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Protecting Delaware Corporate Law: Section 115 And Its Underlying Ramifications

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PROTECTING DELAWARE CORPORATE LAW: SECTION 115 AND ITS UNDERLYING RAMIFICATIONS

ANDREW HOLT*

*"I do not discern an overarching public policy of this State that prevents boards of directors of Delaware corporations from adopting bylaws to require stockholders to litigate intra-corporate disputes in a foreign jurisdiction."*¹

— Chancellor Andre G. Bouchard

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INTRODUCTION

On June 24, 2015, Delaware Governor Jack Markell signed legislation amending the General Corporation Law of the state of Delaware

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1. *City of Providence v. First Citizens Bancshares, Inc.*, 99 A.3d 229, 240 (Del. Ch. 2014).

("DGCL"),² effectively overruling Chancellor Andre Bouchard's decision in *City of Providence v. First Citizens Bancshares, Inc.*,³ while codifying then-Chancellor—now Chief Justice—Leo Strine's opinion in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.* ("*Chevron*") at the same time.⁴ Delaware thus statutorily sanctioned exclusive forum selection clauses—so long as the selected forum is Delaware.⁵ The newly added Section 115 states that

[t]he certificate of incorporation or bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and *no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State.*⁶

In other words, a corporation may now require any or all internal claims against the company to be brought solely in Delaware.⁷ Additionally, Section 115 prohibits a corporation from excluding Delaware as a potential forum; a Delaware corporation cannot select another state as an *exclusive* forum to settle internal disputes—rejecting *City of Providence*.⁸

To be clear, Section 115 does not prohibit a corporation from selecting a foreign jurisdiction as an *additional* forum; however, it does "invalidate any provision selecting only non-Delaware courts, or any arbitral forum, to the extent the provision would prohibit litigation of internal corporate claims in the Delaware courts."⁹ Forum selection clauses have never been the subject of legislation in Delaware; but, due to an increasing number of Delaware corporations adopting such clauses in their charters and bylaws and the subsequent cases upholding these adoptions in *Chevron* and *City of Providence*, Delaware acted.¹⁰

This Article will first explore the influential Delaware case law ratifying

2. Delaware Governor Jack Markell Signs Legislation Amending the Delaware General Corporation Law, RICHARDS, LAYTON & FINGER KNOWLEDGE CTR. (June 24, 2015), <https://www.rlf.com/Publications/6092>.

3. *City of Providence*, 99 A.3d 229.

4. 73 A.3d 934 (Del. Ch. 2013).

5. See John L. Reed, *Delaware (Again) Proposes Sledgehammering Fee-Shifting Bylaws*, HARV. L. SCHOOL F. ON CORP. GOVERNANCE & FIN. REG. (Mar. 12, 2015), <http://corpgov.law.harvard.edu/2015/03/12/delaware-again-proposes-sledgehammering-fee-shifting-bylaws/#comments>.

6. DEL. CODE ANN. tit. 8 § 115 (2015) (emphasis added).

7. See Jack B. Jacobs, *New DGCL Amendments Endorse Forum Selection Clauses and Prohibit Fee-Shifting*, HARV. L. SCHOOL F. ON CORP. GOVERNANCE & FIN. REG. (June 17, 2015), <http://corpgov.law.harvard.edu/2015/06/17/new-dgcl-amendment-s-endorse-forum-selection-clauses-and-prohibit-fee-shifting/>.

8. *Id.*

9. *Id.*

10. *Id.*

internal corporate forum selection clauses and Section 115's response. Next, it will discuss some concerns raised by the addition of Section 115 including (1) the effect of exclusive forum selection clauses on multijurisdictional litigation, (2) Section 115 as a possible legislative intrusion into the corporate boardroom, and (3) the concern for judicial comity among other states and federal jurisdictions and the Delaware courts. The *leitmotif* of this Article is that Delaware has carved out a sophisticated niche as the premier incorporation state for the majority of large U.S. corporations. Like the ever-evolving Apple Inc. iPhone, there is an increasing need to upgrade and innovate the product that is Delaware corporate law. To maintain this innovative edge and respond to developments in the corporate market place, the Delaware legislature (the "General Assembly"), will act sometimes to the exaltation of legal commentators and practitioners, and at other times, in the face of claims of "protectionism."

II. DELAWARE AND INTERNAL FORUM SELECTION CLAUSES

A "forum selection clause" is a contractual provision in which the parties establish the place for specified litigation between the parties.¹¹ These clauses are ubiquitous in commercial contracts.¹² As discussed below, however, they were rarely used before 2010 to address the litigation concerning internal corporate claims. "Internal corporate claims," as defined by Section 115, are "claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director of officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery."¹³ This Section details the three critical Delaware Court of Chancery (the "Court of Chancery") cases that sparked, and subsequently developed, internal corporate forum selection clause case law.

A. Revlon: *Opening the Door*

Before March 16, 2010, while it was commonplace to find forum selection clauses in a corporation's material contracts, it was, however, exceedingly rare to find them in the organic documents (*i.e.*, the charter or bylaws) of the same corporation.¹⁴ On that date, the Court of Chancery

11. BLACK'S LAW DICTIONARY 770 (10th ed. 2014).

12. See, e.g., Richard D. Freer, *Erie's Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1091 (noting the ubiquity of forum selection clauses).

13. DEL. CODE ANN. tit. 8 § 115 (2015).

14. Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333 (2012).

explained in *In re Revlon, Inc. Shareholders Litigation* (“*Revlon*”),¹⁵ that corporations could avoid forum disputes by adopting forum selection provisions in corporate charters.¹⁶ In dicta, Vice-Chancellor Travis Laster observed that if corporate boards of directors (the “Board”) and stockholders “believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes.”¹⁷ Thus, *Revlon* sparked the infiltration of forum selection clauses into corporate charters and bylaws.¹⁸

In *Revlon*’s wake, prominent law firms immediately endorsed the use of these clauses to their corporate clients.¹⁹ In the sixteen months following *Revlon*, eighty-four corporations installed forum-selection clauses in either their bylaws or charters; by contrast, in the nineteen years preceding *Revlon*, only eleven corporations included forum-selection clauses in their internal documents.²⁰ The rampant adoption of internal corporate forum-selection clauses is clearly attributable to *Revlon*’s mere dicta. Eventually, the Court of Chancery would get a chance to clarify or, rather, confirm Vice-Chancellor Laster’s dicta.

B. Chevron: Choosing only Delaware

In *Chevron*, the Court of Chancery got its opportunity. Written by Chief Justice Strine, *Chevron* concerned the oil and gas giant’s decision to adopt a forum-selection clause in its bylaw that provided for any litigation concerning the corporation’s internal affairs to be conducted in Delaware.²¹ The stockholders of Chevron sued the Board over its adoption of the bylaws, claiming (1) that the bylaws were *statutorily* invalid under the DGCL and (2) that they were *contractually* invalid.²²

15. 990 A.2d 940, 960 (Del. Ch. 2010).

