CHIEF JUSTICE VEASEY: Good morning, everybody. My name is Norm Veasey. I have the honor to be Chief Justice of Delaware and I also have the honor to preside over this program this morning, at least the first segment of it. But the first thing I want to do is to thank Professor Larry Hamermesh. This whole program, the centennial of the Delaware General Corporation Law, was his idea. He conceived of it and he executed it and he was able to draw to Delaware these outstanding nationally recognized distinguished speakers. I want to thank him and I think we owe him a great round of applause.

I think we also need to thank the Widener University School of Law for sponsoring this program and the Delaware State Bar Association and particularly to thank those distinguished speakers who did come to Delaware to share this with us. I think the recorded part of these proceedings will be especially meaningful to scholars and judges and practitioners in years to come.

Let me introduce this panel. To my right is Professor Michael Dooley whose biography is in your program. Mike is the William S. Potter Professor of Law at the University of Virginia, and that name should be familiar to many of you. William S. Potter was a distinguished, wonderful lawyer in Delaware, the head of the Potter Anderson & Corroon firm. Many of us have fond memories of Bill Potter. I always looked on Bill as one of my mentors, even though we were in different firms. That's what makes it
nice, that you can have mentors in other firms. I think that it's great that Mike Dooley, the William S. Potter Distinguished Professor of Law at the University of Virginia, is with us.

Mike is also a co-author of that seminal article referred to in his papers by Dooley & Veasey about derivative suits and the American Law Institute. It's the ten-year anniversary of that seminal article, I believe. Mike, in addition to his other accomplishments, is the reporter for the Model Business Corporation Act. That is a product of the Committee on Corporate Laws of the Section of Business Law of the American Bar Association. The Model Act is that document which is looked to by many states for cutting-edge statutory provisions for their general corporation law. Much of it is modeled on Delaware. It does depart from Delaware. And Delaware's often informed by it.

We, in Delaware, take our statutory messages from, first, the General Corporation Law Section of the Delaware Bar Association and then ultimately from the General Assembly. But I know that that body is influenced by the Model Business Corporation Act as well as vice versa. I had the honor to serve on the ABA Committee on Corporate Laws many years ago. It was a wonderful intellectual experience. And we have people in this room who either now or in the recent past have served on that committee.

In addition to Mike Dooley who will be the next presenter, I'm going to speak for about fifteen minutes and then Mike will take over and be the presenter and will provoke, no doubt, some discussion and debate with our other two commentators.

To Mike's right is Grover Brown, who is a practitioner, corporate litigator with the firm of Morris, James, Hitchens & Williams. Grover was the Vice-Chancellor and Chancellor of Delaware from 1973 to 1985. He made many landmark decisions during that time, too many to mention. So he brings to us the perspective of having been there, done that and now is doing it as a corporate litigator, and a very good one at that.

Bill Prickett, to my left, is well-known to all of you. Former president of the Delaware State Bar Association, fellow of the American College of Trial Lawyers, the senior partner, now retired he tells me, of the Prickett, Jones firm. And Bill is a, let's say, feisty and well-accomplished corporate litigator. He has under his belt many victories in landmark cases that have helped shape the landscape of Delaware corporation law and fiduciary duty principles. One of those landmark cases was mentioned by Chancellor Allen.
— *Smith v. Van Gorkom*. Another is the *Weinberg* case. There are other cases too many, too numerous to mention.

I want to talk a little bit about what has happened and maybe a little bit about what's to come. I will try to do that within the usual ethical constraints on judges. Judges may not comment on the merits of a pending or impending proceeding in any court but may explain court procedures or a scholarly presentation for legal education. Well, I can explain some procedures, but I don't know about the scholarly presentation. I'll try, however, to give some of my thoughts without encroaching on what I think a judge may not do.

I think that the ethics rules give judges wide latitude. As a matter of general observation, I think judges should speak out more in fora like this and around the country and to citizens groups to explain the legal process and to build trust and confidence in the judicial system.

But I think the only thing that I wouldn't talk about is what I mentioned as well as not to forecast how even a hypothetical case would be decided because that might be seen as prejudgment and might result in a disqualification. But that constraint does not foreclose talking about macro issues or, as I said, procedures.

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. The courts sit like clams in the water waiting for whatever is brought by the tides. We don't give advisory opinions. We don't reach out to pluck the interesting issues of the day to make a ruling. We wait for our jurisdiction to be invoked. Those words came from my friend former Chief Justice Joseph Baca of the New Mexico Supreme Court. I read that in one of his state of the judiciary messages.

There are some trends that I see from what has happened that we can extrapolate into the future. So I'd like to talk a little bit about trends and how they developed. I won't build on the historic accident that Chancellor Chandler, Vice-Chancellor Jacobs, and Chancellor Allen spoke about yesterday about how we achieved preeminence in corporation law in Delaware. We do have a state-based system of fiduciary duties. Delaware does lead the nation in jurisprudence relating to internal affairs of corporations, fiduciary duty, duty of loyalty, duty of care and the like.

Our statute, now replicated in many states, is an enabling act. It's not regulatory. It is a statute that requires the judiciary to fill in the interstices. And, of course, you know that there was a flirtation with federal corporation

1488 A.2d 858 (Del. 1985).

law and another one was federal common law under 10(b)(5). The latter was laid to rest, in part, by Santa Fe v. Green3 in 1977. The possibility of a federal corporation law or federal minimum standards law exists, but is quiescent for now.

Recently, the Delaware Supreme Court decided a case called Malone v. Brincat4 at the end of 1998. In that case, we recognized the fact that the federal regulatory regime for securities and the Delaware regime for internal affairs of corporations are complementary to each other, but they are distinct. In that case, we said that there is no doctrine in Delaware law that would replicate the federal law on, for example, fraud on the market, involving purchase or sale of securities. But the Delaware law does apply on disclosure issues when stockholders are asked to do something. And Delaware law does apply to fiduciary duties of directors in not making this representation to their stockholders. The remedies are a different issue.

We noted in that case the 1998 federal act that preempts some state class actions relating to securities issues, but left a Delaware carve out in two areas. One would be the exclusively derivative suit, and the other would be in areas of internal affairs that states which normally handle this part of fiduciary duty, including those areas where disclosures relating to action requested by stockholders need to be handled in a manner consistent with fiduciary duty principles.

