of the 2024 amendments. The *Crispo* decision addressed the question of whether a target can sue, on behalf of its shareholders, for lost premium damages resulting from the buyer's breaches.[233] In 2005, the Second Circuit ruled in *Consolidated Edison, Inc. v. Northeast Utilities* against target companies seeking such compensation.[234] For nearly two decades, the position of Delaware's courts on the matter was not clear, and practitioners often used contractual terms to enable the target to claim such compensation on behalf of shareholders who are not parties to the merger agreement.[235] In *Crispo*, the Court of Chancery suggested that Delaware might follow the Second Circuit approach and questioned the legality of the prevailing contractual terms.[236]

While the court acknowledged the efficiency of allowing a target company to seek damages on behalf of its shareholders, it asserted that such an approach is on "shaky ground" and is not in line with contract law principles.[237] The amendment clarified that merger agreements may specify remedies for pre-closing breaches, including damages for lost shareholder premium.[238] By authorizing this remedy, the legislative responses purported to conform the DGCL to the existing market practices.[239]

5. *Political Bargains*

Fee-shifting and Forum Selection Bylaws. Rules governing private litigation require a careful balance between discouraging frivolous lawsuits[240] and enabling legitimate claims.[241] Courts alone cannot always achieve this balance.[242] Consider *fee-shifting bylaws*, which require plaintiffs who unsuccessfully sue a company or its directors to pay the defendants' legal costs and expenses.[243] In *ATP Tour, Inc. v. Deutscher Tennis Bund et al.*, the Delaware Supreme Court upheld a fee-shifting bylaw as facially valid.[244] Although the

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233. *See* Crispo v. Musk, 304 A.3d 567 (Del. Ch. 2023).

234. *See* Consol. Edison, Inc. v. Ne. Utilities, 426 F.3d 524 (2d Cir. 2005).

235. *See Proposed Amendments to the Delaware General Corporation Law Would Address Recent Caselaw Regarding Stockholder Agreements and Merger Agreements*, MORRIS NICHOLS (Mar. 28, 2024), https://www.morrisnichols.com/insights-proposed-2024-amendments-delaware-general-corporation-law [https://perma.cc/24P7-23LR].

236. *Id.*

237. *Crispo*, 304 A.3d at 581 (asserting that such an approach is on "shaky ground" and has no legal basis).

238. *Id.*

239. MORRIS NICHOLS, *supra* note 235.

240. Quinn Curtis & 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.").

241. E. Norman Veasey & Michael P. Dooley, *The Role of Corporate Litigation in the Twenty-First Century*, 25 DEL. J. CORP. L. 131, 155 (2000) ("[T]he representative action is vitally important to the well-being and growth of the Delaware corporate law.").

242. *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.").

243. Jessica Erickson, *The Lost Lessons of Shareholder Derivative Suits*, 77 WASH. & LEE L. REV. 1131, 1193 (2020).

244. ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 558 (Del. 2014).

case involved a nonstock membership corporation, the court's reasoning was sufficiently broad to suggest that the decision also applies to public corporations. This ruling sparked debate over the permissibility of fee-shifting clauses in public corporations.[245] At least 70 public companies adopted fee-shifting provisions.[246]

Delaware reacted quickly by amending Section 102 of the DGCL to prohibit the application of the *ATP's* holding to stock corporations.[247] This amendment was intended "to preserve the efficacy of the enforcement of fiduciary duties in stock corporations."[248]

At the same time, another amendment to the DGCL directly addressed private enforcement by authorizing Delaware exclusive forum provisions for internal corporate claims, while expressly prohibiting charter and bylaw provisions that exclude Delaware as a forum for such claims.[249] This amendment essentially codified the Chancery Court ruling in *Boilermakers*,[250] which upheld the validity of bylaws requiring that claims arising under the DGCL be brought exclusively in Delaware. The amendment also essentially overturned the Chancery Court decision in *First Citizens*,[251] which upheld the validity of bylaws requiring claims to be brought outside Delaware.

These concurrent legislative actions work in opposite directions. The fee-shifting amendment removes a disincentive for filing lawsuits, thereby preserving Delaware courts' ability to set norms (and serving the interests of the plaintiff bar). However, it may also negatively impact managers by increasing the likelihood of lawsuits. This is where the forum selection amendment plays a balancing role. By requiring that litigation remain in Delaware, where courts are more likely to screen frivolous lawsuits,[252] this amendment reduces such lawsuits while reinforcing the interests of the Delaware bar and the state's dominance in corporate law. A former Chancellor of the Delaware Chancery Court

245. Laura D. Richman & Andrew J. Noreuil, *Delaware Amends its General Corporation Law to Authorize Exclusive Forum Provisions and Prohibit Fee-Shifting Provisions*, MAYER BROWN (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 [https://perma.cc/RXW4-EW6W].

246. *Id.*

247. Norman M. Powell, John J. Paschetto & Tammy L. Mercer, *Delaware Transactional & Corporate Law Update: Recent Amendments to Delaware's Entity Laws Permit LPs, like LLCs, to Divide and to Form Registered Series, and Provide that Emailing of Notices Will Be Effective for Corporations Unless Stockholders Opt Out, Among Other Changes*, YOUNG CONAWAY (Sept. 2019), https://www.law.upenn.edu/live/files/9921-business-and-tax-section-update-sept-2019pdf [https://perma.cc/6YCV-77E8].

248. 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. S.B. 75, 148th Gen. Assemb. (Del. 2015).

249. 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. F. 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/ [https://perma.cc/5AXE-WWBT].

250. Boilermakers Loc. 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 951–52 (Del. Ch. 2013).

251. City of Providence v. First Citizens BancShares, Inc., 99 A.3d 229, 239 (Del. Ch. 2014).

252. Following the *Trulia* decision, which imposed stringent standards on disclosure-only settlements in Delaware, there was concern that such lawsuits were increasingly filed elsewhere. *See* Chandler & Rickey, *supra* note 249.

described these twin measures as 'a grand bargain' between Delaware's legal community and its corporate citizens.[253]

Courts are limited in their ability to strike such a bargain. Because they do not control the issues brought before them, courts are ill-equipped to create a regulatory framework that balances the interests of different groups when this requires modifying rules that involve distinct legal doctrines. From a doctrinal perspective, in the absence of express statutory language, courts interpreting the general power of the board to adopt bylaws would face challenges in holding that forum selection bylaws are valid only when they require litigation to take place in Delaware.[254]

Finally, legislation can swiftly provide certainty. Over time, the Delaware courts might have arrived at a similar outcome without legislative interventions. It has been suggested, for example, that had fee-shifting bylaws been subjected to prolonged scrutiny in Delaware courts, most of them would not have survived.[255] Yet, this process would likely be relatively slow and involve a period of significant uncertainty, thereby failing to prevent the chilling effect of fee-shifting provisions. The legislative rule spared this lengthy decision-by-decision process, which would have imposed substantial costs on defendants, plaintiffs, and the public.[256]

The need to provide certainty and prevent real or perceived threat of corporate exodus from Delaware also motivated the controversial 2024–25 amendments, which marked a departure from the traditional pattern of legislative interventions. We now turn to a discussion of these amendments and the evolving dynamics of legislative responses.

IV. The Changing Dynamic of Legislative Responses

Our analysis so far rests on the assumption that the Council, the General Assembly, and Delaware courts often pursue similar objectives. Indeed, much of the literature on Delaware assumed that its courts and legislature share the common goal of maintaining Delaware's position as the leading venue for incorporations.[257] Therefore, even when they addressed important legal questions, legislative reactions to court decisions were rarely controversial.

The 2024–25 amendments, however, took a different turn. We use our sample to highlight the unusual process leading to the 2024–25 amendments.[258] We also find that, in the period leading to the 2024–2025 amendments, legislative responses have become more

253. *Id.*

254. *See City of Providence*, 99 A.3d at 239 ("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.").

255. Michael J. Kaufman & 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 "the only fee-shifting bylaws that will survive equitable review are those that shift reasonable fees to the other party . . . in cases of frivolous lawsuits or litigation tactics").

256. *Id.*

257. *See, e.g.*, Edward Fox, *Is There a Delaware Effect for Controlled Firms?*, 23 U. PA. J. BUS. L. 1, 27 (2020) (explaining how "Delaware courts appear to decide cases with an eye on keeping companies incorporating in Delaware"); *but see* Bainbridge, *supra* note 74, at 138–40 (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).

258. *See infra* Part IV.B.

frequent and more likely to override courts' rulings. These findings, we argue, reinforce the need for additional research concerning the contemporary forces underlying the interaction between Delaware's judiciary and legislative branch. In Section A, we describe the 2024–25 amendments and the controversy around them. In Section B, we use our study of past legislative responses to highlight the notable differences in the dynamic underlying the 2024–25 amendments and previous responses. Finally, in Section C, we analyze the 2024–25 amendments in light of Delaware's competitive strategy.