16. *Id.* at 960.

17. *Id.*

18. See, e.g., Timothy P. Crudo & Andrea Cheuk, *Location, Location, Location: The Current State of Corporate Forum-Selection Provisions*, 19 WESTLAW J. SEC. LITIG. & REG. 1, 2 (2013) (explaining how *Revlon* set off a rush to “implement corporate forum-selection clauses”).

19. See, e.g., LATHAM & WATKINS, LLP, *Designating Delaware’s Court of Chancery as the Exclusive Jurisdiction for Intra-Corporate Disputes: A New “Must” for Delaware Company Charter or Bylaws*, CORP. GOVERNANCE COMMENT. (Apr. 2010) (recommending a specific clause the firm drafted vesting jurisdiction in the Court of Chancery).

20. *Id.*

21. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 937 (Del. Ch. 2013) (including Fed-Ex’s adoption of an exclusive forum-selection clause designating Delaware).

22. *Id.* at 938.

Regarding the stockholders' first claim, Chief Justice Strine held that the forum-selection clause choosing Delaware as the company's forum for internal disputes was valid. Citing Section 109(b) of the DGCL, Chief Justice Strine explained that a corporation's Board is free to adopt "any provision, not inconsistent with law or with the . . . [charter], relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."²³ Chief Justice Strine determined the Board's power to adopt this bylaw fell within the purview of Section 109(b). Ultimately, it is statutory authorization that grants the ability of a corporate charter to confer to the Board the power to adopt, amend, or repeal bylaws.²⁴ As with a Board's ability to use a poison pill to thwart hostile takeovers, Chief Justice Strine explains that a Board similarly has the authority to "adopt a bylaw to protect against what they claim is a threat to their corporations and stockholders, the potential for duplicative law suits in multiple jurisdictions over single events."²⁵

As for the stockholders' second claim, Chief Justice Strine held that the bylaws were contractually valid.²⁶ The stockholders claimed that the bylaws were invalid because the Board unilaterally adopted them; that is, the bylaws cannot be contractual because the stockholders did not vote ahead of time to approve them.²⁷ Chief Justice Strine explained that the litany of Delaware Supreme Court decisions illustrate that corporate bylaws "constitute a binding part of the contract between a Delaware corporation and its stockholders."²⁸ Chief Justice Strine explained that Chevron's stockholders "have assented to a contractual framework established by the DGCL and the certificates of incorporation that explicitly recognized that stockholders will be bound by bylaws adopted unilaterally by their Boards."²⁹ Here, Chevron's charter explicitly authorized the Board to implement bylaws such as a forum-selection clause.³⁰ Additionally, should the Board draft a bylaw to the stockholders' dismay, stockholders are free to repeal or amend the displeasing bylaws—a right that cannot be taken

23. *Id.* at 950.

24. DEL. CODE ANN. tit. 8, § 109(a) (2015) ("[A]ny corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors[.]").

25. *Chevron*, A.3d at 953.

26. *Id.* at 958.

27. *Id.* at 954-55.

28. *Id.* at 955.

29. *Id.* at 956.

30. *Id.*

away by the board or the legislature.³¹

Chief Justice Strine discussed the seminal forum-selection clause case, *Carnival Cruise Lines, Inc. v. Shute*,³² where the U.S. Supreme Court approved the unilateral use of a contractual forum-selection clause on the back of cruise ship tickets.³³ Chief Justice Strinere emphasized that unlike cruise ship passengers, who have no mechanism to amend the terms in their contract, the stockholders of a corporation retain the right to repeal or amend the terms adopted by their Board.³⁴ Thus, where the Board has adopted a forum-selection bylaw that falls within the DGCL, Delaware courts will ultimately enforce them just as with any other bylaw.³⁵ Therefore, *Chevron* stands for the proposition that, as long as a forum-selection clause is adopted within Delaware statutory limits, it is lawful—at least if it selects Delaware as the forum.³⁶

C. City of Providence: Choosing Anywhere but Delaware

In *City of Providence*, Chancellor Bouchard extended the ability of a corporation to use a forum-selection clause in the bylaws to designate a foreign jurisdiction as the *exclusive* forum for internal disputes.³⁷ This case dealt with a forum selection bylaw “virtually identical to the ones that . . . Chief Justice Strine found to be facially valid in . . . [*Chevron*].”³⁸ Here, however, the clause designated the U.S. District Court for the Eastern District of North Carolina “or any North Carolina state court with jurisdiction, as the exclusive forum, instead of the courts of Delaware.”³⁹

City of Providence (“Providence”), as a shareholder of the defendant corporation, challenged First Citizens BancShares, Inc.’s (“FC North”) adoption of the forum selection bylaw.⁴⁰ FC North, a bank holding company incorporated in Delaware, has its headquarters in Raleigh, North Carolina, and the majority of its deposits and branches in North Carolina.⁴¹ Not only did Providence challenge the Board’s right to do this, but it also

31. *Id.* (citing *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d. 226, 231 (Del. 2008)).

32. 499 U.S. 585 (1991).

33. *Chevron*, 73 A.3d at 957-58.

34. *Id.* at 958 (applying *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991)).

35. *Id.*

36. *See generally id.*

37. *City of Providence v. First Citizens Bancshares, Inc.*, 99 A.3d 229, 240 (Del. Ch. 2014).

38. *Id.* at 230.

39. *Id.*

40. *Id.* at 231.

41. *Id.*

challenged the timing: the Board adopted the bylaw on the same day it had announced a merger agreement to acquire a bank holding company based in South Carolina.⁴²

Citing *Chevron*, Chancellor Bouchard explained that “[s]tockholders are on notice that, as to those subjects that are subject of regulation by bylaw under 8 *Del. C.* § 109(b), the Board itself may act unilaterally to adopt bylaws addressing those subjects.”⁴³ While the bylaw in this case chose a forum other than Delaware, Chancellor Bouchard relied on the same analysis used in *Chevron* to address the validity of the bylaw and stated that nothing in *Chevron* prohibits a Delaware corporation from choosing an exclusive forum other than Delaware.⁴⁴ As for the timing of the bylaw, Providence asserted that the bylaw was self-serving to an alleged stockholder in connection with a self-interested transaction.⁴⁵ However, Chancellor Bouchard stated that the complaint lacked any well-pled allegations of wrongdoing and the fact that the Board adopted the bylaw on a “cloudy” day when it entered into a merger—rather than a “clear” day—was immaterial.⁴⁶ Moreover, a forum selection bylaw merely regulates “*where* stockholders may file suit, not *whether* the stockholder may file”⁴⁷

Lastly, Chancellor Bouchard addressed Delaware’s “purported interest” in deciding the case. Providence asserted that Delaware has a strong public policy in favor of the Court of Chancery deciding novel questions of Delaware corporate law.⁴⁸ In response, Chancellor Bouchard explained that this novelty as described by Providence was overstated, at least in this case, because, at its core, the complaint alleged self-dealing and waste: claims governed by well-established principles of Delaware law.⁴⁹ Such issues are “far from the type of unprecedented claims that might theoretically outweigh Delaware’s substantial interest in enforcing a facially valid forum selection bylaw designating a [foreign jurisdiction] as an exclusive forum.”⁵⁰ Further to his point, he explained that the General Assembly did not express a preference on whether a Board could require

42. *Id.*

43. *Id.* at 234 (quoting *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934, 955-56 (Del. Ch. 2013)).