As far as the future is concerned in this area, there is always out there in Congress, it seems, some massive preemption legislation being considered that would preempt state law in many areas. Now there is a move to preempt state law in some product liability areas, mass torts and the like, sometimes with sweeping language that would maybe sweep up this Delaware carve out if it's not monitored vigilantly. There is now the Y2K legislation in the Congress that is moving on a fast track. I believe it has the potential to be the camel's nose in the tent because that statute, among other things, would preempt state litigation relating to Y2K issues. It seems that there is a concern that it might go broader and involve more federal preemption.

But I'm going to assume for purposes of this session this morning that we have in this nation a state-based system of fiduciary duty law. With that background, I just wanted to mention that in the materials, Section 6 of the materials contains a speech that I gave at Tulane this spring. I'm not going to repeat that, but I do want to refer you to it simply to highlight the traditional interaction between the Delaware Court of Chancery and the Delaware Supreme Court.

3 Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977).
4 722 A.2d 5 (Del. 1998).
Chancery has about 500 business cases a year. Those would include traditional corporate cases as well as other cases: limited liability companies, limited partnerships, contract cases relating to business and the like. That's about seventy-five percent of the docket of the Court of Chancery in recent years.

Only about five percent of the docket of the Delaware Supreme Court, however, comprises these business cases. But those cases take about twenty percent of the time in the Supreme Court.

The Supreme Court has almost 600 cases a year. We dispose of most of those during the year. We dispose of about eight to ten cases a week sitting on panels of three or en banc. The Delaware court system has a ninety-day rule imposed by the Chief Justice that says each judge is expected to decide her or his case within ninety days from the date of submission to the date of decision. But, if not, a report should be filed with the Chief Justice giving a plan for deciding that case.

Very few cases go over the ninety-day rule, but there are some. I'm guilty sometimes of going over the ninety day myself, but almost all cases are decided within ninety days. The Supreme Court has an average of thirty days deciding its cases from the date of submission to the date of decision.

The Court of Chancery appeals to the Supreme Court are very few. Of those business law cases in the Court of Chancery that I discussed, about ninety-five percent stay in the Court of Chancery. That is to say, they are not appealed. The parties are either satisfied with the decision of the Court of Chancery or there's a money factor or the transaction moves on and an appeal is not necessary.

Of the five percent of the Chancery business cases that are appealed, seventy-five percent are affirmed. And many of those are affirmed on the basis of the scholarly work of the Court of Chancery.

Of the twenty-five percent that are not affirmed, fifteen percent are reversed outright and the other ten percent are affirmed in part and reversed in part.

The Supreme Court, I think, basically decides appeals from the Court of Chancery and reverses usually only when the Supreme Court sees a new direction for the law. Very few cases are reversed just on the basis of ordinary error, but there are some of those, of course.

The Supreme Court does, I think, have the responsibility for policy direction in business law cases and hopefully would inform the nation and the world about what we see as the way these cases should go in the future.

That raises the question of predictability and stability. The Supreme Court in a few cases has said that predictability and stability are important to Delaware jurisprudence. We don't believe that it's helpful to have wild swings in the way cases are decided. We don't think that it's a good idea to
have stray dictum that's misleading, although that does creep in no matter how you try to avoid it. But our goal is predictability/stability.

There was a discussion about codification. We don't have much codification of our corporation law in Delaware. And that could be argued as good or bad. There are, of course, imperfections in the highly textured way that the Court of Chancery and the Supreme Court approach fiduciary duty issues, but there's a lot to commend that. So that's something that has been debated and will be debated. Can a practitioner plan better in a system where the rules are set out in a codified form that is designed to leave very little doubt? Who knows?

In the Model Business Corporation Act a few years ago when I was on the Corporate Laws Committee, we tried to set forth in a very detailed way a safe harbor for interested director transactions. As you know, Delaware Section 144\(^4\) has very few words in it. But the Model Business Corporation Act has a lot of words in it and some complain that it looked too much like the Internal Revenue Code. But the design there was to codify the safe harbor. And if you were not in the safe harbor, you may or may not have had a problem. But if you were in the safe harbor, you didn't have liability concerns.

So the question is should the corporation law go that way? Should Delaware go that way?

I understand there is some study underway in Delaware General Corporation Law section to make some revisions in the Delaware law. I think one of the beauties of the Delaware law over the years has been that we have not tried to do too much. We do not have, for example, the kinds of antitakeover legislation that is extant in states like Pennsylvania. And we have tried not to rock the boat too much. I hope that whatever's done either by the Bar Association and the General Assembly or by the courts in changing the law will reflect the goal of the physician's Hippocratic Oath: first, do no harm. I would add a second: adhere to principles of gradualism.

Just to trace the cases a little bit, Chancellor Allen mentioned yesterday these wonderful Chancellors of the past Josiah Wolcott and Collins Seitz, just to mention two of them. And Chancellor Allen is one of the great Chancellors of the past, as is Grover Brown and the others in this room. But I think that if you look at the rich fabric of Delaware jurisprudence over the years shaped by Chancellors and Vice-Chancellors, it's very interesting.

The Supreme Court, of course, has made some changes in the laws. In 1977, the Supreme Court decided Singer v. Magnavox Co.,\(^6\) which

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\(^6\)380 A.2d 969 (Del. 1977).
basically said you had to have a business purpose for a merger. But in 1983, Weinberger\(^7\) came along and said no, that's not right. You don't have to have a business purpose for a merger. So it overruled Singer.\(^8\)

I think Chancellor Brown was caught on both ends of that problem. I think he was the trial judge in Singer\(^9\) and the Supreme Court reversed, saying you need a business purpose. Then he was the trial judge in Weinberger\(^10\) where he said he didn't much like the business purpose test, but he had to go along with it. The Supreme Court basically agreed with him and overruled Singer.\(^11\)

Reference has been made to the 1985 watershed year with those four major blockbuster cases beginning with Smith v. Van Gorkom\(^12\) and then Unocal,\(^13\) which I think reshaped the way courts look at how to handle hostile takeovers and the duties of boards and what the Court should do in terms of requiring the directors to meet an intermediate burden of showing that there is a threat and that the response is proportional.

Then there was Moran v. Household\(^14\) that validated the poison pill installation but warned that the board of directors had to exercise its fiduciary duty on redemption when a hostile takeover occurred, for example.

And then, of course, there was Revlon\(^15\) that basically says that if the board decides to sell the company, they must get the best price obtainable.