A. The 2024–25 Amendments

The 2024 amendment was introduced in response to the high-profile *Moelis* decision, which invalidated provisions in an agreement between a corporation and its founding shareholder. The agreement required the board to obtain the founder's consent before considering various actions, limited the board's discretion over the board's size and composition, and required the board to ensure founder representation on all committees.[259] The court held that the combination of these provisions was facially invalid because it infringed on the board's authority under Section 141(a), which requires that the management of a corporation be directed by or under the oversight of its board.[260] The post-*Moelis* amendment provided that a corporation has the power to enter into shareholder agreements that include the consent rights and other provisions addressed in *Moelis*, even if these rights were not set forth in a certificate of incorporation.[261]

In *Moelis*, the court acknowledged that its holdings might not align with the prevailing market practices but explained that it was bound by the statute.[262] The legislative responses purported to conform the DGCL to the existing market practices.[263] Nonetheless, the post-*Moelis* amendment, which was published only six weeks after the court ruling, sparked unprecedented controversy.[264]

259. *See* West Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809 (Del. Ch. 2024). For recent studies describing the role of shareholder agreements in corporate governance, see Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 913 (2021); Gabriel Rauterberg, *The Separation of Voting and Control: The Role of Contract in Corporate Governance*, 38 YALE J. ON REG. 1124, 1124 (2021).

260. *Moelis*, 311 A.3d 809.

261. *See* MORRIS NICHOLS, *supra* note 235; *see also* Jill E. Fisch & Steven Davidoff Solomon, *Contract Rights and Control* (EUR. CORP. GOVERNANCE INST., Working Paper No. 844, 2025) (discussing the implications of this amendment for the definition of "control").

262. *See* Fisch & Solomon, *supra* note 261; *see also Moelis*, 311 A.3d at 816. Vice Chancellor Laster states, "What happens when the seemingly irresistible force of market practice meets the traditionally immovable object of statutory law? A court must uphold the law, so the statute prevails." *Id.* at 816. According to Laster, "[m]arket participants must conform their conduct to legal requirements, not the other way around." *Id.* at 881.

263. *See* MORRIS NICHOLS, *supra* note 235.

264. *See, e.g.*, Sarath Sanga & Gabriel Rauterberg, *Proposed Amendments to DGCL on Stockholder Contracting Would Create More Problems Than They Purportedly Solve*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 5, 2024), https://corpgov.law.harvard.edu/2024/04/05/proposed-amendments-to-dgcl-on-stockholder-contracting-would-create-more-problems-than-they-purportedly-solve/ [https://perma.cc/XF3N-Q3MT] (arguing the Amendment "would replace a century of nuanced if imperfect Delaware jurisprudence with an open-ended statement that enables too much to be taken at face value"); *see also* sources cited *supra* notes 13–14.

Critics of the post-*Moelis* amendment argue that it undermines Delaware's foundational principle of board-centric governance,[265] erodes investor protection,[266] and grants disproportionate power to dominant shareholders.[267] Conversely, supporters describe the amendment as an issue of "form over substance,"[268] asserting that it allows corporations to include in shareholder agreements the same types of governance arrangements that could be included in a company's charter or its preferred stock.[269]

There was little calm before another amendment was enacted in March 2025. This amendment was introduced in February 2025 in response to growing concerns about a corporate exodus from the state[270]—a concern that gained momentum following Tesla's high-profile reincorporation in Texas after the Court of Chancery voided Elon Musk's record $56 billion compensation package.[271]

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265. *See, e.g.*, Kahan & Rock, *supra* note 14; Letter from Robert B. Thompson, Professor of Bus. L., Geo. L., to Kate Harmon, President, Del. State Bar Ass'n (Apr. 11, 2024), https://s3.documentcloud.org/documents/24678984/letter-to-delaware-bar-april-112024.pdf [https://perma.cc/BK3W-SJUA].

266. *See, e.g.*, Bebchuk, *supra* note 14; Jordan Howell, *Dissent in House Judiciary over Controversial Corporate Amendments*, DEL. CALL (June 19, 2024), https://delawarecall.com/2024/06/19/dissent-in-house-judiciary-over-controversial-corporate-amendments/ [https://perma.cc/Z6RY-XQBV] ("[C]ritics contend the amendments will give companies *carte blanche* to enter into secret side deals with powerful investors . . . but without needing approval from shareholders.").

267. *See* Sanga & Rauterberg, *supra* note 264 (arguing that the Amendment "would replace a century of nuanced if imperfect Delaware jurisprudence with an open-ended statement that enables too much to be taken at face value"); Ann Lipton, *What is the Value of the Corporate Form?*, BUS. L. PROF BLOG (Mar. 29, 2024), https://www.businesslawprofessors.com/2024/03/what-is-the-value-of-the-corporate-form/ [https://perma.cc/DMT5-8DZJ] (claiming that the proposed amendment "does not seem to place any limits on the kinds of rights that can be given to stockholders directly in the first place").

268. *See* CHANCERY DAILY, *supra* note 13; s*ee also* Reddy & Cheffins, *supra* note 21, at 45–50 (arguing that SB 313 was a necessary and pragmatic response to *Moelis* that restored commercial certainty).

269. A revision to the original proposal clarified that shareholder agreements could only establish corporate structures that are already permissible under the corporate charter and Delaware law. *See* Jordan Howell, *Controversy Swirls Around Proposed Changes to Delaware's Corporate Code*, DEL. CALL (May 24, 2024), https://delawarecall.com/2024/05/24/controversy-swirls-around-proposed-changes-to-delawares-corporate-code/ [https://perma.cc/7S7D-VMWG]; *see also* Lawrence Hamermesh, *Letter in Support of the Proposed Amendments to § 122 DGCL*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 11, 2024), https://corpgov.law.harvard.edu/2024/06/11/letter-in-support-of-the-proposed-amendments-to-%C2%A7-122-dgcl/ [https://perma.cc/WU3T-6YES]. Moreover, most public companies have blank-check preferred shares in their charter, the terms of which may be expressly determined by the board. Therefore, certain rights conferred by shareholder agreements can also be put in a preferred stock, without shareholder approval.

270. *See* sources cited *supra* notes 2–3; *see also* Jordan Howell, *Delaware Call Interviews Sen. Bryan Townsend About SB21*, DEL. CALL (Feb. 21, 2025), https://delawarecall.com/2025/02/21/delaware-call-interviews-sen-bryan-townsend-about-sb21/ [https://perma.cc/285Y-PSHD]; *see also* Jens Frankenreiter, *What the Past Can Teach Us About SB 21 and the Threat of Corporate Exodus*, CLS BLUE SKY BLOG (Mar. 12, 2025), https://clsbluesky.law.columbia.edu/2025/03/12/what-the-past-can-teach-us-about-sb-21-and-the-threat-of-corporate-exodus/ [https://perma.cc/46MZ-7K8Y]; Kahan & Rock, *supra* note 21 (explaining how Nevada and Texas have recently begun competing with Delaware through lax laws and pro-business reforms in the wake of Musk's anti-Delaware campaign and Tesla's move to Texas).

271. Tornetta v. Musk, 310 A.3d 430 (Del. Ch. 2024); Tornetta v. Musk, 326 A.3d 1203 (Del. Ch. 2024). Since Tesla's departure, several leading public corporations such as Dropbox and TradeDesk reincorporated outside Delaware, while others such as Meta and Walmart are reportedly considering. *See* Lora Kolodny, *After Elon Musk's Delaware Exit, State Lawmakers Weigh Bill to Overhaul Corporate Law*, CNBC (Mar. 15, 2025), https://www.cnbc.com/2025/03/15/after-elon-musk-delaware-exit-state-weighs-overhaul-of-corporate-law.html [https://perma.cc/YQ3R-AM74].

This major amendment eases constraints on related-party transactions, including those involving controlling shareholders, by overturning a substantial body of case law and doctrines. Among other things, the amended Section 144 of the DGCL provides safe harbor from monetary liability for controller self-dealing transactions—except freezeouts—if they are approved either by an disinterested committee composed of at least two directors *or* by a majority vote of disinterested shareholders,[272] narrows the definition of "controlling shareholder,"[273] and establishes a strong presumption of independence for directors who are not a party to a transaction and who have been deemed independent under rules of the stock exchange on which the company's stock is listed.[274] Lastly, the amended Section 220 narrows the definition of "Books and Records", raising the procedural hurdles for shareholders' inspection demands and codifying a specific, exhaustive list of materials such as charters, bylaws, shareholders' meeting minutes and board minutes.[275] Although the amendment preserves a limited right to access "other specific records" such as emails and contracts, it imposes quite high burdens on the shareholder.[276]

Prominent law firms have praised this legislation as "necessary," "remarkable," and "balanced."[277] Legal scholars and investors, in contrast, have argued that the rapid enactment and far-reaching scope of the amendment deviate from Delaware's traditional balance of flexible statutes which are carefully shaped by Delaware courts, and would undermine judicial oversight that is vital for protecting investors.[278]

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272. *See* DEL. CODE § 144(b) (2025); *see* DEL. CODE § 144(c) (2025).