44. *See id.* at 230.

45. *Id.* at 240-41.

46. *Id.* at 241.

47. *Id.*

48. *Id.* at 239.

49. *Id.* at 240 (citation omitted).

50. *Id.*

internal disputes to be conducted in a foreign jurisdiction.⁵¹ To conclude, Chancellor Bouchard explained it was logical—not unreasonable—to select North Carolina as FC North’s exclusive forum for internal disputes: that was the situs of its headquarters and the majority of its business.⁵²

D. Section 115: Protectionism or Justified Concern

In 1999, in *Elf Atochem N. Am., Inc. v. Jaffari*,⁵³ a case akin to *City of Providence* but applicable to Delaware limited liability companies (“LLC”), the Delaware Supreme Court upheld a forum-selection clause in the company’s operating agreement, which designated a foreign jurisdiction as the exclusive forum for internal disputes.⁵⁴ In response, the General Assembly enacted Section 18-109(d) of the Delaware LLC Act that, in effect, prohibited a Delaware LLC from selecting a foreign jurisdiction as its exclusive forum for internal disputes.⁵⁵ The legislature amended the Limited Partnership Act in an analogous way.⁵⁶

Nevertheless, fifteen years later, Section 115 has been characterized, by some, as a “protectionist measure designed to funnel litigation into Delaware.”⁵⁷ Critics of the amendment claim the legislation to be “a solution to a problem that does not exist.”⁵⁸ Some Delaware practitioners have suggested that Section 115, along with the prohibition on fee-shifting

51. *Id.*

52. *Id.*

53. 727 A.2d 286 (Del. 1998).

54. *Id.*

55. DEL. CODE ANN. tit. 18 § 109(d) (2015). “In a written limited liability company agreement or other writing, a manager or member may consent to be subject to the nonexclusive jurisdiction of the courts of, or arbitration in, a specified jurisdiction, or the exclusive jurisdiction of the courts of the State of Delaware, or the exclusivity of arbitration in a specified jurisdiction or the State of Delaware, and to be served with legal process in the manner prescribed in such limited liability company agreement or other writing. Except by agreeing to arbitrate any arbitrable matter in a specified jurisdiction or in the State of Delaware, a member who is not a manager may not waive its right to maintain a legal action or proceeding in the courts of the State of Delaware with respect to matters relating to the organization or internal affairs of a limited liability company.” *See also* *Baker v. Impact Holding, Inc.*, No. CIVA 4960-VCP, 2010 WL 1931032 (Del. Ch. May 13, 2010) (comparing Section 18-109(d) to, at the time, the lack of such forum selection provision or public policy regarding such provision in the DGCL).

56. *Baker*, 2010 WL 1931032, at *2 (discussing the General Assembly’s amendment to the Limited Partnership Act in the same “fashion” as Section 18-109(d)).

57. Andrew D. Cordo and F. Troupe Mickler IV, *Significant Fee-Shifting and Forum Selection Amendments Proposed to the DGCL*, ASHBY & GEDDES, P.A. (Mar. 25, 2015), <http://www.ashby-geddes.com/blogs-bankruptcy,Significant-Fee-Shifting-Forum-Selection-Amendments-Proposed-DGCL>.

58. *Id.*

passed in the same bill, “lends the appearance of a legislation land grab.”⁵⁹

The Council of the Corporation Law Section of the Delaware State Bar Association (the “Council”)—composed of members of the Delaware bar who annually propose amendments to the DGCL—drafted the 2015 amendments that included Section 115.⁶⁰ Explanations for the Council’s amendments range from the cynical protectionism claims mentioned above to more practical public policy concerns. These concerns include enabling Delaware to maintain oversight over its laws, and as Reed explains, to combat the “proliferation of other courts trying to interpret [Delaware’s] laws without parties having recourse to Delaware’s courts.”⁶¹ The export of Delaware corporate law to foreign jurisdictions has long been a concern.⁶² From a practical point of view, Professor Stephen Bainbridge maintains that keeping internal disputes in Delaware is preferable because of the expert judges and “[n]o home-state bias in favor of one side or the other, since usually both sides will have their principal place of business elsewhere.”⁶³ Moreover, Delaware is “more rigorous than most in policing plaintiff lawyers bringing suits not in the best interest of the corporation or its shareholders as a whole.”⁶⁴

If stakeholders of Delaware corporations—mainly the shareholders,

59. Reed, *supra* note 5.

60. William Chandler et al., *Wilson Sonsini Discusses Proposed 2015 Amendments to the Delaware General Corporation Law*, THE CLS BLUE SKY BLOG (Mar. 18, 2015), <http://clsbluesky.law.columbia.edu/2015/03/18/wilson-sonsini-discuss-es-proposed-2015-amendments-to-the-delaware-general-corporation-law/>.

61. Reed, *supra* note 5.

62. See *Sternberg v. O’Neil*, 550 A.2d 1105, 1124-25 (Del. 1988) (citing *Armstrong v. Pomerance*, 423 A.2d 174, 178 (Del. 1988)) (“The Delaware courts and legislature have long recognized a ‘need for consistency and certainty in the interpretation and application of Delaware corporation law and the desirability of providing a definite forum in which shareholders can challenge the actions of corporate management without having to overcome certain procedural barriers which can be particularly onerous in the context of derivative litigation.’”); *In re Topps Co.*, 924 A.2d 951, 959 (Del. Ch. 2007) (explaining that the “benefits created by our judiciary’s handling of corporate disputes are endangered if our state’s compelling public policy interest in deciding these disputes is not recognized and decisions are instead routinely made by a variety of state and federal judges who only deal episodically with our law”). See generally Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware’s Stake in Corporate Law*, 34 DEL. J. CORP. L. 57 (2009) (discussing Delaware’s interests in other jurisdictions applying its laws).