In the late '80s and the early '90s, there was the Time Warner\(^16\) case that basically told the directors that they could exercise their business judgment in good faith to make strategic decisions for the future of the enterprise. And in that case, the enterprise would have been ongoing.

But later, of course, in Paramount v. QVC,\(^17\) there was a takeover and the enterprise would not be ongoing. The Court there held that the directors had to get the best price obtainable when there was a change or sale of control.

In 1996, Chancellor Allen made an interesting decision that was never appealed to the Delaware Supreme Court in the case called Caremark.\(^18\)

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\(^7\)Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).
\(^9\)Id.
\(^12\)488 A.2d 858 (Del. 1985).
\(^16\)Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1989).
\(^18\)In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).
That case had to do with the oversight responsibility of directors. It was in the context of the approval of a settlement, so much of what the Chancellor said there was dictum, but it's being talked about all over the world. What are the Caremark responsibilities of the board of directors to establish a system of law compliance? The Chancellor said there that the utter failure to have one in light of modern events, including sentencing guidelines, could lead to liability problems. But maybe so, maybe not.

The Delaware Supreme Court, in the *Graham v. Allis-Chalmers* case in the mid-'60s said directors would be liable in the event that they were warned by red flags, but perhaps not otherwise.

Also in the mid-'60s, Chancellor Seitz rendered a decision in *Lutz v. Boas* that held outside directors of the mutual fund responsible for gross negligence for being asleep at the switch in their oversight, in the carrying out of their oversight responsibilities.

Now, of course, in 1998, the famous *Quickturn* decision was made. I wasn't on the panel, but I think it was New Year's Eve. Justice Holland wrote the opinion for the Court. That case basically was a reflection of what the Court said to everybody in 1985 in *Moran v. Household.* That is that the board of directors has a responsibility to consider redeeming the pill when the time comes. The Court in *Quickturn* said that you couldn't have a pill that disabled future boards of directors from redeeming the pill by what is called a dead hand provision.

I think we need to talk a little bit about the future of derivative suits, and I think Mike Dooley is going to talk about that. But let me just mention that the derivative suit evolution in Delaware has been rather interesting. You will remember in the '80s the cases involving the Ross Perot buyout by General Motors. There were two derivative suits arising out of that. One was a demand excused case: *Grobow.* The other was a demand-refused case: *Levine.* Those cases established the parameters for the board of directors in handling derivative litigation.

The demand requirement is very much criticized around the nation. The American Law Institute developed its own principles of corporate
governance in many areas and I think the centerpiece of that work was Part 7 relating to derivative suits.27

Professor Jack Coffee is here. Jack was the Reporter for that section. We had many debates about how that should go and how the future should adhere to principles of Delaware law or depart from principles of Delaware law. Mostly to depart.

The Model Business Corporation Act (MBCA) that Mike Dooley and the committee are responsible for, Mike Dooley in large part, has established more of a statutory regime for handling derivative litigation. The ALI's approach is a little different. The MBCA provision is a little different from the ALI's provision, and they're both different from Delaware.

But one of the interesting cases involving this issue was a Pennsylvania Supreme Court case that surprisingly, to me, took the ALI principles and remanded to the trial court to apply. That is, the PECO Energy case, the name of the case is Cuker v. Mikalauskas,28 692 A.2d 1042, a 1997 case. The Supreme Court remanded it to the trial court and said apply Part 7 of the American Law Institute principles.29 The Pennsylvania Supreme Court also had some criticism of Delaware in there. And I don't know what happened to that case, but I thought it was rather surprising. The Supreme Court of Pennsylvania just gave carte blanche to a new regime and told the trial court to do it. I'm not being critical but it's kind of an interesting way for a court to go. I would be very surprised if our court went in that kind of a direction.

What we have out there now in Delaware derivative litigation, I think, is a reshaping, tweaking of the law that's happened in the last few years to try to explain what the demand requirement is, to try to explain what the demand refusal is, try to make some emphasis on independent directors and the like.

I think the case that expicates that most clearly is Grimes v. Donald,30 a Delaware Supreme Court decision in 1996 that's found at 673 A.2d 1207. There's a lot in there, in that decision, including a road map for plaintiffs' lawyers to use Section 220, the books and records action, with "rifled precision." (Language that came in a later case.) Such an action can be used to find out what a plaintiff needs to find out in order to bring a derivative action and without implicating discovery at an early stage before the demand requirement has been settled.

27A.L.I.'s, PRINCIPLES OF CORPORATE GOVERNANCE (1994).
28692 A.2d 1042 (Pa. 1997).
29A.L.I.'s, PRINCIPLES OF CORPORATE GOVERNANCE (1994).
The Supreme Court of the United States in the Kemper case did, during this period of time, consider whether there should be a universal demand, which is really the predicate of the ALI and the MBCA. The Supreme Court said, no, under Maryland law which was very much like Delaware law, you have to follow Rule 23.1 or its equivalent in order to establish the regime for handling derivative litigation.

I know that my fellow panelists are going to be talking about the derivative litigation of the future and the class action litigation of the future and I'll let them go. But I just want to close with some crystal ball gazing, and I'm mindful of what Chancellor Chandler said about eating broken glass when one does that. I see more private ordering in the future in various corporate transactions. We're seeing it already. Contractual arrangements, joint ventures, stockholders' agreements, better drafting of preferred stock. We had a couple cases in Delaware that suggested that practitioners need to do a little better drafting in that area, the Kaiser case and the Avatex area.

Courts will limit their roles and will not bail people out if they don't provide contractually for minority relief or if the law doesn't otherwise provide for it. That would be the 1993 Nixon v. Blackwell case.

There'll be more alternative entities used. We won't be relying exclusively on corporation law but we will see use of limited liability company acts. We're getting more cases adjudicating those alternative entities, such as the limited liability company act, limited partnerships, business trusts and the like.

We'll see more court-appointed experts in certain areas. There'll be more alternate dispute resolution. There has to be. Courts cannot handle it without it. The Court of Chancery now has a mediation rule, I think it's Rule 174. Chancellor tells me that's being used and I see in the future it will be used more.

And there'll be more high-tech. You'll see in these materials the state of the judiciary message that I gave recently to the General Assembly. I happen to be chair-elect of the National Center for State Courts as well as president-elect of the Conference of Chief Justices. The nationwide thrust of these institutions is a quest for better practices of judicial management, businesslike handling of litigation. So I see more of that going on.