273. When a shareholder holds less than a majority of voting shares, a finding of "actual control" requires ownership or control of at least one-third of the voting shares and the ability to exercise managerial authority. *See* DEL. CODE § 144(e)(2) (2025) ("Has the power functionally equivalent to that of a stockholder that owns or controls a majority in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors by virtue of ownership or control of at least one-third in voting power . . ."). The amendment undermines cases where major shareholders who held less than one-third of the voting shares were deemed as controllers. *See e.g.*, cases cited *supra* note 271.

274. *See* DEL. CODE § 144(d) (2025).

275. *See* DEL. CODE § 220(a) (2025).

276. *See* DEL. CODE § 220(g). Furthermore, the amendment allows corporation to impose reasonable confidentially restrictions in order to limit the use and distribution of inspected records. *See* DEL. CODE § 220(b)(3).

277. *See, e.g.*, *Thirty Years Later - Why Companies Continue to Choose Delaware: General Perspectives and Thoughts on Proposed Amendments*, MORRIS, NICHOLS, ARSHT & TUNNELL LLP (Feb. 18, 2025), https://www.morrisnichols.com/insights-thirty-years-later-why-companies-continue-to-choose-delaware-general-perspectives-and-thoughts-on-proposed-amendments [https://perma.cc/4EET-2QRW] (discussing Delaware's legislative role in keeping companies in Delaware); *Delaware Legislators and Governor Propose Landmark Legislation*, WILSON SONSINI GOODRICH & ROSATI (Feb. 18, 2025), https://www.wsgr.com/en/insights/delaware-legislators-and-governor-propose-landmark-legislation.html (on file with the *Journal of Corporation Law*) (discussing recent Delaware legislation aimed at revamping Delaware's corporate law); Martin Lipton, *Delaware*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 21, 2025), https://corpgov.law.harvard.edu/2025/02/21/delaware [https://perma.cc/NQD7-DU73] (discussing Delaware's proposed legislation to amend Delaware's corporate law); *see also* Bainbridge, *supra* note 5 (arguing Delaware courts have increasingly constrained controlling shareholder transactions through an expanded definition of control and stricter cleansing standards, and it proposes recalibrating these doctrines to reduce litigation, encourage value-enhancing deals, and preserve Delaware's appeal as a leading incorporation forum).

278. *See* sources cited *supra* note 6; Bebchuk & Kastiel, *supra* note 85; Lund & Talley, *supra* note 21; *see also* Goshen & Stein, *supra* note 21, at 59 (explaining that some aspects of the amendment may have been required); *see also* Marcel Kahan & Edward B. Rock, *What Newly Amended DGCL § 144 Says (and Does Not Say) about Controlling Stockholder Transactions*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 5, 2025), https://corpgov.law.harvard.edu/2025/06/05/what-newly-amended-dgcl-%c2%a7144-says-and-does-not-say-

In this Article, we do not take a stand on the substance of the 2024–25 amendments. Rather, we use our study of six decades of legislative responses to highlight noticeable changes in the dynamic underlying these legislative responses and analyze them in light of our framework.

B. *The Deviations from Past Patterns*

There are several notable differences in the dynamic underlying the 2024–25 amendments and previous legislative responses.

First, legislative responses have become more frequent in the years leading to the 2024–25 amendments. As discussed in Part C, 1, we observed an average of 0.7 legislative responses per year during the past six decades. The 2024–25 amendments mark a departure from this historical pattern, with five amendments effectively overturning court decisions within a year.[279] The 2024–25 amendments also occurred against a backdrop of a series of substantive legislative responses to court decisions.[280] These include the 2022 amendment authorizing captive insurance;[281] the 2022 expansion of Section 102(b)(7) to officers,[282] and the 2023 amendment authorizing charter amendments permitting stock splits without shareholder approval—a response to pending litigation in the Court of Chancery (the *AMC* and *Coliseum Capital* cases).[283]

Second, historically, there has often been a notable gap between court decisions and legislative responses. On average, legislation in our sample occurred 5.5 years after the court decision, with the median gap being 1.5 years. In contrast, the proposed 2024

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about-controlling-stockholder-transactions/ [https://perma.cc/ZGG9-H4JP] (explaining that "[t]he law governing the fiduciary duties of 'common law' controllers who are not also 'statutory controllers' is unaffected by the amendments to § 144").

279. The 2025 amendment overturned a substantial body of cases, many of which overlap in their rulings. Adopting a conservative calculation method, we do not count each case it overturned separately but rather treat this amendment as overturning two major aspects of Delaware law: the amendment to Section 144 of the DGCL, which now provides a safe harbor from monetary liability for certain controller self-dealing transactions, and the amendment to Section 220, which narrows the definition of "Books and Records." A less conservative calculation method would only strengthen the results presented in this section. The year 2003 also included three amendments, but none of them directly overturned court decisions and some of them were essentially "invited" by courts. *See* APPENDIX A, *supra* note 119.

280. It could be interesting to examine the extent to which a generational shift in the composition of the Council is associated with the increased incident of substantive legislative responses to court decisions, and whether the most recent generation of the Council members are more willing to flex legislative muscle. Due to data limitation, such examination is beyond the scope of our Article. *See* Laster, *supra* note 21, at 1259–60 (noting the increase in significant legislative interventions during the 2022–2025 period as an indicator of a new "legislative era" for Delaware courts).

281. *See supra* notes 146–50 and accompanying text.

282. Klingsberg & Board, *supra* notes 147–48 and accompanying text.

283. *In re* AMC Ent. Holdings, Inc. S'holder Litig., 299 A.3d 501 (Del. Ch. 2023); Coliseum Cap. Mgmt., LLC, v. Anthos, No. 2023-0220, 2023 WL 2730707 (Del. Ch. 2023). This amendment has been subject to criticism. Some view it as a significant departure from Delaware's traditional approach to shareholder protection. *See, e.g.*, *The Long Form - Special Edition - April 8, 2024*, CHANCERY DAILY; *see* Usha Rodrigues, *The Hidden Logic of Shareholder Democracy*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 19, 2024), https://corpgov.law.harvard.edu/2024/04/19/the-hidden-logic-of-shareholder-democracy/ [https://perma.cc/P39C-BK6N] (describing this amendment as a destabilization of the shareholder "veto vote").

amendments were announced on March 28, 2024, just *five weeks* after the *Moelis* decision.[284] Despite widespread calls to slow down the legislation, the bill was approved by the Senate and the House within less than three months.[285]

Third, critics argued that the 2024 amendments marked the first time in the General Assembly's history that a Chancery Court decision was overturned before the Delaware Supreme Court had the opportunity to review it.[286] Our analysis supports this view. We found that only *one* Chancery Court decision was still pending by the time of the amendment. Moreover, even in this case, the Chancery Court did not make a definitive ruling on the issue at hand, making it incomparable to the 2024 intervention.[287]

Fourth, the 2025 amendment did not originate with the Council, as is typical. Instead, the Governor led the initiative, enlisting experts to draft the bill quickly.[288] The amendment was eventually passed at an unusually rapid pace, taking only six weeks from its proposal to the General Assembly until it was signed into law by the Governor.[289]

Fifth, unlike virtually all prior amendments that were passed unanimously or with only one dissenting vote, the 2024–25 amendments encountered fierce opposition at different stages of the legislative process.[290] For example, the 2024 bill narrowly passed the House Judiciary Committee, with six votes in favor, four votes against, and one member absent.[291] In the final vote in the House, the amendment passed with 34 votes in favor and 7 votes against.[292] Similarly, the 2025 amendment was approved, with a vote of 52 to 7 in Delaware's General Assembly.[293]

It is instructive to compare the 2024–25 legislative process with the dynamic that followed the *Van Gorkom* decision. In a retrospective interview, E. Norman Veasey, who served as President of the DSBA and later Chief Justice of the Delaware Supreme Court,

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284. West Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809 (Del. Ch. 2024) (citing the *Moelis* decision was given on Feb. 23, 2024).

285. *See* Jordan Howell, *Sparks Fly in Final Hearing on Corporate Law Amendments*, DEL. CALL (June 22, 2024), https://delawarecall.com/2024/06/22/sparks-fly-in-final-hearing-on-corporate-law-amendments/ [https://perma.cc/99GK-PVYS] (discussing recent disagreements within the Delaware Legislature regarding recent amendments to Delaware corporate law).

286. At the time the amendments were proposed, "[t]he Moelis case had not even reached summary judgment in the Court of Chancery and was still months away from a likely appeal to the Delaware Supreme Court." *Id.*

287. In *Hollinger Inc. v. Hollinger Int'l, Inc.* (2004), the Court of Chancery questioned the literal interpretation of Section 271 of the DGCL but declined to rule on the issue. Hollinger Inc. v. Hollinger Int'l, Inc., 858 A.2d 342 (Del. Ch. 2004). In response, the legislature amended that Section in 2005. This is case where the amendment clarified an issue that the court had identified but chose not to rule on. FREDERICK H. ALEXANDER & JEFFREY R. WOLTERS, ANALYSIS OF THE 2005 AMENDMENTS TO THE DELAWARE GENERAL CORPORATION LAW 5 (Aug. 2005).