63. Stephen Bainbridge, *Airgas and Choice of Forum Article Provisions*, PROFESSORBRAINBRIDGE.COM (Feb. 16, 2011), <http://www.professorbainbridge.com/professorbainbridge.com/2011/02/airgas-and-choice-of-forum-article-provisions.html#tp>.

64. *Id.*; see also Liz Hoffman, *The Judge Who Shoots Down Merger Suits*, WALL ST. J. (Jan. 10, 2016), <http://www.wsj.com/articles/the-judge-who-shoots-down-merger-lawsuits-1452076201> (discussing Vice Chancellor Laster’s proclivity to dismiss meritless strike suits).

officers, and directors of the corporation—are to expect consistency and expertise in the application of the DGCL, Delaware is most likely the proper forum for the review of internal disputes rather than, as Chief Justice Strine put it, “state and federal judges who only deal episodically with [Delaware] law.”⁶⁵ Therefore, Section 115’s codification of *Chevron* is apt; there is no plausible reason why a Delaware corporation should not be able to choose Delaware as the exclusive forum for its internal disputes. The controversy is not whether Delaware courts are more qualified at to interpret and apply the DGCL—they clearly are—but whether it is for the General Assembly to ban corporations from choosing a foreign jurisdiction as an exclusive forum for their internal disputes.

Delaware judges, legal practitioners, and lawmakers have developed a unique and sophisticated corporate jurisprudence that is unmatched. It is predominately for this reason that sixty percent of the Fortune 500 companies have chosen to incorporate in Delaware.⁶⁶ Justifying Section 115’s prohibition on excluding Delaware as a forum, the Council maintains that “the value of Delaware as a favored jurisdiction of incorporation is dependent on a consistent development of a balance of corporate law, and that the Delaware courts are best situated to continue to oversee that development[.]”⁶⁷ Additionally, Delaware courts should be able to reel in corporate actors attempting to escape Delaware oversight for nefarious reasons.⁶⁸ Delaware has a vested interest in maintaining oversight over the application of its laws and the avoidance of another court misinterpreting and misapplying nuanced corporate fiduciary requirements; as the Council believes, the survival of Delaware’s corporate framework may very well depend on it.⁶⁹

As suggested by Vice-Chancellor Laster in *Revlon*, “Delaware courts [need to] retain some measure of inherent residual authority so that entities created under the authority of Delaware law [can not] wholly empty themselves from Delaware oversight.”⁷⁰ Vice-Chancellor Laster did not indicate what those measures could or should be or the potential ramifications thereof. As with any piece of legislation, there are inherent and inevitable concerns that flow from Section 115: (1) the effect on multi-jurisdictional litigation; (2) an overreaching by a legislature into the corporate boardroom; and (3) the effect on judicial comity among other

65. *In re Topps Co.*, 924 A.2d. at 959.

66. Stevelman, *supra* note 62, at 66.

67. Chandler, *supra* note 60.

68. *See City of Providence v. First Citizens Bancshares, Inc.*, 99 A.3d 229, 240 (Del. Ch. 2014).

69. *See Cordo*, *supra* note 57.

70. *In re Revlon, Inc.*, 990 A.2d 940, 961 n.8 (Del. Ch. 2010).

state courts, Delaware, and the federal court system.

III. RAMIFICATIONS OF SECTION 115

A. Effects on Multi-Jurisdictional Litigation

Exclusive forum selection clauses were supposed to cure the plague that is multi-jurisdictional litigation on Delaware corporations and their officers and directors.⁷¹ Vice-Chancellor Laster practically prescribed this cure in *Revlon*: “if [a Board] and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes.”⁷²

Multi-jurisdictional litigation occurs when different sets of plaintiffs’ counsel file class action lawsuits challenging a proposed transaction, such as a merger, in both the state in which the company is incorporated, often Delaware, and the state where the corporation has its principal place of business.⁷³ This “rush to the courthouse” consists of lawsuits that typically raise virtually identical claims on behalf of the same stockholder class.⁷⁴ As noted by Chief Justice Chandler, “[d]efense counsel is forced to litigate the same case—often identical claims—in multiple courts.”⁷⁵

Practitioners, judges, and legal commentators have documented the monetary costs and other evils of this phenomenon.⁷⁶ The costs are

71. See Edward B. Micheletti & Jenness E. Parker, *Multi-Jurisdictional Litigation: Who Caused This Problem, and Can It Be Fixed*, 37 DEL. J. CORP. L. 1, 25 (2012) (discussing forum selection clauses as a solution to multi-jurisdictional litigation); Minor Meyers, *Fixing Multi-Forum Shareholder Litigation*, U. ILL. L. REV. 467, 524 (2014) (“The most prominent approach to dealing with multi-forum shareholder litigation is for companies to adopt forum selection clauses in their organizational documents.”). But see Mark Gideon, *Multijurisdictional M&A Litigation*, 40 IOWA J. CORP. L. 291, 313 (2015) (explaining that exclusive forum selections clauses are a sub-optimal and flawed solution to multijurisdictional litigation).

72. *Revlon*, 990 A.2d at 960.

73. Micheletti & Parker, *supra* note 71, at 12-13; see also Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137 (2011) (discussing thoroughly multi-jurisdictional litigation).

74. See Micheletti & Parker, *supra* note 71, at 5.

75. *In re Allion Healthcare Inc.*, No. 5022-CC, 2011 Del. Ch. LEXIS 48 at *12. (discussing the “Multi-Forum Deal Litigation Problem” further).

76. See Robert Borowski, *Combatting Multiforum Shareholder Litigation: A Federal Acceptance of Forum Selection Bylaws*, 44 SW. L. REV. 149 (2014); William Savitt, *The Genius of the Modern Chancery System*, 2012 COL. BUS. L. REV. 570, 599 (2012) (“Extensive litigation of Delaware fiduciary claims in the courts of other states imposes significant costs on litigants and society.”). But see Randall S. Thomas, *What Should We Do About Multijurisdictional Litigation in M&A Deals?*, 66 VAND. L. REV. 1925, 1941-49 (2013) (arguing the benefits and suggesting that the costs are

ultimately borne by shareholders by way of attorneys' fees to both plaintiffs' and defense counsel. The net result of this phenomenon is that it "forces defendants to consider settling deal litigation that, but for the risks posed by multi-jurisdictional litigation, defendants might otherwise have moved to dismiss."⁷⁷ Further, judicial resources are also wasted "as judges in two or more jurisdictions review the same documents and at times are asked to decide the exact same motions."⁷⁸