I see more business courts around the country, more use of video conferencing, the internet, electronic filing. The Florida Supreme Court cases are all on the internet.

32Kaiser Aluminum Corp. v. Matheson, 681 A.2d 392 (Del. 1996).
34626 A.2d 1366 (Del. 1993).
The practice of law will change, the globalization of the practice of law, multidisciplinary phenomenon in the practice of law where accounting firms are absorbing law firms. There are ethical implications of that phenomenon. We're trying to write new ethics and new professionalism regulations for multidisciplinary law. Courts will not tolerate litigation abuse shenanigans such as the one we observed in our addendum in the *Paramount* case.\(^{35}\)

The quality of courts, I think, will be improved. I think courts need to follow seven basic principles in their decision making. One is to be clear. Two is to be prompt. Three is to be balanced. Four is to have a coherent economic rationale. Five is to render decisions that are stable. Six is to be intellectually honest. And seven is to properly limit the function of the Court to that which the Court must do and to eliminate those things the Court should not do.

Now to talk about the future and where we go from here is our presenter Mike Dooley.

**PROFESSOR DOOLEY:** Thank you, Chief Justice. I'm quite honored to be included in this celebration of what would prove to be one of the most significant events in the history and development of American corporations. Indeed, as we have heard from several speakers over the last couple of days, Delaware has not only set the standard for the rest of the states in the United States, but increasingly is exercising influence abroad. For the past 100 years, this state has been the laboratory where our most fundamental concepts of corporate governance have been developed and refined.

I'm particularly honored to be sharing the podium this morning with my friend and your distinguished Chief Justice. I wasn't sure whether the Chief Justice was going to acknowledge the fact that we had once done an article together.\(^ {36}\) So if you look at my outline, you will see that I've included as many references to it as I thought did not exceed the bounds of decency. Perhaps I went a little beyond that.

The only regret I have is that we're not making a joint presentation this morning. Not only would my presentation undoubtedly be helped a great deal by his insights, but the last time we worked together, I dawdled around so long that he was finally goaded into doing the first draft which as we all know is the hardest part.

My acceptance of this assignment is proof positive that fools rush in where wise men never go. I undertook a similar assignment a couple of

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years ago before the Third Circuit Judicial Conference in which I was also asked to gaze into the future of business litigation into the twenty-first century. On that occasion, I predicted that we'd be spending most of the twenty-first century trying to correct all of the mistakes we had made in the twentieth century. This occasion demands a fresh approach so I thought I would propose a couple of new mistakes that we might be able to make over the next couple of years to give our successors something to do in the years to come.

The title for this symposium suggests that we should be looking at the next 100 years of corporate law. I just can't see that far, maybe for the same reason that I'm no longer much attracted to products that offer a lifetime guarantee.

Instead, I've tried to peer a little bit into the near term, say the next twenty-five years or so, to think about what aspects of our current system seem most likely to provoke calls for reform and what form those proposals might take. Within those constraints, and they are quite limited, it seems to me that the most likely candidate for reform on the state level is the derivative suit.

Now, I have to confess I was more than a little distressed yesterday to observe Mr. Rosenthal administer the last rites to the derivative suit. According to him, it's already dead and gone and buried. But in conversations I've had with others over the last day or so, I understand that there is still some debate about that proposition.

So we will, as the economists do, assume a can opener and I'll ask you to assume that derivative suits is still a live topic, if not in Delaware, at least in the other forty-nine states.

Why would derivative suits come under such close scrutiny? Well, in part, it's because the derivative suit tends to be tarred with the same brush as the securities class action. If you go back and look at the legislative history for the 1995 Act, many of the criticisms that were leveled against the securities class action in the committee reports can and have been made of the derivative suit as well for a number of years. So both forms of representative action are said to generate far too many lawsuits at public and private costs that greatly exceed any systemic or private party benefits that might result from the litigation.

While there are many similarities between these two types of actions, there are very important differences. And the most important, I think, is indispensability. We could, and I've elsewhere argued should, get rid of the private securities class action on behalf of secondary market traders, that is,

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in those cases where the issuer has derived no benefit from the alleged fraud, and still maintain an enforcement system that would be run by the SEC and the justice department. 38 This would no doubt result in a significant decrease in the number of cases that are brought, but the imposition of high civil fines and criminal penalties on those persons actually responsible for the violation should result in adequate deterrence.

We cannot dispense with the derivative suit without doing absolutely irreparable damage to our corporate governance system. While the public goods aspects of derivative litigation has been greatly exaggerated,39 we cannot ignore the fact that the meat of our governance system has been supplied by the common law that has been developed in just such lawsuits. This is not to say that the shareholder suit has not come to play too large a role in our system or that at least as it is presently experienced, it is cost-effective.

On the contrary, I would assert that the theory, if not the operative reality of our corporate governance system, envisions the shareholder suit as a true exception to a system that is otherwise built on self-governance.40 It should be regarded as a remedy of last resort only when the mechanisms of self-governance, that is board fidelity and the informed exercise of the shareholders franchise, has broken down for one reason or another.

In predicting that there'll be efforts during the next quarter century to decrease the incidence and diminish the importance of the derivative suit, I'm mindful of the hazards of even short-term predictions. And I was sort of amused to think about what sort of remarks would have been made and what the issues would have been if we had held this conference twenty-five years ago, 1975. And how different the world would have looked then. Then the topic most likely would have been whether state corporation law had any future at all. And the proposition that I've asserted here that state corporation law has become mature and stable while the future of federal securities litigation is somewhat shaky would have been perfectly laughable.

Then the debate would have focused on the question of when, rather than whether, federal securities law would completely preempt traditional state corporation law, reducing state law to a set of filing requirements similar to but perhaps not even as important as the Blue Sky laws.

Recall Bill Cary's excoriating a hock on Delaware specifically and state law generally in 1974.41 He then called for federal minimum standards

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38 Id. at 1175-76.
39 Dooley & Veasey, supra note 36, at 539.
legislation, a call that was echoed by many others, some of whom went even further and called for a comprehensive federal incorporation law.

Recall also the remarkable reaction to Santa Fe v. Green, in which the Supreme Court held that 10(b)(5) is a simple antifraud provision and could not be read to create a federal law of fiduciary duty or to override existing state law. That decision, which seems completely unremarkable today and did to many of us even at that time, prompted even more calls for federal legislation. None was forthcoming.