288. *See, e.g.*, Lawrence Cunningham, *What Is the Furor Behind Delaware SB 21?*, PROMARKET (Apr. 9, 2025), https://www.promarket.org/2025/04/09/what-is-the-furor-behind-delaware-sb-21/ [https://perma.cc/FTC4-A4M6]; Kahan & Rock, *supra* note 21, at 26–27.

289. For a tracker of the amendment timeline, see CHANCERY DAILY, *supra* note 13.

290. *See supra* notes 128–29.

291. Jordan Howell, *Senate Judiciary Ignores Objections to Corporate Law Amendments*, DEL. CALL (June 12, 2024), https://delawarecall.com/2024/06/12/senate-judiciary-ignores-objections-to-corporate-law-amendments/ [https://perma.cc/2F4J-JPG5] ("[T]he Judiciary Committee . . . has seven members but only four who voted in favor of the legislation.").

292. Howell, *supra* note 285; Jeff Montgomery, *Delaware's Corporate Law Debate Left 'Blood On The Floor'*, LAW360 (June 21, 2024), https://www.law360.com/articles/1850449 [https://perma.cc/2TP3-PV53].

293. *See* S.B. 21, 153d Gen. Assemb. (Del. 2025).

emphasized that the final wording of Section 102(b)(7) was the product of extensive negotiations between attorneys representing plaintiffs and corporations. Veasey credited Joe Rosenthal, a plaintiffs' lawyer, with advocating for exceptions to the exculpation provision and the requirement for shareholder approval.[294] Despite plaintiffs' lawyers being a minority on the Council, it was crucial for all parties to achieve consensus. By contrast, the 2024–25 amendments lacked a similar consensus-building process.[295]

Sixth, the 2024 amendment challenged the long-held assumption about the harmonious relationship between Delaware's legislative and judicial branches. As Representative John Kolwalko stated: "[t]his particular [2024] bill intends to blur the Constitutional line of separation of powers by having the state legislature pass a law that can hamstring the judiciary, even as active cases are being judged."[296] In an open letter to the DSBA Executive Committee, Chancellor McCormick criticized the 2024 amendments, contending that they are "a drastic departure from Delaware's respected traditions."[297] Critics voiced concerns that "such a major change in response to a group of transactional lawyers frustrated by a recent Court of Chancery opinion threatens Delaware's legitimacy,"[298] and that passing the law would send a message that "Delaware courts don't matter."[299]

Finally, and most importantly, the 2025 amendment sharply deviated from Delaware's tradition concerning the *substance* of legislative responses. Our study has found that Delaware has consistently refrained from amending the DGCL to alter the substance of directors' fiduciary duties or the scope of judicial review. Consider the exculpation and captive insurance examples discussed above.[300] In both cases, the Delaware legislature responded to court decisions expanding director liability without interfering directly with the norms promulgated by courts. Rather, it devised a new mechanism to shield insiders from out-of-pocket liability. The 2025 amendment, in contrast, represents the first direct legislative intervention in the scope of judicial review.[301]

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294. Interview by Edward McNally with E. Norman Veasey, former Chief Justice of the Del. Sup. Ct. (June 20, 2017) (on file with author) (describing how they negotiated Section 102(b) with Joe Rosenthal).

295. *See* sources cited *supra* note 15.

296. Howell, *supra* note 266.

297. Letter from Kathaleen St. Jude McCormick, Chancellor, Del. Ct. of Chancery, to The Del. State Bar Ass'n Exec. Comm. 5 (Apr. 12, 2024) (on file with the Del. Ct. of Chancery); *see also* Kahan & Rock, *supra* note 21, at 33 ("In doing so, the amendment . . . undermined Delaware's claim to technocratic expertise and apolitical neutrality.").

298. Kahan & Rock, *supra* note 14; *see also* CII Letter, *supra* note 13 (explaining that Delaware's "reputation could be seriously impaired by a perception that influential actors can easily change the law whenever the Delaware Court of Chancery has the temerity to rule against them").

299. *See* Howell, *supra* note 266 (quoting Dael Norwood).

300. *Supra* Part III.A.

301. It is possible that the Delaware legislature avoided intervening in the scope of judicial review due to constitutional concerns. In DuPont v. DuPont, 85 A.2d 724, 728–29 (Del. 1951), the Court ruled that the General Assembly was constitutionally prohibited from reducing the Chancery Court's jurisdiction from what it was in 1792, which was equivalent to the general equity powers of the High Court of Chancery of Great Britain at the time of the United States's breakaway from Britain. *See also* Lyman Johnson, *Delaware's Non-Waivable Duties*, 91 B.U. L. REV. 701, 716–18 (2011). A recent complaint applying the DuPont precedent to SB21—which prohibits the court from awarding equitable relief when a transaction complies with Section 144 safe harbors—argues that the limitations imposed on the Chancery Court are unconstitutional because the amendments abolish equitable causes of action and infringe on the separation of powers between the legislative and judicial branches. *See* Plumbers & Fitters Loc. 295 Pension Fund v. Dropbox, Inc., C.A. No. 2025-0354, 2025 WL 1093738 (Del. Ch. filed Apr. 8, 2025).

The 2024 and 2025 amendments were also perceived by many as interventions that overturned existing case law in favor of a specific group—controlling shareholders. True, we also identify a consistent pattern of providing more ways to insulate corporate insiders or controllers from out-of-pocket liability, as shown by 30% of the amendments in our sample.[302] This could be viewed as the Council and the General Assembly adopting a pro-management stance. We note, however, that the most significant interventions in this category were based on private ordering: empowering shareholders to decide whether to shield insiders from liability. For example, director and officer exculpation requires shareholder approval,[303] and when these protections are put to a vote, they generally receive the support of shareholders.[304] The 2025 amendment, however, was not based on private ordering. Prior to its adoption, a proposal to amend and allow companies to adopt these provisions voluntarily through charter amendments approved by shareholders was rejected by the Delaware legislature.[305]

To summarize, although Delaware has consistently used legislative amendments to respond to court decisions, these legislative responses rarely sparked controversy. However, the dynamic between Delaware's legislature and its judiciary has recently changed, especially in the aftermath of the *Moelis* and *Match Group* decisions.[306] Time will tell whether the open controversy surrounding the 2024-25 amendments represents an anomaly or the culmination of increasing tensions between Delaware courts and the Council. Yet, this trend invites further research into the modern forces shaping Delaware's corporate law and the factors that have led to the evolving dynamics of legislative responses.

C. The Challenges Leading to the 2024–25 Amendments

In this Section, we analyze the controversial 2024–25 amendments in light of our framework that explains how Delaware uses legislative responses as part of its competitive strategy.

The 2024 Amendment. We argue that the 2024 amendment exemplifies another challenge associated with Delaware's heavy reliance on courts: the use of ex-post adjudication to determine the validity of governance innovations. Delaware courts are tasked with determining whether companies' governance arrangements are lawful. Courts, however, must wait for plaintiffs to challenge these arrangements through litigation. When a lawsuit is filed after a governance innovation has become prevalent, a decision invalidating this

302. One notable exception, however, is the extension of personal jurisdiction to officers by an amendment to Section 3114. *See* Hamermesh, *supra* note 139.

303. *See supra* Part III.B.1; *see also* Kahan, *supra* note 49, at 25 ("Delaware would want to provide firms with a choice of rules along the pro-management/pro-shareholder dimension.").

304. *See supra* notes 137, 149 and accompanying text.

305. H. Amend. 1 for S.S. 1 for S.B. 21, 153d Gen. Assemb. (Del. 2025) (stating the proposal was initiated by a group of law professors, arguing that that this type of opt-in mechanism is "consistent with Delaware's enabling corporate law framework"); *see also* Cydney Posner, *Will an Opt-In Mechanism Resolve the Melee over Delaware's Controversial SB 21?*, COOLEY PUBCO (Mar. 25, 2025), https://cooleypubco.com/2025/03/25/opt-in-sb-21/ [https://perma.cc/R9FJ-QVZ3] (providing the quoted language from legal scholars).

306. *See, e.g.*, Jordan Howell, *Top Delaware Judge Calls for More Debate over Contentious Corporate Amendments*, DEL. CALL (May 29, 2024), https://delawarecall.com/2024/05/29/top-delaware-judge-calls-for-more-debate-over-contentious-corporate-amendments/ [https://perma.cc/976Q-5N2D] (quoting retired professor Lawrence Hamermesh, who said: "you'd have to go back to 1988—the age of hostile takeovers—to find a legislative process that was more contentious").

innovation could leave the companies that adopted it without the ability to adjust. In other words, a legal system based on ex-post adjudication faces dual concerns: (1) the emergence and persistence of legally questionable market practices; and (2) the high costs associated with invalidating such practices much later.