One of the primary reasons for filing *outside* of Delaware—even when a corporation is incorporated in Delaware—is to avoid the experienced corporate oversight of the Court of Chancery.⁷⁹ Plaintiffs' lawyers know that a claim for breach of fiduciary duty that might otherwise be dismissed by the Court of Chancery may gain traction in a non-Delaware forum.⁸⁰ Thus, a foreign court unfamiliar with Delaware law may permit a plaintiff's case to continue even though it would have been tossed out by an experienced corporate law judge in Delaware.⁸¹ In addition to plaintiffs' lawyers escaping the purview of the Delaware judiciary, as discussed by Professor Minor Meyers, multijurisdictional litigation can inhibit the incorporation state from deciding "important cases with which to shape the content of their corporate law"⁸²—one of the primary concerns of Delaware.⁸³

For the foregoing reasons, corporations (and jurists) prefer to corral internal corporate claims into one forum, avoiding multi-jurisdictional suits and. It is also apparent why Delaware would prefer that those internal corporate claims be litigated in the state of incorporation; it wants oversight of both the application of its laws and the actors formed within its borders. Section 115 does not entirely restrict a corporation's use of an exclusive forum selection clause to avoid multi-jurisdictional litigation. To the contrary, the statute codifies a corporation's ability to select Delaware as its exclusive forum for internal corporate claims.⁸⁴ If a corporation designates only Delaware as its forum, it both eliminates multijurisdictional litigation (and the evils that come with it) and satisfies Delaware's interest in the application, development, and evolution of Delaware corporate law within its borders.

overstated).

77. Micheletti & Parker, *supra* note 71, at 12.

78. *Allion*, 2011 Del. Ch. LEXIS 48 at *5.

79. *Id.* at *6.

80. *Id.*

81. *See id.* at *7.

82. Meyers, *supra* note 71.

83. *See Chandler, supra* note 60.

84. *See DEL CODE ANN. tit. 8 § 115* (2015).

Section 115 does, however, eliminate options for a Delaware corporation. It states that “no provision of the certificate of incorporation or the bylaws may *prohibit* bringing such claims in the courts of this State.”⁸⁵ A corporation like FC North, therefore, can no longer choose the state it does most of its business in—or any other state except Delaware—as an exclusive forum to resolve internal corporate claims.⁸⁶ If a corporation intends to keep open its principal place of business as a forum a forum selection clause by inserting a forum-selection clause in its charter or bylaws, it cannot do so at the exclusion of Delaware, thus subjecting itself to multi-jurisdictional litigation.⁸⁷ The practical effect of Section 115 is that the only forum a corporation could choose that would eliminate the risk of multi-forum litigation is Delaware.⁸⁸

B. An Intrusion into the Boardroom

Two months prior to the passage of Section 115, Barry Harris, Chief Legal Officer for FC North, blasted the then-proposed Section 115 as a legislative intrusion into the corporate boardroom in a letter to the Secretary of the State of the State of Delaware (“Secretary of State”).⁸⁹ Citing *Chevron* and *City of Providence*, Harris explained that Delaware courts recognized the contractual rights of corporations and Section 115 “interferes unnecessarily with the sound judgment of its Board, which is in the best position to determine the forum that is most convenient and beneficial to the corporation and its stockholders.”⁹⁰ Harris described Section 115 as “legislatively over[riding]” a Board’s reasoned decision that intra-corporate litigation be conducted elsewhere.⁹¹ In another letter to the Secretary of State from Michael Cunningham, General Counsel of Red Hat, Inc. (“Red Hat”), assailed the legislation as “micromanag[ing] corporate governance”; whereas, historically Delaware has been “remarkable[y] flexibl[e]” and “hands off.”⁹²

85. *Id.* (emphasis added).

86. *See id.*

87. *See* Chandler, *supra* note 60 (citing the Council’s concerns for the need to eliminate Multi-jurisdictional litigation).

88. *Id.*

89. *See* Letter from Barry P. Harris, IV, Vice President and Chief Legal Officer, First Citizens Bancshares, to Jeffrey W. Bullock, Secretary of State, Delaware Department of State (Apr. 8, 2015) (on file with the Delaware state legislature) [hereinafter “Harris Letter”], <http://legis.delaware.gov/LIS/lis148.nsf/e955250df0285a27852568ac0070372a/e0a816faaba21d6585257e4a006400cc/>.

90. *Id.*

91. *Id.*

92. Letter from Michael Cunningham, Executive Vice President and General Counsel, Red Hat, Inc., to Jeffrey W. Bullock, Secretary of State, Delaware

Historically, the DGCL has been “widely regarded as the most flexible in the nation because it leaves the parties to the corporate contract (managers and stockholders) with great leeway to structure their relations, subject to relatively loose statutory constraints and to the policing of director misconduct through equitable review.”⁹³ The DGCL is an enabling act that is intended to be a “skeletal framework” from which the “flesh and blood” of corporate law is crafted by judges.⁹⁴ The General Assembly has historically preferred against “regulatory prescription” and deferred to the judicial expertise on corporate legal matters.⁹⁵ Legal scholars have noted that even the Delaware courts have demonstrated hostility toward legislative intrusions into the corporate arena.⁹⁶

With the permissive and enabling nature of the DGCL and the expertise of the judiciary to police and mold corporate law in mind,⁹⁷ one can understand why the corporate officers of Red Hat, FC North, and likely other Delaware corporations were disconcerted at the release of then-proposed Section 115.⁹⁸ The Delaware judiciary had spoken: (1) *Revlon* proposed that exclusive forum selections clauses were permissible;⁹⁹ (2) *Chevron* approved Delaware as an exclusive forum;¹⁰⁰ and (3) *City of Providence* held a corporation may select a foreign jurisdiction as an

Department of State (May 7, 2015), <http://legis.delaware.gov/LIS/lis148.nsf/e955250df0285a27852568ac0070372a/e0a816faaba21d6585257e4a006400ce/> (on file with the Delaware state legislature).

93. *Jones Apparel Grp. v. Maxwell Shoe Co.*, 883 A.2d 837, 845 (Del. 2004).

94. E. Norman Veasey & Christine T. Di Gulielmo, *What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1411 (2004) (“Enabling acts, such as the Delaware General Corporation Law (DGCL), are part of the corporate law. They create only a skeletal framework, however. The “flesh and blood” of corporate law is judge-made.”).

95. See Omar Scott Simmons, *Branding the Small Wonder: Delaware’s Dominance and the Market for Corporate Law*, 42 U. RICH. L. REV. 1129, 1159 (2008) (“As a result of the legislature’s preference against regulatory prescription and its deference to the judicial branch, Delaware courts are often the first responders to corporate law controversies.”).

96. See e.g., Marcel Kahan and Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1594-97 (2005) (citing numerous examples where Delaware courts have narrowly construed provisions of the DGCL).