Moreover, the Supreme Court, which had begun the so-called federal common law of corporations in the Borak case, not only limited its growth in Santa Fe, but explicitly recognized corporate governance as an area that is traditionally relegated to the states in Cort v. Ash.

Three other decisions by the Supreme Court in this period were also especially important in preserving the role of state law in corporate governance: Piper v. Chris-Craft Industries, Inc., in which the Court held that the contestants to a tender offer did not have standing to seek monetary damages; Schreiber v. Burlington Northern, Inc., where the Court held that a tender offer defensive tactic could not be manipulative within the meaning of the Williams Act without some sort of act of deception.

Now, both of these decisions primarily concern statutory interpretation, and so on one level seem fairly unremarkable and perhaps not directly related to federalism questions. But the true significance for state law development becomes apparent if you imagine that the Court had come out the other way in both of those cases. What would have been the fate of the unsolicited tender offer if bidder and target were each armed with a neutron bomb of a damage action of undefined proportions against one another?

42See, e.g., A.A. Sommer, Jr., "Going Private: A Lesson in Corporate Responsibility, [1974-1975 Transfer Binder], FED. SEC. L. REP. (CCH) ¶ 80,010 (Nov. 20, 1974).
46Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977).
49Id. at 45.
51Id. at 12-13.
Assuming the tender offer survived that state of mutually assured destruction and supposing that Schreiber52 agreed that any interference with the free market and the tender offer was manipulative, all defensive tactics would be invalid because all are designed in some measure to at least delay if not preclude shareholder acceptance of a bidder's offer. In any event, a contrary decision in either one of these cases would have meant that state courts would have been effectively ousted of jurisdiction over tender offers and virtually all such cases would have been litigated under the federal securities law.

Finally, in Burks v. Lasker,53 the Court confirmed that the substantive law of derivative suits is a matter of state law and that federal courts must apply the law of the state of incorporation to determine the power of the board of directors to pose or dismiss a derivative suit, even one founded on a federal claim.54

Once again, the special and presumably more liberal federal rules for derivative suits would have inspired widespread efforts to recharacterize traditional state law claims as federal securities claims and state law would have faded in significance.

As it turned out, the two specific areas that the Supreme Court ceded to the states, that is, tender offer defensive tactics and derivative suits, would prove to be among the most challenging and significant, if not the most significant, corporate law questions in this century. In meeting this challenge primarily through the leadership of the Delaware courts, state courts achieved a new level of maturity and stability, in my judgment. More important, the principal decisions during this era reaffirmed the basic principle of self-governance against attacks from both right and left.

What's particularly interesting about the Court's handling of tender offers and derivative actions is that in each case there was substantial support and some political pressure for radically different approaches. In the case of tender offers, the academic support for a completely free hand for bidders contrasted sharply with the sentiment among many state legislatures for a completely free hand for the incumbents.55

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53441 U.S. 471 (1979); see Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90 (1991) (finding that federal courts must apply the demand rule of the state of incorporation in a claim under the Investment Company Act).
54Burks, 441 U.S. at 477-85.
The Unocal test,66 in my judgment, recognizes the possibility of mixed motives, understands that there are conflicting principles in place here, and does about as well as one could hope in trying to sort these out so as to protect the legitimate interests of the shareholders while preserving the legitimate exercise of the board's traditional authority.

Ironically, while advocates of limiting the board's authority in resisting unsolicited takeovers came from the law in economics wing of academia, the board's authority in derivative suits came under attack from the more traditional Berle67 wing of academics.

Recall the arguments that ostensibly independent directors couldn't be trusted to evaluate a complaint against one of their colleagues because of "structural bias."68 Or the argument that derivative suits were too important to the development of corporate law to be evaluated by anyone other than the judge. Nonetheless, the courts affirmed that the decision to pursue or forego the corporate claim resides with the board unless the plaintiff can overcome the business judgment rule as applied to the demand requirement.69

In both cases, tender offers and derivative suits, limiting the board's authority was justified by appeal to a "higher value." We need to preserve the disciplinary effect of tender offers; we need the unique public goods aspect of derivative suits. Although the first proposition is overstated (not all targets become such because of poor management), the second is unsupportable (most derivative suits settle without opinion), and neither took into account the systemic effects of eroding the board's authority in these crucial areas.

Chancellor Allen's warning in *City Capital*\(^{60}\) about the potentially unraveling effect of even *Unocal*\(^{61}\) is, in my judgment, a complete answer to those who advocate greater judicial oversight of private corporations for whatever reason. And concern with reserving the traditional authority of the board and traditional relationships between board and shareholders, and, thus, the broader principle of self-governance is the dominant theme of the leading Delaware cases during this era. It is a view that after much pushing and tugging and pulling it would eventually prevail in the ALI's Principles of Corporate Governance\(^{62}\) with respect to their provisions on derivative suits and transactions in control, at least.

The strongest support for the principle of self-governance came in the form of the liability limiting charter provisions that were first authorized in 102(b)(7) of the Delaware General Corporation Law.\(^{63}\) Similar provisions have been enacted in forty-three states and they have been routinely approved when presented to shareholders as charter amendments.\(^{64}\)

So now we come to what seems to me to be the puzzle. With the business judgment rule and the principle of self-governance firmly established and the adoption by most firms of liability limiting charter provisions, why haven't we seen a sharp decline in the number of derivative suits brought in Delaware and elsewhere?

One possibility, of course, is that criticism of the derivative suit is misguided and that such suits are, in fact, paying their own way, like, they are producing benefits that are greater than their cost. This seems to me unlikely, unless there's been a revolutionary change in the nature of derivative suits in the past few years. Otherwise, the empirical evidence,

\(^{60}\)As Chancellor Allen cautioned:
The danger that [the *Unocal* test] poses is, of course, that courts — in exercising some element of substantive judgment — will too readily seek to assert the primacy of their own view on a question upon which reasonable, completely disinterested minds might differ. Thus, inartfully applied, the *Unocal* form of analysis could permit an unraveling of the well-made fabric of the business judgment rule in this important context. Accordingly, whenever, as is this case, this court is required to apply the *Unocal* form of review, it should do so cautiously, with a clear appreciation for the risks and special responsibility this approach entails.