To illustrate this challenge, consider the following scenario: At T_0, a company adopts a novel governance arrangement. Although neither the DGCL nor case law expressly addresses the validity of this arrangement, the company's legal advisors believe it to be valid. At T_1, a lawsuit is filed, and the court holds that the governance innovation is unlawful. If the time gap between T_0 and T_1 is small, the court's ruling is unlikely to create a problem for other companies.

Courts, however, depend on plaintiffs to bring cases. Assume the governance arrangement is left unchallenged for several years. With time, more companies decide to follow suit, and a new market practice emerges. Only then a lawsuit challenging the new governance arrangement is filed. When the gap between T_0 and T_1 is large, and a market practice emerges, the court's invalidation of the governance innovation will significantly affect many companies that will need to redesign their existing governance structure (including the need to secure the consent of different stakeholders). The ruling can also create widespread uncertainty about the validity of similar practices and corporate governance norms.

In the *Moelis* case, the stockholder agreement at issue was executed in 2014, with the lawsuit filed nearly a decade later.[307] Critics argued that the *Moelis* ruling threatened the legality of potentially thousands of existing contracts that "have been the basis for longstanding investments in both public and private companies."[308] They also claimed that it potentially invalidates common provisions in settlement agreements between companies and activist investors.[309]

Relying on courts to determine the validity of governance innovations that have become prevalent creates a challenge for Delaware. On the one hand, courts should invalidate unlawful governance norms, and they should do so even when a governance innovation has become widespread. Indeed, both Vice Chancellor Laster in the *Moelis* opinion and legal scholars have pointed out the significant difficulty in validating unlawful actions solely because they have become common after they were unchallenged for a long time.[310] If they avoid invalidating governance arrangements only because of the costs for other companies, courts will de facto empower lawyers advising corporations to shape corporate

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307. West Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809, 825–26 (Del. Ch. 2024).

308. *See* Hamermesh, *supra* note 264; Macey, *supra* note 8, at 7–8; *see also The Long Form - June 12, 2024*, CHANCERY DAILY, https://mailchi.mp/chancerydaily.com/2024-06-12-long-form-fwklnknjgytftfytfygu [https://perma.cc/EU5Q-WD2S]; *see also* CHANCERY DAILY, *supra* note 13 (discussing how the Chair of the Council emphasized that "there's lots of agreements already out there that are of questionable, validity, or arguably, potentially invalid"); *but see* Gladriel Shobe, Jarrod Shobe & William W. Clayton, *Moelis and Private Equity in the Public Market*, 43 YALE J. ON REGUL. 598, 644–45 (2026) (asserting many of the shareholder agreements were adopted by private companies and are not publicly disclosed, it is impossible to estimate their accurate number).

309. *See, e.g.*, Arthur B. Crozier, Gabrielle E. Wolf & Jonathan L. Kovacs, *2024 Proxy Season Trends: Mid-Season Review*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 15, 2024), https://corpgov.law.harvard.edu/2024/06/15/2024-proxy-season-trends-mid-season-review/ [https://perma.cc/XJ4U-65RP].

310. *See* West Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809 (Del. Ch. 2024); Bebchuk, *supra* note 14.

law. This might adversely affect their ex-ante incentives and the level of caution they exercise when advising clients.

On the other hand, courts have limited capacity to address the market-wide implications when the governance norm underlying their decision has turned into a market practice. One could argue that the legal system should not be concerned with firms that had adopted governance arrangements that were later found to be unlawful. From this perspective, entrepreneurs and companies should avoid adopting questionable governance arrangements in the first place. This strict approach, however, could hinder innovation and inhibit the development of new, beneficial corporate practices. Moreover, the more prevalent the practice becomes and the longer it goes unchallenged after becoming widespread—the stronger the market's reliance on it, and the costs of invalidation increase.

Overall, the 2024 amendment shows that while respecting established market practices can promote business certainty and innovation, it also risks granting too much power to lawyers. In the next Part, we analyze several paths to address this complexity.

The 2025 Amendment. This recent amendment is an example of how legislation enables Delaware to address *exit threats* that require a timely response. As explained in Section IV.A, Delaware legislators introduced SB21—which overturns a substantial body of Delaware case law—in response to growing concerns of a corporate exodus, especially by controlled companies, following a series of decisions that increased judicial oversight of self-dealing transactions. Whether the threat was real or perceived, and whether the amendment serves insiders or aims to "rebalance certain aspects of Delaware law,"[311] the perception within Delaware's government was that swift action was necessary.

As we explained in Section II.B above, even if courts agree with the need to respond to exit threats, they can at best gradually recalibrate the law through case-by-case rulings, and this process is inherently slow. Legal change through courts is incremental, and reversing precedent—particularly decisions by the Delaware Supreme Court—can take considerable time. Accordingly, when Delaware officials face what they view as a credible and urgent threat of a corporate exodus, they can use legislation to swiftly address the threat.

It is instructive to compare the 2025 amendment with an earlier example of threats of mass corporate exit in response to court decisions. In 1988, the Delaware Chancery Court held in *Interco* that a company could not maintain a poison pill once a restructuring plan had been adopted and ordered the board to redeem the pill and allow shareholders to evaluate the merits of a tender offer.[312] *Interco* provoked a strong backlash and widespread concern that Delaware was failing to provide effective protection against hostile takeovers. Martin Lipton, the prominent lawyer who invented the poison pill, responded by publicly advocating for reincorporation outside of Delaware.[313] *Interco* was reaffirmed just six weeks later by the Court of Chancery in *Pillsbury*, which intensified the controversy.[314]

311. Klinger-Wilensky, Lafferty & DiTomo, *supra* note 4; Lund & Talley, *supra* note 21, at 31.

312. *See* City Cap. Assocs. Ltd. P'ship. v. Interco Inc., 551 A.2d 787 (Del. Ch. 1988).

313. Letter from Martin Lipton, Founding Partner, Wachtell, Lipton, Rosen & Katz, to Clients on *The Interco Case* (Nov. 3, 1988), https://theliptonarchive.org/wp-content/uploads/340-The-Interco-Case-dated-November-3-1988.pdf [https://perma.cc/XR6V-HKY7].

314. *See* Grand Metro. Pub., Ltd. v. Pillsbury Co., 558 A.2d 1049 (Del. Ch. 1988).

Lipton's response to *Pillsbury* was even more forceful; he warned that abandoning the business judgment rule in anti-takeover scenarios would lead to a "takeover frenzy."[315]

However, just four months after *Interco*, the Delaware Chancery Court issued its decision in *Polaroid*, signaling a move away from *Interco* and expressing renewed support for board discretion in resisting hostile takeovers.[316] The shift continued in July 1989 with the Chancery Court's decision in *Time*, which criticized the reasoning in *Interco*.[317] That decision was later affirmed by the Delaware Supreme Court in February 1990.[318]

Our framework can explain why, unlike the *judicial* response to the 1980s threat of corporate exodus, the 2025 response took the form of legislative action. *First*, given the wave of hostile takeovers at the time, *Interco* was followed by a series of similar cases that gave the courts an opportunity to refine or change their position within a short timeframe. *Second*, *Interco* involved a relatively narrow legal issue—whether courts should order boards to redeem a poison pill. This made it easier for courts to announce a change of position—especially since none of the early cases had been decided by the Delaware Supreme Court. *Third*, poison pill litigation often involved requests for interim relief, enabling courts to issue timely responses. *Finally*, *Interco* did not expose officers and directors to the risk of personal liability.

Our framework also explains other aspects of the 2025 amendment. As we explained above, this amendment broke the tradition that legislative responses do not directly override courts' positions on the scope of fiduciary duties or the nature of judicial review. In our view, this feature demonstrates one of the inherent risks of relying on a system of judge-made law accompanied by legislative responses. The DGCL did not define "control" or set process or other requirements for approving self-dealing transactions. Perhaps counter-intuitively, the lack of any pre-existing statutory framework for regulating controller self-dealing transactions makes it harder to adopt more nuanced strategies of legislative responses. Rather, it may require legislation that would directly interfere with domains that were previously developed exclusively by court decisions.

Of course, an overly broad legislative response could trigger calls from certain constituencies, including shareholders, for federal intervention. In the case of the 2025 amendment, it is unclear whether these calls were serious. What is clear, however, is that the Delaware legislature was not constrained by the threat that favoring controllers would trigger federal intervention, possibly due to an existing business-friendly federal government.

V. Going Forward

In this Part, we first consider the implications of our article and discuss important questions that it raises for further research. We then explain how Delaware can design legislative responses to address the challenges of judge-made law and explore the implications of our framework on two important players—institutional investors and lawyers.

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315. Letter from Martin Lipton, Founding Partner, Wachtell, Lipton, Rosen & Katz, to Clients on *You Can't Just Say No in Delaware No More* (Dec. 17, 1988), https://theliptonarchive.org/wp-content/uploads/346-You-Cant-Just-Say-No-in-Delaware-No-More-dated-December-17-1988.pdf [https://perma.cc/F8R2-PPBZ].

316. Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 278, 279–80 (Del. Ch. 1989).