97. See Chandler, *supra* note 60; Harris Letter, *supra* note 89.

98. As discussed above, the General Assembly typically allows the Delaware judiciary to craft the “flesh and blood” of Delaware corporate law. Here, however, the General Assembly enacted Section 115 notwithstanding the judiciary’s blessing. Corporations may be at a loss when attempting to calculate whether or not a case law will be trumped by the General Assembly.

99. See *In re Revlon, Inc.*, 990 A.2d 940, 960 (Del. Ch. 2010).

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

exclusive forum—thus eliminating Delaware as a forum for potential litigants.¹⁰¹ In those decisions, Chief Justice Strine and Chancellor Bouchard—two of the most respected corporate law jurists on the bench—endorsed exclusive forum selection clauses selecting Delaware and foreign jurisdictions.¹⁰² Why would the General Assembly do an end run around the Delaware judiciary—who is typically left to craft the “flesh and blood” of corporate law?

In its proposal of Section 115, the Council recognized the broadly enabling nature of the DGCL.¹⁰³ The Council also acknowledged, however, that “it is the General Assembly, not the courts, that should evaluate whether, on public policy grounds, the [DGCL’s] authorizing breadth should be narrowed.”¹⁰⁴ Rejecting claims of protectionism, the Council explained that the normally broad enabling nature of the DGCL should be trimmed back to address a denial of access to Delaware courts, which an exclusive forum selection clause designating a foreign jurisdiction arguably does.¹⁰⁵

Norman Monhait, then-Chair of the Corporate Law Section of the Delaware State Bar Association,¹⁰⁶ testified to the Delaware House Judiciary Committee that the “restriction *protects* fairness in litigation by preventing corporations from exploiting the advantages of local courts while still benefitting from Delaware’s favorable corporate climate.”¹⁰⁷ Of course, Mr. Monhait used the word “protect” but most likely not in the sense used by critics who assail Section 115 and similar maneuvers by the legislature as “protectionism.”¹⁰⁸ Mr. Monhait’s testimony did not elaborate on what “exploiting the advantages of local courts” meant, but one can infer from the various opinions of the Delaware judiciary that these “advantages” include foreign “state and federal judges who only deal episodically with [Delaware corporate law].”¹⁰⁹ And, these advantages are

101. *City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229, 240 (Del. Ch. 2014).

102. *See supra* Sections II.B and II.C.

103. CORPORATION LAW SECTION OF THE DELAWARE STATE BAR ASSOCIATION, *Explanation of Council Legislative Proposal*.http://www.skadden.com/newsletters/Proposed_DGCL_Amendments_Related_Documents.pdf (last visited Feb. 10, 2016).

104. *Id.* at 10.

105. *Id.* at 4.

106. As discussed above, the Council, who in effect drafted Section 115, is a part of the Corporate Law Section. *See supra*, note 51.

107. *An Act to Amend Title 8 of the Delaware Code Relating to the General Corporation Law: Hearing on SB 75 Before H. Judiciary Comm.*, 2015 Leg. 148th Sess. (De. 2015) (statement by Norman Monhait) (emphasis added).

108. *See Harris Letter, supra* note 89 (suggesting the amendment comes off as a “protectionist” move).

109. *In re Topps Co.*, 924 A.2d. 951, 959 (Del. Ch. 2007).

the underlying reasons why plaintiffs' attorneys choose to file outside of Delaware.¹¹⁰ Even if Mr. Monhait's statement was a Freudian slip, a legislature's concern is not the views of those outside of Delaware who would question its actions as being protectionist but that of the constituency that elects them. The people of Delaware obviously have a vested interest in seeing the maintenance of their edge in the corporate market place and the evolution of their law. As Mr. Monhait suggested, Section 115 protects Delaware (and its interests in maintaining suits within the state), which provides a favorable corporate climate from those that would exploit other jurisdictions' lack of corporate legal wherewithal.

Nevertheless, Section 115 is not the first—nor is it the last—amendment to the DGCL that directors and officers may view as an interference with corporate governance.¹¹¹ Similar to the legislature's response to *City of Providence* by way of Section 115, the legislature added Section 145(f) in response to *Schoon v. Troy Corp.* in 2009.¹¹² In *Schoon*, the Court of Chancery upheld a bylaw that abrogated a director's claim for advancement and indemnification rights provided under Section 145(e) of the DGCL.¹¹³ The court held that a former director was not entitled to the advancement of litigation expenses because the provision of the bylaw granting that right was eliminated in an amendment passed *after* the director left office but *prior* to the initiation of claims against him.¹¹⁴

Section 145(f) responded to *Schoon* by providing that a right to indemnification or advancement contained in the charter or bylaws cannot be eliminated by an amendment adopted after the occurrence of the act or omission that is the subject of litigation for which indemnification or advancement is being sought.¹¹⁵ Notwithstanding Section 145(f)'s

110. See *supra* Section II.D.

111. Section 145(f) is simply an illustrative example. There are several other examples of amendments to the DGCL, which arguably infringe on the corporate governance of a board of directors. Such as, in 2005, the legislature's amendment of Section 271 in response to the Court of Chancery's decision in *Hollinger v. Hollinger Int., Inc.* 858 A.2d 342 (Del. Ch. 2004). That amendment strengthened shareholder protection when a corporation sells all or substantially all of its assets. See DEL CODE ANN. tit. 8 § 271 (2015); see also Alex Righi, Note, *Shareholders on Shaky Ground: Section 271's Remaining Loophole*, 108 NW. U.L. REV. 1451 (2014) (detailing the amendment to Section 271).

112. *Schoon v. Troy Corp.*, 948 A.2d 1157 (Del. Ch. 2008).

113. See *id.*

114. See *id.*; Robert S. Reder, et al., *Proposed Amendments to the DGCL*, LAW 360 (Mar. 18, 2009), <http://www.law360.com/articles/92396/proposed-amendments-to-dgcl>.

115. DEL. CODE ANN. tit. 8 § 145(f) (2015) ("A right to indemnification or advancement of expenses arising under a provision of the certificate of incorporation or a bylaw shall not be eliminated or impaired by an amendment to the certificate of incorporation or a bylaw after the occurrence of the act or omission that is the subject

“interference” with a corporation’s ability to amend its charter and bylaws regarding indemnification and advancement for former directors, scholars and practitioners praised the legislature for “preserv[ing] drafting flexibility that can accomplish ‘elimination or impairment’ of advancement and indemnification rights after the occurrence of the challenged act or omission.”¹¹⁶ While Section 145(f) prevents a corporation from eliminating indemnification or advancement of expenses for a director or officer after the fact, it carves out an exception permitting elimination if a provision in effect at the time of such occurrence authorized such elimination, thus preserving flexibility for corporate Boards.¹¹⁷

Section 102(b)(7) of the DGCL is another example of meticulous legislative maneuvering by the General Assembly. This piece of legislation empowered Delaware corporations through a charter provision (adopted by stockholders) to protect corporate directors from monetary liability for breach of the duty of care. In *Smith v. Van Gorkom*,¹¹⁸ the Delaware Supreme Court had held that a Board was grossly negligent because it quickly approved a merger without sufficient inquiry with the result that the director defendants were exposed to multi-million dollar personal liability.¹¹⁹ Critics described the holding as “one of the worst in the history of corporate law.”¹²⁰ The fallout from this decision included a mass panic among current and prospective directors of public corporations across the United States because of the potential for personal civil liability and subsequent monetary damages imposed on them by a court.¹²¹

of the civil, criminal administrative or investigative action, suit or proceeding for which indemnification or advancement of expenses is sought, *unless the provision in effect at the time of such act or omission explicitly authorizes such elimination or impairment after such action or omission has occurred.*”) (emphasis added).