\(^{62}\)A.L.I.'s, Principles of Corporate Governance (1994).


particularly Roberta Romano's study, suggests that derivative suits are producing, at best, trivial benefits for shareholders. 65

So what other possibilities suggest themselves? Well, one possibility is that suits are being initiated against corporations that do not have an independent majority of directors, notwithstanding the fact that there are clear legal advantages to composing your board that way.

The second possibility is that plaintiffs are disguising what are, in fact, routine care complaints as breaches of loyalty, or as involving some other claims for which liability limitation is not available. 66 In view of other evidence suggesting that larger firms are more often the subject of derivative suits than smaller firms, 67 I am somewhat inclined toward the second reason that this is primarily a matter of pleading.

In any event, it's very clear, and I think everyone would agree, that once a derivative suit survives a motion to dismiss, it has a positive settlement value. In some and, depending on the size and organizational complexity of the corporate party, perhaps many cases, the settlement value may exceed the value of the claim on the merits because of the asymmetric discovery costs that plaintiffs can impose on defendants. 68 Romano's findings on the rate of settlement and the rate and paucity of monetary judgments to shareholders compared with the rate at which attorneys' fees are recovered are sobering, I think. 69

One aspect of this debate that I've not seen mentioned before is the significance of the high rate of shareholder approval of these liability limiting provisions. This can be token shareholder indifference or outright aversion to such suits. It may well be that if we put it up to a vote of shareholders on derivative suits and other shareholder actions that they would be disapproved pretty routinely.

Now, if that's so, and if most derivative actions seem to contribute little to shareholder wealth and have little precedential value because of the

66 See Dooley & Veasey, supra note 36, at 540:
There are very few reported examples of "pure" care cases, and the species may approach extinction as more statutes limit the permissible grounds for recovering damages from directors to more aggravated forms of misconduct. The clever pleader, skirting rule 11, may be able to find some colorable claim of self-interest to justify what is otherwise a nonrecoverable claim of mistaken judgment.

Id.
67 See id. at 541-42.
69 See infra text accompanying note 80.
high rate of settlement, we have to confront at least the possibility that the number of such suits being commenced is significantly greater than would be optimal. So assuming that perception comes to be sufficiently widely held and there is some effort to reform derivative proposals, what form of proposals might we expect over the next twenty-five years? What will be on the agenda? How should we think about derivative suit reform?

In the concluding portion of my outline, I have suggested some possible approaches and I'll run through those and try to evaluate them for you now.

One of the approaches is something that Chief Justice Veasey has already referred to and, indeed, that has been sort of a recurring theme over the past couple of days: greater predictability in the statute itself, reducing indeterminacy by clearer statutory standards establishing the board's authority and the occasions on which directors can be held liable.\(^7\)

We have done a lot of work on this in the Model Act, and I cite for your consideration the statutory provisions relating, first of all, to the board's control of derivative actions,\(^7\) the effect of board or shareholder approval of directors' conflicting interest transactions,\(^7\) which the Chief Justice mentioned before, and finally a brand new and, I think, quite interesting provision on standards for director liability.\(^7\)

There's a lot to recommend this sort of approach on transparency grounds. But it certainly is not a complete codification and leaves plenty of room for judicial discretion, particularly in states outside of Delaware where there may be some confusion as to just what the law is. But I'm not so optimistic that codification of substantive standards will have much, if any, effect on the incidence of derivative litigation.

First, these Model Act provisions, while the Chief Justice has described them as departing from, in some respects, Delaware law, are, for the most part, either based upon or quite consistent with Delaware law principles. There are one or two differences. We do have a universal demand requirement,\(^7\) but through the rest of the provisions in derivative suits, it largely tracks Delaware law, perhaps due to the fact that the Chief Justice was one of the drafters of the Model Act derivative suit provisions.

Secondly, for those who have put a lot of faith in pleading standards and so-called tougher standards, I would cite you to the Private Securities

\(^7\)For a novel criticism of the supposed "indeterminancy" of Delaware law, see Ehud Kamar, A Regulatory Competition Theory of Indeterminacy in Corporate Law, 98 COLUM. L. REV. 1908, 1913-18 (1998).


\(^7\)Id. §§ 8.60-.63.

\(^7\)Id. § 8.31.

\(^7\)Id. § 7.42.
Litigation Act of 1995, which, as you know, did make rather significant efforts at clearer definitions in the area of securities liability particularly with respect to pleading claims in an effort to decrease the number of securities class actions that were brought. In point of fact, since the Act has been adopted, the number of securities class action claims that are brought in federal courts has actually increased dramatically. During this last year, such actions set a record, being brought at the rate of approximately one a day.

And finally, of course, once the complaint survives a motion to dismiss, unless you can somehow cut it off before then, the settlement value of even a dubious claim has value out of proportion to its merits, again, in view of the disproportional discovery costs that can be imposed on corporate defendants.

A second possibility, of which we've already seen at least a shadow, is to take a further step toward alternative dispute resolution by authorizing shareholder amendments requiring the arbitration of at least some types of shareholder claims.

This approach has several points in its favor. First, depending on the utilization of the mediation process now authorized by Chancery Rule 174, we may acquire some experience with the alternative dispute resolution approach in a corporate context, and in three or five years be in a better position to assess the feasibility of arbitration of internal corporate disputes.

Secondly, permitting shareholders to choose whether claims are going to be privately arbitrated or publicly tried in a judicial forum is consistent with the choice permitted by 102(b)(7)-type provisions. Again, this would give us a more accurate measure of shareholders' actual preferences with regard to these sorts of suits.

Third, there are clear cost advantages to arbitration in view of lower discovery costs and, in turn, lower discovery costs should reduce the settlement value of derivative suits and the incentives to bring more marginal claims.

There is, however, an overriding objection to such an approach. How can we decide what are the "some types" of shareholder claims that are going to be privately arbitrated and, therefore, more or less hidden, and those that are going to be publicly litigated in a judicial forum? The drafting problems inherent in distinguishing between claims that ought to be arbitrated and those that should not be seem to me to be insuperable, and some derivative claims are certainly going to present new and important issues of corporate

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governance. So the decrease in the number of judicial opinions in these sorts of claims that would result from widespread arbitration is an unacceptable cost to the corporate governance system.

I'm left then with thinking that the most feasible approach is to focus on attorneys' fees and, in particular, the "substantial benefit rule" that has characterized derivative suits for a long time. This is another point at which there are both important differences and important similarities between the federal securities class action and the derivative suit.