317. Paramount Commc'ns Inc. v. Time Inc., No. 10670, 1989 WL 79880, at *29 (Del. Ch. July 14, 1989).

318. Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1155 (Del. 1989).

A. Future Research

Our findings raise important questions for researchers of corporate law that go beyond the scope of our current study of past legislative responses. In this Section, we review these questions and outline directions for future research.

The conventional view holds that Delaware's legislative and judicial branches share the goal of maximizing incorporations in Delaware.[319] Under this account, legislative responses to court rulings do not reflect disagreement or tension between Delaware's judiciary and the legislature. Rather, they represent instances in which legislation can overcome the courts' institutional limitations. However, the pattern of legislative responses that we uncovered—and especially the increasing frequency of controversial legislative responses—raises the suspicion that this dynamic is the outcome of *different objectives* that guide Delaware's judicial and legislative branches. More specifically, is Delaware's legislation more susceptible to pressure by interest groups such as managers, controlling shareholders, or lawyers than its judiciary?

While it highlights the need to explore this question, our study of past legislative responses cannot provide a comprehensive answer to the question of whether the Delaware legislature has *consistently* responded to protect a specific group, such as managers. Answering this question requires an analysis of not only the cases in which Delaware amended the DGCL in response to a judicial decision but also the cases in which it decided not to amend the statute, as well as other amendments that are not related to court decisions.

With these limitations in mind, we explored our sample to determine who are the beneficiaries of legislative responses. We use a rough classification designed for illustrative purposes only to determine whether an amendment appears to benefit a specific group.[320] We find that 16% of the amendments in our sample seem to benefit shareholders, 34% seem to benefit corporate insiders or controllers, and 50% do not address issues that seem to involve direct conflicts between the two groups.[321] In other words, about half of the legislative responses address issues that do not seem to involve conflicts between different corporate constituencies—although some of these amendments may be technical and of lesser importance to shareholders or managers.

There is also the question of whether what appears as a bias towards one group ultimately harms firm value. For instance, insulating directors and officers from liability for non-conflicted decisions could raise the concern of a legislature being captured by managers, but this pattern may also be consistent with shareholders' interest in attracting qualified candidates to the board and incentivizing them to take risks. Future empirical work would have to account for such difficulties.[322]

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319. *See, e.g.*, Fox, *supra* note 257; Simmons, *supra* note 56, at 1167 ("The relationship between the Delaware corporate bar, the General Assembly, the Division of Corporations, and the judiciary is best described as symbiotic.").

320. Our analysis here is based on the direct apparent effect of the DGCL amendments. We acknowledge that an amendment that appears to restrict managers might in fact benefit them by preventing federal intervention or reducing pressure by institutional investors. Yet, such a comprehensive analysis of each legislative amendment is beyond the scope of this Article.

321. *See* APPENDIX A, *supra* note 119.

322. For a recent preliminary examination of the implications of the 2025 Amendment, *see* Kenneth Khoo & Roberto Tallarita, *The Price of Delaware Corporate Law Reform* 1 (2025) (unpublished working paper) (on file at https://ssrn.com/abstract=5318203) (finding that around the date of SB 21's announcement, Delaware

Moreover, our study of the interplay between Delaware's legislation and its judiciary has focused only on legislative responses to court decisions. A fuller account requires research into how *courts* have responded to past legislative amendments. Our methodology can also be used to analyze legislative responses to court decisions concerning partnerships, LLCs, and other business entities. This broader inquiry may shed more light on the forces that drive legislative responses and uncover potential differences in legislative intervention patterns and objectives across various legal entities with different stakeholders.

Our finding that legislative responses have become more frequent, with the controversial 2024–25 amendments expressly overturning court decisions, not only reinforces the need for research into the forces that currently shape Delaware corporate law but also raises the question whether these interests have changed over time. And if so, what are the reasons behind the dramatic increase in legislative overrides in recent years? Why now?

One possible explanation lies in a shift in the litigation landscape and the nature of the claims being brought. For instance, the growing sophistication and capabilities of plaintiff attorneys, along with rising fee awards, may have encouraged more novel and creative claims involving alleged non-compliance with provisions of the DGCL, which invite legislative interventions more often, as seen in the three cases that prompted the 2024 amendment.

The rise in litigation, however, could also be related to changes in the ownership structure of Delaware corporations. The rise of dual-class share structures and other innovative contractual arrangements has increased the number of controlled companies.[323] In such firms, conflicts between controlling and minority shareholders tend to be more common[324]—particularly when controlling shareholders are sophisticated actors, such as private equity firms, which employ strategies that often provoke legal challenges.[325]

In both cases, common law courts that employ ex-post judicial review have limited capacity to screen, at the outset, the flow of claims. This, in turn, could increase the pressure for legislative intervention to limit the number of lawsuits. These are merely initial, speculative answers. We believe the issue warrants deeper investigation into the institutional factors contributing to this evolving dynamic.

Another promising avenue for research concerns Delaware's process of corporate legislation. Our findings suggest that legislation plays a more important role than previously recognized in Delaware's corporate law. This insight calls for more research on Delaware's

companies experienced negative abnormal returns relative to other U.S. companies); *cf.* Tiago Duarte-Silva & Aaron Dolgoff, *Did SB21's Changes to Delaware Corporate Law Harm Shareholders?*, CLS BLUE SKY BLOG (Apr. 16, 2025), https://clsbluesky.law.columbia.edu/2025/04/16/did-sb21s-changes-to-delaware-corporate-law-harm-shareholders/ [https://perma.cc/5SZK-HXQP] (finding no evidence that SB 21 has hurt shareholders).

323. Dhruv Aggarwal et al., *The Rise of Dual-Class Stock IPOs*, 144 J. FIN. ECON. 122 (2022).

324. *See, e.g.*, Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453 (2019) (dictating how small-minority controllers can distort corporate decision making); Lucian A. Bebchuk, Kobi Kastiel & Edward B. Rock, *Delaware and the Perils of Small Minority Controllers*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 5, 2025), https://corpgov.law.harvard.edu/2025/03/05/delaware-and-the-perils-of-small-minority-controllers/ [https://perma.cc/WSR9-44EV].

325. *See* Shobe, Shobe & Clayton, *supra* note 308, at 655–56 (indicating that private equity firms, the primary beneficiaries of overturning *Moelis* as they are responsible for most of the existing shareholders agreements, used sophisticated lobbying efforts to enact SB 313); *see also* Kahan & Rock, *supra* note 21, at 40–43.

unique process for amending the DGCL.[326] For example, will more transparency concerning the Council's deliberations improve this process or undermine Delaware's effort to 'professionalize' its corporate law? Our study also invites research into legislative amendments that *did not* respond to court decisions. What is the motivation for these amendments? Are these amendments aligned with the patterns we observed in responsive legislation or do they differ in their objectives or motivation?

Finally, outside corporate law, it would be interesting to explore legislative responsiveness to court decisions in other legal contexts, such as contracts, torts, or securities regulation, and compare them to the legislature's involvement in Delaware corporate law. How frequent are legislative interventions in these other areas? What triggers them? Is there a difference between interventions at the Federal level versus the state level?

B. The Allocation of Power between Courts and Legislators

Delaware's corporate law traditionally relies on flexible standards and ex-post judicial interpretation. While this model allows for nuance and adaptability, it also creates persistent uncertainty, especially when courts confront evolving market practices that are yet to be clearly sanctioned.[327] Taking as given Delaware's reliance on courts and standards to shape corporate law, this section explores several mechanisms to address this challenge.

Grandfathering Amendments. Recall that the market practice challenge underlying the 2024 amendment arises when courts find that a governance innovation adopted by many public and private companies is unlawful. Institutional constraints limit the court's ability to address this challenge. If it finds a governance norm is unlawful, the court cannot provide all the companies that adopted the norm the opportunity to adjust by declaring, for example, that its ruling will become effective only at some future time. Differently put, courts generally cannot grandfather unlawful governance arrangements (even if they have become common in the marketplace).[328] Legislation, in contrast, can adopt grandfathering or similar arrangements. Based on that understanding, Kahan and Rock put forward a compromise proposal in the context of the *Moelis* amendment, which included a three- or five-year safe harbor from the application of the *Moelis* ruling to existing shareholder agreements.[329]

We propose that Delaware use legislative amendments of this type to address the market practice challenge. This approach offers several advantages: it provides companies with time to conform their governance arrangements to the court's ruling. At the same time, it preserves the role of the courts as independent arbiters of the legality of new governance practices (and does not grant too much power to lawyers advising companies). Finally, the

326. For recent studies addressing this matter, see Varallo, Blumberg & Potts, *supra* note 21; Whitehead, *supra* note 21; Kahan & Rock, *supra* note 21.

327. A rich body of literature analyzes the extent to which legal commands should be promulgated as statutory rules that establish legal norms ex ante, or as flexible standards applied through ex post judicial review. For prominent examples, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

328. To address this challenge, courts sometime provide guidance to market players on preferred market practices through *dicta*. *See* Savitt, *supra* note 56. However, the use of this tool is subject to court discretion and may not be appropriate in all situations.