116. William D. Johnston, *Flexibility Under Delaware Law in Drafting Advancement Provisions on a “Clear Day,” and Potential Surprises for Those Who Do Not Take Advantage of That Flexibility*, 13 DEL. L. REV. 21, 27 (2011).

117. See DEL. CODE ANN. tit. 8 § 145(f).

118. 488 A.2d 858 (Del. 1985).

119. See *id.*

120. Daniel Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 BUS. LAW. 1437, 1455 (1985).

121. See e.g., Sondra J. Thorson, *Protecting Shareholders: Illinois Needs a Director Liability Statute*, 26 J. MARSHALL L. REV. 105, 127 (1992) (“The award of monetary damages in *Van Gorkom* triggered a national panic among directors and prospective directors. Their concerns were two-fold. First, corporate managers, the corporate bar, and commentators feared that qualified persons would refuse to serve as outside corporate directors rather than expose themselves to the possibility of personal liability. Second, these same parties contended that even if qualified persons agreed to serve as directors, they would react to the threat of personal liability by making overly conservative, risk-averse decisions that would ultimately be harmful to the interests of the corporation.”).

Consequently, the price for director and officer insurance skyrocketed: so much so that some Boards could not get sufficient coverage at any price.¹²² Perceiving unnecessary exposure to civil liability on the part of directors, the General Assembly, in response, drew up Section 102(b)(7), which empowered corporations to exculpate directors and officers for breaching their duty of care.¹²³ The General Assembly knew, however, that it had to draw this line carefully so as to *not* enable exculpation for acts not made in good faith or in violation of the duty of loyalty.¹²⁴ Section 102(b)(7) remains a heralded piece of legislation in which the General Assembly reacted to both preserve the ability of corporations to enlist corporate directors and protect Delaware's corporate framework from a perceived mistake by the judiciary.

Section 115 preserves flexibility for corporations and protects Delaware's corporate framework in a similar fashion. Corporations may still avoid multi-jurisdictional litigation by selecting Delaware as an exclusive forum.¹²⁵ They may also choose their principal place of business (or any other forum) as a selected forum so long as Delaware remains an option.¹²⁶ In the examples discussed above, the General Assembly acted in spite of judicial rulings to the contrary. It perceived an error by the judiciary—one that would negatively affect Delaware's corporate legal framework. Sections 102(b)(7), 145(f), and 115 all infringe on how a Board governs its corporation; however, in all instances, the legislation empowers Boards in some manner and responds to changes in the corporate marketplace. Ultimately, most amendments to the DGCL will attempt to maintain and preserve flexibility for corporate Boards while protecting all stakeholders involved,¹²⁷ including Delaware and its interest in maintaining oversight of the development and evolution of its law.

122. See Bernard S. Sharfman, *The Enduring Legacy of Smith v. Van Gorkom*, 33 DEL. J. CORP. 287, 302 (2008).

123. Lawrence A. Cunningham & Charles M. Yablon, *Delaware Fiduciary Duty Law After QVC and Technicolor: A Unified Standard (And the End of Regulation)*, 49 BUS. LAW. 1593, 1625 (1994) ("Section 102(b)(7) was a response to the Delaware Supreme Court's imposition of due care liability in *Van Gorkom*, which the Delaware legislature was convinced threatened exposing management to undue civil liability.").

124. See Johnathan W. Groessl, *Delaware's New Section 102(B)(7): Boon or Bane for Corporate Directors*, 37 DEPAUL L. REV. 411, 433-35 (1988) (discussing the General Assembly's adoption of 102(b)(7) and permitting the elimination of liability for duty of care violations but not that of loyalty).

125. See DEL. CODE ANN. tit. 8 § 115 (2015).

126. See *id.*

127. See Johnston, *supra* note 107, at 22 (pointing out that corporations still have flexibility in how they draft their indemnification protection).

C. Concern for Comity

In *City of Providence*, Chancellor Bouchard explained that, if non-Delaware courts are to enforce valid bylaws designating Delaware as an exclusive forum for intra-corporate disputes, then, as a matter of comity, Delaware should recognize and enforce bylaws designating non-Delaware jurisdictions as exclusive forums.¹²⁸ In his letter to the Secretary of State, Harris pointed out that Section 115 ignores any concern for judicial comity.¹²⁹ Certainly, the implementation of Section 115 does raise concern for judicial comity; Delaware corporations and Delaware courts will expect foreign courts to recognize corporate charters and bylaws designating Delaware as an exclusive forum. With the enactment of Section 115, the chances of a corporation selecting a foreign forum (along with Delaware) are much slimmer now than prior to Section 115 because corporations will look to corral litigation into one forum via an exclusive forum selection clause and can only do that by designating Delaware.¹³⁰ Foreign courts may not look favorably on forum selection clauses designating Delaware as an exclusive forum when Delaware legislation has all but forced the hand of corporations to choose Delaware.

Comity is the mutual recognition of legislative, executive, and judicial acts.¹³¹ In the context of American jurisprudence, judicial comity is “a principle by which the courts of one state or jurisdiction give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect.”¹³² The intimate nature of the states’ relationships with each other leads to a greater degree of comity toward each other than a state or the United States may give to a foreign nation’s law or judicial opinion.¹³³ The purpose of comity is to foster cooperation and harmony and to encourage amiable and respectful relationships among the states.¹³⁴

Prior to the enactment of Section 115, courts outside of Delaware generally enforced forum selection bylaws designating Delaware as an exclusive forum.¹³⁵ In *Butorin v. Blount*,¹³⁶ although the U.S. District

128. See *City of Providence v. First Citizens Bancshares*, 99 A.3d 229, 242 (Del. Ch. 2014).

129. See Harris Letter, *supra* note 89.

130. See *supra* Section III.A.

131. *Comity*, BLACK’S LAW DICTIONARY (10th ed. 2014).