In the former case, the settlement value of a claim lies not only in the potential costs of discovery and resultant interruption of business, but also in the potentially astronomical damages that are faced by the defendants. The credibility of a threat like that is greatly enhanced by the fact that an issuer with deep pockets is invariably joined as a defendant under a theory of respondeat superior. But class action still has to produce some monetary recovery for the class if the plaintiff's lawyer is to recover any fees.\(^{78}\)

In contrast, the damages at stake in a derivative suit are generally less in amount simply because no relief is being sought from the corporation. And there's only so much blood you can get out of individual directors.

On the other hand, the derivative plaintiff is twice blessed compared to the securities class action lawyer in the sense that recovery of attorneys' fees is not restricted to the common fund recovered, but can be awarded if the litigation resulted in what is believed to be a "substantial benefit" to the corporation.

Notwithstanding the modest monetary recoveries, attorneys' fees were awarded in ninety percent of the cases. And in approximately ten percent of the cases, attorneys' fees were the only form of relief that was awarded. It's worthwhile noting that in the sample of derivative and class actions studied by Romano, only fifty percent of the settlements resulted in any monetary recovery for the corporation or the shareholder, averaging on a per-share basis fifteen cents per share in the case of derivative suits.\(^{79}\)

The higher rate of attorneys' fees recovered in relation to monetary recoveries can only represent derivative claims, not class actions. And the same is true for those settlements that result in only the award of attorneys' fees. In both instances, the predicate for the award must have been the

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\(^{78}\)This may not be strictly true in Delaware, where a violation of the board's disclosure duties may result in at least nominal damages to the affected class of shareholders, even though the shareholders appear to have suffered no actual economic harm. See Malone v. Brincat, 722 A.2d 5, 12 n.27 (Del. 1998); In re Tri-Star Pictures, Inc., Litig., 634 A.2d 319, 333-34 (Del. 1993); but cf: Loudon v. Archer-Daniels-Midland Co., 700 A.2d 135, 142-43 (Del. 1997). Disclosure claims under the federal proxy rules appear to be treated as *sui generis* derivative actions for purposes of attorneys' fees, regardless of whether the claim otherwise satisfies the usual requirements for a derivative action. See Mills v. Electric Auto-Lite Co., 396 U.S. 375, 395-97 (1970).

\(^{79}\)Romano, *supra* note 65, at 61.
parties' agreement that the lawsuit resulted in some intangible substantial benefit such as "corporate therapeutics." Very often the therapy took the form of an amendment to the bylaws or a change in some other internal procedure. But according to Romano, most of the structural changes cited as "substantial benefits" in settlement appear to have been adopted by the corporation solely in response to what she says is the need to paper a record in order to justify an award of attorneys' fees to the Court.\(^{80}\)

If there's going to be any reform of the derivative suit at all, it's going to be very marginal. A rather modest change in derivative suit procedures that might reduce the number of marginal claims that are brought is to base attorneys' fees in substantial benefit cases on the monetizable value of the benefit to the corporation rather than on the effort expended by the attorney. The current contrary rule, I think, results in excessive incentives to bring derivative actions and insufficient incentives for lawyers to screen those actions up front.

I'm not at all suggesting doing away with the substantial benefit rule because some intangible benefits can, in fact, be valued in monetary terms. Suppose, for example, a derivative suit results in the cancellation of an unfavorable contract that the corporation has with an insider, saving the corporation $400,000. Well, to paraphrase Ben Franklin, $400,000 saved is $400,000 earned. And the attorneys' fee in that case should be based upon the same considerations as if there had been an actual monetary payment of that amount.

Where the benefit cannot be valued in monetary terms, either the plaintiffs' lawyer would take nothing, as would be the case in the class action, or if that seems overly harsh, an appropriate fee could be set by the court subject to some statutory cap. These could not exceed "$\ldots\$_."

My best guess is that a focus on attorneys' fee rather than on the substantive law of derivative suit is the most promising agenda item for consideration of derivative suit reform. It seems likely to decrease the number of marginal claims that are brought while having little or no effect on the incentive to bring meritorious suits.

Mr. Chief Justice, let the games begin.

CHIEF JUSTICE VEASEY: Thank you, Mike, for that very lucid and thought-provoking presentation.

Now, we have Grover Brown and Bill Prickett. And I introduced you in alphabetical order but that doesn't mean you have to go that way. So in your comeback, would you like to decide who should go first?

MR. BROWN: He's retired.

CHIEF JUSTICE VEASEY: All right.

\(^{80}\)Id. at 63.
MR. PRICKETT: I think I should forego saying anything in view of the fact that the Chief Justice has spoken and we have heard from Professor Dooley. What more can be added? But I was introduced by the Chief Justice as somebody who was known for feistiness. I didn't hear anything about being scholarly.

CHIEF JUSTICE VEASEY: You're that, too. You're that, too.

MR. PRICKETT: First of all, let me preen my feathers a little bit now that I've retired. I notice that there is a recurrent panoply of cases of which I have had some hand, i.e., Weinberger v UOP, Smith v. Van Gorkom, Tri-Star and, more recently, Malone v. Brincat. All of these are representative cases brought by me and my colleagues on a representative basis, either as class or derivative actions.

Now, I recite these cases not simply to preen my legal feathers as I fade into the background. Rather, I point out that significant changes in the Delaware law came about as a result of these actions. In other words, these are some of the cases that were presented to the Court of Chancery and ultimately to the Supreme Court which resulted in a sea tide of changes in the Delaware corporate law. The justification for representative actions, both class and derivative, lies not in the fees that have been talked about, including the suggestion that fees be cut down. The importance of these cases is they are the grist from which the law progresses step-by-step.

And, therefore, before you succumb to the suggestions of Professor Dooley, who gently advocates doing away with derivative actions by making them uneconomic, consider the fact that at least up until this time, without cases just mentioned, there would have been no progress in terms of the evolution of the Delaware corporate law.

And, therefore, let's consider first things first — that is, how important is this type of litigation to the whole process? I suggest to you these cases are of major importance. Professor Romano, to the contrary notwithstanding, such important cases must be nurtured and encouraged. Without such cases, the Court is not going to be adjudicating important corporate issues. To say that "the cost benefit" is this or that is to disregard the important function of representative litigation. And to nit pick about how much is paid as a result of the settlement of these cases is overlooking how important this litigation is to the whole system.