329. Marcel Kahan & Edward Rock, *Section 122(18) DGCL: A Proposed Compromise*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 10, 2024), https://corpgov.law.harvard.edu/2024/06/10/section-12218-dgcl-a-proposed-compromise/ [https://perma.cc/7CBK-B646].

delayed application of the court's decision would allow for a longer legislative process concerning the need for additional legislative amendments.[330]

Ex-ante guidance and pre-ruling. In theory, another potential path for preserving the role of courts while addressing the drawbacks of ex post judicial review is to establish a mechanism to provide official guidance upfront. For example, the SEC "No-Action Letter" process allows companies to submit detailed descriptions of proposed activities and receive assurance that the SEC would not recommend enforcement action against them.[331] These letters are also published on the SEC's website, offering guidance to other companies facing similar issues.[332] Providing lawyers with guidance from the outset reduces instances where they assume certain practices are legal, only for courts to later rule otherwise. Importing such a mechanism to Delaware, however, requires substantial structural changes in its existing model, and it is unlikely to happen in the foreseeable future.

A comparable approach has been proposed in Texas, where pending legislation aims to authorize business courts to issue preliminary judicial determination of a director's independence.[333] This initiative has been explicitly framed as an attempt to challenge Delaware's dominance by providing greater predictability.[334] At its core, this approach reflects a different conception of corporate adjudication, in which the court's role is not limited to resolving disputes after the fact.

We have thus far considered mechanisms to address some of the drawbacks of relying on courts to produce corporate law norms. Another approach, however, is expanding the legislature's role to areas that have traditionally been left to courts that apply indeterminate standards.[335] Greater reliance on statutory rules will also reduce the likelihood of further clashes between the judiciary and the legislature. A rule-based strategy, however, shifts power away from judges and could undermine Delaware's traditional competitive advantage, which relies on expert judges to set norms.[336] The 2025 amendment represents a move in this direction, signaling a willingness to legislate in domains that were exclusively governed by judge-made law. However, it remains to be seen whether this amendment will be an unusual occurrence or a pivotal moment leading to additional deviations from the traditional common law model of Delaware corporate lawmaking

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330. A grandfathering amendment will reduce the costs of invalidating established market practices. One might argue, however, that it would not eliminate the problem of defeated reasonable expectations and irretrievable sunk costs. A more comprehensive grandfathering approach would permanently validate existing arrangements and leave the market-changing ruling in place prospectively only. This approach, however, might undermine advisors' incentive to ensure that new governance innovation comply with legal requirements.

331. *No Action Letters*, U.S. SEC. & EXCH. COMM'N, https://www.investor.gov/introduction-investing/investing-basics/glossary/no-action-letters [https://perma.cc/5P6G-GJWL].

332. *Id.* ("[T]he SEC staff may permit parties other than the requestor to rely on the no-action relief to the extent that the third party's facts and circumstances are substantially similar to those described in the underlying request.").

333. *See* S.B. No. 29, 2025 Gen. Assemb., 89th Sess. § 21.4161(d) (Tex. 2025) ("Promptly after receiving a petition . . . the court shall hold a preliminary hearing to determine the appropriate legal counsel to represent the corporation and its shareholders.").

334. *See* Macey & Romano, *supra* note 3.

335. *See, e.g.*, Kaplow, *supra* note 327.

336. *See supra* notes 86–88 and accompanying text.

C. Institutional Investors

The large asset managers—and especially the Big Three—collectively hold a large fraction of the shares in the U.S. capital market and exert significant influence over public companies.[337] These investors presumably have an interest in ensuring that legislative changes do not reduce the value of Delaware corporations, which constitute a significant fraction of the companies in their portfolios.[338] Large asset managers occasionally express their views on regulatory reforms that might affect them as investors in public companies.[339] However, despite their substantial stakes, these asset managers have largely remained silent on Delaware's corporate legislation, and their relevance as a lobbying force in Delaware's legislative process is far from clear.

In the 2024 controversial amendments, for example, the only response came from two letters that the Council of Institutional Investors (CII) sent to the DSBA and the Governor requesting, unsuccessfully, that DSBA pause the legislative process and that the Governor veto SB 313.[340] A similar pattern repeated in 2025. CII and the Managed Funds Association (MFA) tried to urge, unsuccessfully, the DSBA and the Governor to pause the legislative process and reconsider the proposed reforms of SB 21.[341] None of the giant index funds, however, expressed their view on either of these pressing amendments.

While they may possess significant influence over companies in their portfolio, the largest asset managers may lack the capacity to affect legislative reforms in Delaware. Recently, the SEC imposed new restrictions on institutional investors' engagement with public companies, including efforts to influence a company's stance on political issues.[342] These restrictions may further discourage institutional investors from lobbying against legislation, as doing so could trigger additional regulatory scrutiny and backlash. In contrast, insiders face fewer restrictions on political activity. More importantly, they control the decision of where to incorporate, giving them credible leverage when opposing proposed

337. *See, e.g.*, Lucian A. Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 725–26 (2019); Edward B. Rock, *Institutional Investors in Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 363, 365 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

338. For the leading role of Delaware in attracting incorporations, see *supra* note 46.

339. *See, e.g.*, Letter from Paul Bodnar, Kathryn Fulton & Elizabeth Kent, BlackRock, to Vanessa A. Countryman, Secretary, SEC, *The Enhancement and Standardization of Climate-Related Disclosures for Investors (File Number S7-10-22)* (June 17, 2022), https://www.blackrock.com/corporate/literature/publication/sec-enhancement-and-standardization-of-climate-related-disclosures-for-investors-061722.pdf [https://perma.cc/8J9L-UDB3] (citing BlackRock's comment letter on the SEC's proposed rule on climate risk disclosure).

340. *See* CII Letter *supra* note 13.

341. *See* Letter from Jeffery P. Mahoney, Council Institutional Invs., to The Honorable Matt Meyer, Governor Del. (Mar. 6, 2025), https://s3.documentcloud.org/documents/25555433/march-6-2025-cii-letter-to-delaware-governor-final.pdf [https://perma.cc/DLQ8-JRK7]; *see also* Letter from Managed Funds Ass'n & Council Institutional Invs., to Christella St. Juste, Off. Senator Darius J. Brown (Mar. 18, 2025), https://s3.documentcloud.org/documents/25591322/mfa-cii-joint-letter-re-delaware-sb-21.pdf [https://perma.cc/39LC-CFKK].

342. *See Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting*, U.S. SEC. & EXCH. COMM'N (July 11, 2025), https://www.sec.gov/rules-regulations/staff-guidance/corporation-finance-interpretations/exchange-act-sections-13d-13g-regulation-13d-g-beneficial-ownership-reporting [https://perma.cc/7SBH-9557] (stating that Question 103.12 clarifies the circumstances under which investors engaging with issuers lose eligibility to report beneficial ownership on Schedule 13G and become subject to the broader disclosure requirements of Schedule 13D).

legislative reforms.[343] Since incorporation decisions have significant implications for the state revenue and the welfare of local constituents,[344] Delaware legislators have strong incentives to be attentive to insiders' lobbying efforts—so long as those efforts are not too radical as to jeopardize the entire incorporation enterprise.

This problem is particularly acute in controlled companies, where the controller can threaten to reincorporate from Delaware to Nevada without the approval of other public shareholders.[345] With such a background threat, institutional investors who are dissatisfied with recent legislative developments have limited recourse. Even when factoring in the alleged reduction in shareholder protections, Delaware remains a more attractive option to investors than Nevada. The 2024–25 amendments thus reveal a significant asymmetry in the design of Delaware's corporate law: the voice of institutional investors is barely heard, and their influence as a lobbying force in Delaware's legislative process is extremely limited.

D. Lawyers

Unlike institutional investors, lawyers play a significant role in Delaware's legislative process.[346] Macey and Miller argue that Delaware's corporate law reflects a political equilibrium where the Delaware Bar uses its influence to secure demand for the services of Delaware lawyers by creating indeterminate legal standards that encourage litigation.[347] Indeterminate law, they argue, may be costly for both Delaware (litigation costs may deter incorporations) and shareholders (suboptimal corporate law), yet, for Delaware lawyers, indeterminate standards can generate sufficient legal work to offset any potential decline in incorporations.[348]

343. This is especially true in controlled companies, where the decision to reincorporate can be made without approval from a majority of minority shareholders. *See* Maffei. v. Palkon, 339 A.3d 705 (Del. 2025).

344. *See Governor Meyer Signs SB21 Strengthening Delaware Corporate Law*, DEL. NEWS (Mar. 26, 2025), https://news.delaware.gov/2025/03/26/governor-meyer-signs-sb21-strengthening-delaware-corporate-law/ [https://perma.cc/6PHK-MXVP] (stating that their support "will also protect state revenue that will fund education, affordable housing, and infrastructure improvements across our state").