132. *Head v. Platte Cty.*, 749 P.2d 6 (Kan. 1988); see also *Schoeberlein v. Purdue Univ.*, 544 N.E. 2d 283 (Ill. 1989) (discussing judicial comity at great length).

133. *Schoeberlein*, 544 N.E. 2d at 378.

134. See *id.* (discussing the purpose of comity).

135. See Bonnie J. Poe et al., *Forum Selection Bylaws Continue to Gain Ground, But Questions Remain*, Cohen & Gresser LLP (July 1 2015), <https://www.cohengress>

Court for the Southern District of Texas recognized that one of the plaintiffs' claims was federal, the court *sua sponte* transferred the case to the U.S. District Court for the District of Delaware because of a forum selection bylaw designating Delaware courts as the exclusive forum for derivative suits.¹³⁷ In 2014, a federal court in Ohio also recognized a corporation's bylaw selecting Delaware courts as the exclusive forum for intra-corporate disputes and transferred the case to a federal court in Delaware.¹³⁸

Since Section 115's enactment, at least one court has recognized the validity of the exclusive forum selection clauses designating Delaware. Overruling a lower court's decision to reject the exclusive forum selection clause, the Supreme Court of the State of Oregon explained that comity and respect for Delaware's corporate legal framework weighed against interfering and attempting to regulate the relationship between TriQuint's directors and shareholders.¹³⁹ Citing *Chevron*, the court alluded to Delaware's framework, which allows corporate directors to unilaterally amend the corporation's bylaws to designate an exclusive forum for intra-company disputes and the shareholders' ability to repeal them.¹⁴⁰ That court, therefore, held an exclusive forum selection clause that designated Delaware as the exclusive forum for disputes was facially valid and did not violate Oregon public policy.¹⁴¹

In connection with comity, the General Assembly made sure not to run afoul of the Full-Faith and Credit Clause of the U.S. Constitution.¹⁴² One might wonder why the General Assembly did not entirely preclude corporations from designating foreign jurisdictions even if keeping Delaware as option—aside from preserving flexibility as noted above. In *In re Kloiber*,¹⁴³ Vice-Chancellor Laster suggested why by quoting the U.S. Constitution: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings over of every other State."¹⁴⁴ And, should "Delaware . . . preclude a sister state from hearing a

er.com/assets/site/Forum_Bylaw_6_29.pdf.

136. 106 F. Supp. 833 (S.D. Tex. 2015).

137. *Id.* at 835.

138. *North v. McNamara*, 47 F. Supp. 3d 635, 646 (S.D. Ohio 2014).

139. *Roberts v. TriQuint Semiconductor, Inc.*, 358 Or. 413, 428, 430 (2015).

140. *Id.* at 428-29.

141. *Id.* at 430.

142. *See* U.S. CONST. ART. IV, § 1.

143. 98 A.3d 924 (Del. Ch. 2014) (vacated by *Imo Daniel Kloiber Dynasty Trust*, 214 Del. Ch. LEXIS 190 (Del. Ch. Sept. 3, 2014)).

144. *In re Daniel Kloiber Dynasty Tr.*, 98 A.3d at 939 (quoting U.S. CONST. ART. IV, § 1).

matter of Delaware law, it would not be giving constitutional respect to the judicial proceedings of its sister states.”¹⁴⁵ In other words, Delaware “cannot unilaterally preclude a sister state from hearing claims under its law.”¹⁴⁶ Therefore, if Section 115 maintained that internal claims concerning Delaware corporations shall *only* be brought in the state of Delaware, then the General Assembly may have “unilaterally” precluded other states from hearing those claims, running afoul of the Full Faith and Credit Clause.¹⁴⁷

If Section 115 is to have a real effect on another court’s disposition on Delaware’s alleged protectionism, it is likely to reaffirm other courts’ concern for comity and Delaware’s interest in its corporate legal framework. Years after Delaware’s enactment of Section 18-109(d) of the Delaware LLC Act¹⁴⁸—the LLC equivalent to Section 115—a Vermont court entertained a judicial request for dissolution of a Delaware LLC.¹⁴⁹ Citing concern for comity and the general principle that dissolution should be left to the state of formation, the Vermont court dismissed the action.¹⁵⁰ The court noted Section 18-109(d)’s flexibility of permitting members of an LLC to consent to the non-exclusive jurisdiction of a state other than Delaware.¹⁵¹ Section 18-109(d) did not affect the outcome of the case. As with Section 18-109(d), Section 115 leaves open the door for corporations to designate other jurisdictions to resolve intra-corporate disputes—albeit on a non-exclusive basis. Simply because Section 115 narrows the options for corporations to draw up forum-selection clauses, it does not mean a court is going to enforce selection clauses differently. An exclusive forum-selection clause that designates Delaware for intra-corporate disputes should be interpreted and enforced all the same after Section 115 as it was before much like the enforcement of LLC agreements after Section 18-109(d).¹⁵² If nothing else, Section 115 reinforces the concern for comity among the states and Delaware’s interest in its legal framework.

145. *Id.*

146. *Id.*

147. *See id.*

148. DEL. CODE ANN. tit. 18 § 109(d) (2015).

149. *Casella Waste Sys., Inc. v. FT Tech., Inc.*, No. 409-6-07, 2009 Vt. Super. LEXIS 14, at *1-2 (Vt. Super. Ct. Feb. 6, 2009).

150. *Id.* at *9.

151. *Id.* at *8.

152. Other than the Vermont case, there is little case law outside of Delaware discussing Section 18-109(d). More to the point, there was little fanfare among legal commentators concerning an LLC’s ability to select courts other than Delaware as an exclusive forum for intra-company disputes.

CONCLUSION

The string of case law regarding internal forum selection clauses illustrates the legal savvy and prowess with which the Delaware judiciary analyzes and applies corporate law. Ironically, the General Assembly annulled one of these decisions—*City of Providence*—in an effort not only to protect the stakeholders of corporations who seek the expertise and consistency that Delaware provides but also to ensure the very existence and evolution of *Delaware* corporate law.

Any time that the General Assembly acts, or any legislature for that matter, there are inevitable and inherent side effects. Legislatures often overstep their bounds and meddle unnecessarily, and Delaware's legislature is no exception. The General Assembly, however, strategically acts when it perceives public policy concerns arising out of the judiciary's application of the DGCL. Claims of "legislative intrusion" by the General Assembly are often overheated and overstated. Adjustments like Section 102(b)(7) often empower and embolden Boards rather than hamper them. The General Assembly attempts to preserve the inherent flexibility of the DGCL, while adjusting to changes in the market. As with any commodity in which a state or country is the market leader, there will be calls of "protectionism" when a legislature acts to preserve it and even strengthen it.