345. In *TripAdvisor*, the Delaware Supreme Court held that a reincorporation to Nevada should not have been regarded as providing the controller with a private benefit and thus should not be subject to entire fairness review, because the alleged reduction in litigation risk resulting from a change in domicile was too hypothetical and speculative to constitute a non-ratable benefit. *See* Maffei v. Palkon, No. 125, 2024, 2025 Del. LEXIS 51, 57 (Feb. 4, 2025).

346. *See supra* Part I.A; *see also* Eldar & Rauterberg, *supra* note 44, at 181 ("The main source of legislative drafting for any changes to Delaware's corporate law is not a political branch but instead the Council of the Delaware State Bar Association's Corporation Law Section.").

347. Macey & Miller, *supra* note 67 at 472, 504 (exploring the powerful role of lawyers in Delaware and predicting that "[a]s between revenues from advisory work and litigation, the bar would certainly favor litigation, because a higher percentage of advisory work can be performed by lawyers in other states"); *see also* Kahan & Rock, *supra* note 21, at 42 ("In effect, Delaware subcontracts the design of its corporate law to the Delaware bar.").

348. Bainbridge, *supra* note 74; *see also* Macey & Miller, *supra* note 67, at 504 (arguing that the bar could benefit from legal rules that increase expected legal fees per corporation, even if such rules reduced the absolute number of firms chartered in the state); *see also* Kahan & Rock, *supra* note 21, at 42 (noting that Delaware lawyers benefit directly from litigation, while the state's interest is more indirect, as such litigation benefits tax-paying in-state lawyers and local hospitality industries while enhancing the value of its judiciary).

Our account sheds additional light on Macey and Miller's interest group theory.[349] We find that legislative interventions affect *trial* lawyers in both directions. On the one hand, several legislative amendments encourage litigation in Delaware, including the *prohibition on fee-shifting* (removing a disincentive for filing lawsuits)[350] and the *forum selection* amendment (ensuring litigation remains in Delaware).[351] Moreover, some legislative amendments insulating directors from out-of-pocket liability—e.g., approving the use of *captive insurance* and expanding *indemnification* rights—align with the interests of trial lawyers, who benefit from a system where courts use litigation to set new corporate law norms.[352] These legislative amendments, therefore, might support Macey and Miller's account.

On the other hand, other amendments go in the opposite direction. For example, the *exculpation* and advanced renouncements of *corporate opportunities* amendments restrict plaintiffs from bringing claims that were previously actionable.

We also find amendments that seem to be motivated by the need to uphold market practices invalidated by courts, thereby responding (sometimes swiftly) to the demands of out-of-state advisors and *transactional* lawyers. The 2024 amendments illustrate this point. Two amendments (following *Crispo* and *Activision*) were allegedly justified by the need to validate customary provisions and practices in M&A agreements. Another (following *Moelis*) upheld the validity of shareholder agreements that were arguably prevalent in the market.[353] These interventions have led some to claim that they are proof of "Delaware's willingness to be pragmatic in working with influential lawyers from out-of-state,"[354] and that the amendments were aimed at "bail[ing] out lawyers who wrote illegal agreements instead of having them deal with the consequences of their actions."[355]

Similarly, the 2025 amendment took place against a backdrop of growing criticism from out-of-state lawyers, who argue that recent Delaware court rulings are creating

349. Macey & Miller, *supra* note 67, at 501. They acknowledge that "[i]f a judicial decision upsets that equilibrium, the legislature can restore the balance by enacting new statutes," but their analysis does not deeply explore how this legislative-judicial interaction influences the broader political dynamics within Delaware's corporate law framework.

350. *See supra* Part III.B.5.

351. *Id.*

352. *See supra* Part III.B.1.

353. *See supra* Part IV.C.

354. Jeff Montgomery, *Storm Clouds Gather Over Delaware's Business Haven Rep*, LAW360 (Apr. 26, 2024), https://www.law360.com/articles/1829926/storm-clouds-gather-over-delaware-s-business-haven-rep?copied=1 [https://perma.cc/PL8X-GAHM]; (quoting law professor Minor Myers saying that "many public companies have similar stockholder agreements, and lawyers behind them may be concerned about now being seen as having advised something in direct conflict with Delaware corporation laws . . . That to me is proof of nothing so much as the correctness of the Moelis opinion and the state's willingness to be pragmatic in working with influential lawyers from out-of-state").

355. Katie Tabeling, House Sends Corporate Law Amendments to Governor, DEL. BUS. TIMES (June 21, 2024), https://delawarebusinesstimes.com/news/corporate-law-amendments-goveno [https://perma.cc/QJ7P-Y79N] (quoting Rep. Madinah Wilson-Anton saying that the bill would continue to allow the thousands of attorneys that work in Delaware to work with companies that incorporate here and that she thinks "what we're being asked to do here is to bail out lawyers who wrote illegal agreements instead of having them deal with the consequences of their actions"); *see also* Michael Hanrahan, *Statement Regarding the Activision Amendments*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 10, 2024), https://corpgov.law.harvard.edu/2024/07/10/statement-regarding-the-activision-amendments [https://perma.cc/W6B5-BARC] ("The [*Activision* Amendment's] primary purpose appears to be protecting lawyers who fail to follow plain requirements of the DGCL.").

uncertainty for businesses.[356] Other amendments that align with the interests of transactional lawyers include the limitation on the revocation of indemnification (*Schoon*),[357] the use of corporate opportunities advanced renunciations,[358] and the amendment to sections 204 and 205 of the DGCL, which allow corporations to ratify "defective corporate acts" that are void or voidable due to a failure of authorization.[359]

It is perhaps unsurprising that Delaware uses legislation to respond to corporate advisors' needs given the composition of the Council and our framework that explains why the legislature is better positioned than courts to provide certainty in a swift manner. The 2024–25 amendments, however, raised the concern that the Council may be too deferential to the demands of corporate advisors. These amendments also highlight the need for further study of the growing influence of prominent out-of-state law firms—who advise the majority of large public companies—on the development of Delaware corporate law.[360]

CONCLUSION

The Delaware model inspired policymakers in the United States and around the world. But what does it take to be like Delaware?

This Article proposes a framework that explains why ongoing legislative responses to court decisions play an important role in Delaware, a jurisdiction that relies on courts for setting corporate law norms. It documents a persistent pattern over the past decades of legislative responses to judicial decisions that aim at addressing main challenges inherent in Delaware's reliance on judge-made law, including the tension between norm-setting and insulating corporate insiders from out-of-pocket liability, the limitations of fiduciary-based adjudication, and other institutional constraints of the judiciary. The interplay between courts and legislation also allows Delaware to adapt to stakeholder pressures and mitigate the risk of federal intervention or DExit. When employed properly, we show how these legislative interventions *complement* courts, often alleviating external pressures when a judicial ruling creates shocks or uncertainties in the market.

However, the 2024–25 amendments present a cautionary tale and underscore the risks underlying this strategy. These amendments suggest that legislative responses might reflect disagreements between Delaware's legislature and its judiciary and jeopardize the stability

356. *See, e.g.*, Amy Simmerman, William B. Chandler III & David Berger, *Delaware's Status as the Favored Corporate Home: Reflections and Considerations*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 8, 2024), https://corpgov.law.harvard.edu/2024/05/08/delawares-status-as-the-favored-corporate-home-reflections-and-considerations/ [https://perma.cc/9QH2-3XHV] (explaining growing criticism by out of state attorneys).

357. *Supra* notes 185–87 and accompanying text.

358. *Supra* notes 189–202 and accompanying text.

359. In *Nguyen v. View, Inc.*, the court held that an act rejected by stockholders was not a "defective corporate act" subject to cure by ratification under Section 204. *See* Nguyen v. View, Inc., No. 11138, 2017 WL 2439074 (Del. Ch. June 6, 2017). This ruling created uncertainty about which acts could be ratified under Section 204. To address this concern, the legislature amended Section 204 and clarified the definition of "defective corporate act" to include acts within the corporation's power without regard to the failure of authorization. *See* C. Stephen Bigler & Stephanie Norman, *Proposed Amendments to Section 204 of the Delaware General Corporation Law Resolve Uncertainty Created by the Reasoning in Nguyen v. View, Inc.*, 17 A.B.A. BUS. L. SEC. (2018).

360. *See* Kahan & Rock, *supra* note 21, at 43 (noting the effects of an increase in out-of-state law firms with Delaware offices, whose lawyers have limited independence and a reduced stake in Delaware's long-term interests).

of the Delaware model. These amendments thus call for more informed analysis of Delaware's legislative-judiciary interplay. Our Article is a first step in that direction.

Time will tell whether the open controversy around the 2024–25 amendments will be an outlier or a turning point, making future legislative responses to court decisions more contentious. If this trend persists, how will judges and shareholders react in the future? Will courts find ways to challenge legislative responses that significantly limit their decisions? Will large institutional investors, who have remained on the sidelines so far, try to influence Delaware's corporate legislation by avoiding investing in companies incorporated in Delaware? If contentious legislative interference in court decisions becomes the new norm, researchers will need to further study the various interests and ideologies that may motivate the members of the Council, as well as the need for structural reforms in Delaware's traditional lawmaking process.