Therefore, what should be addressed is how do you correct the excesses that occur in some cases? How can you streamline the progress of

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cases that do present serious problems so that the Court of Chancery and the Supreme Court can address these issues and resolve them promptly?

Now, let's talk a little bit about what has happened to representative cases.

First of all, so far as the derivative action is concerned (unless I misheard Mike Goldman, Esquire), he, in effect, said that it was dead in Delaware. I agree. There are very few suits being brought in Delaware. Why? Because one is forced to spend a year-and-a-half or so diddling around with the preliminary issue of demand. The demand issue is very expensive litigation not only for the plaintiff, but also for the corporation. Realistically, if you are suing the directors or the management, the idea that they are going to seriously consider taking over the litigation or allow you to go forward is a myth. That just does not happen. What has been done is create a preliminary step that is very expensive before you even get to the issue that has generated the suit.

In that connection, I can't help but reiterate what I said yesterday — that is, there is a myth that those of us who bring these representative actions deliberately file suits which we know are legally marginal or have no legal merit whatsoever. I assure you that in more than forty years of practice there has never been a single instance in which I brought a marginal or legally meritless suit, hoping that the defendants' attorneys would advise a client to pay a legal fee rather than go through the process of getting the case dismissed if it was truly marginal. That just does not happen in Delaware. Nevertheless, there is a persistent myth that is circulated around that there are many marginal or meritless suits.

The legal buzz saw of the motion to dismiss as a sure way of making sure that marginal suits are not brought. What is the legal effect of a motion to dismiss? He who brings the marginal or meritless suit and gets thrown out of court at the motion to dismiss stage ends up not with any fee or reimbursement for advances and expenses. Further, when he loses a motion to dismiss, the attorney for the plaintiff still has to pay fifty to sixty percent of what he might have gotten for his overhead. There is no incentive to bring marginal or meritless suits in Delaware. Quite the contrary.

And I notice that our speaker yesterday referred to "strike suits." I made a point of asking him afterwards if he was referring to Delaware. He replied, "Oh, I wasn't talking about Delaware." And I said, "Well, I wish you had said that because you implied that there were a lot of strike suits in Delaware. The fact is that 'strike suits' simply have not been brought in the Delaware courts."

Next, there was also a suggestion by Professor Dooley that payment for a successful representative suit should somehow be based on the hours that plaintiffs' attorney had devoted to the litigation. That pernicious
"Lindy" rule was adopted by the federal courts. But the federal courts are gradually retreating from "Lindy." The need for hours got so bad in the federal system that at times plaintiffs and defendants were covertly cooperating to extend cases. The defendants were keeping legions of young lawyers working meaninglessly at cases that could be settled. The plaintiffs' lawyers were piling up hours because they couldn't get paid unless they had the requisite hours. Fortunately, "Lindy" has never taken root in Delaware. The Delaware courts are interested in what amount of time it has taken you to produce the result. But the touchstone of any fee application in Delaware remains: just what you have done for the corporation or the stockholders. The plea that you have a lot of hours falls on deaf ears in the Delaware courts if you haven't produced anything of benefit for the client you represent — the stockholders or the corporation.

The Delaware courts are properly skeptical about cosmetic benefits: you must really prove a benefit. I know of no suit where the Delaware courts have approved a settlement and awarded attorneys' fees where there has not been a reasonable showing that the suit conferred a benefit. Conversely, I have seen cases where the Court of Chancery has denied a fee because there was no showing of any benefit from what was done to the stockholders or the corporation.

Let me conclude with a few further comments.

First, the representative action is vitally important to the well-being and growth of the Delaware corporate law. Such litigation should be encouraged so as to bring to the Delaware court system important issues. Professor Dooley conceded there must be derivative suits because some issues are too important and fundamental to leave them to mediation or arbitration. The only way the Delaware corporate law is going to develop is through litigation. If the Delaware corporate law does not continue to grow, it will stultify and will no longer be the preeminent forum for the resolution of these very important corporate issues.

Therefore, it seems to me what needs to be done is to clarify and expedite procedures so that the overworked court system is not presented with a lot of extraneous disputes on collateral issues but rather the critical issues that are important to the case in question and to the Delaware corporate law, get heard and decided promptly.

And to that end, you ought to cut down on the very real abuses of discovery. Now, the parties burden one another with voluminous unnecessary discovery. That is because there is no effective limits on discovery. But there must be judicial control on discovery. I focus on the

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key issue. In injunctive cases, the court requires litigants to present just enough information to the court so that the court could make the determination of whether to issue an injunction or whether to dismiss. The discovery problem can be solved by limiting discovery and expediting limited discovery to what is really needed to decide the issue before the court. Discovery is an area in which progress is needed in terms of maintaining the representative suit but at the same time cutting down on the cost and delay by abuses of discovery.

Second, one of the problems on which our English colleagues chided us with lies in the fact that it does take litigation in order to solve many corporate problems. We should devote some of our creative energy to considering how we can accelerate and make available the processes of the court to resolving the important corporate issues without going through the nineteenth century system of litigation. Advisory opinions and declaratory judgments are all areas that should be thought about constructively. But we should work to make the present system work. We certainly do not commit the solution of corporate procedure to a federal or state bureaucracy. The judicial institutions that we have now, the Court of Chancery and the Supreme Court are uniquely fitted to resolve these questions. The question is: how do we improve the Delaware legal system to meet the problems of the next century? That is our challenge that we have to meet.

A second challenge was also raised by our English visitor, that is, our system has worked well enough during the past hundred years and, because of this, Delaware has become the focal point of corporate disputes. The question is whether the United States and, more particularly, the jurisdiction of Delaware can have the imagination and the creativity to provide a forum for the bigger entities that are now going to be controlling the world's business. Is Delaware going to be able to provide a forum for the very real struggles between the competing interests such as we have done in the last century for Delaware corporations and for corporations all over the United States? That is what this seminar is really about.

Thank you.
CHIEF JUSTICE VEASEY: And scholarliness. Thank you.
MR. PRICKETT: Can I have two copies of that?
CHIEF JUSTICE VEASEY: Grover.
MR. BROWN: Let me just say to the Chief Justice I thought this would be a good opportunity for me, in view of the hour, to do after my Maurice Hartnett imitation. My good friend Justice Hartnett, when he was on the Court of Chancery, used to sit quietly, I'm told, through the whole argument, never say anything, never ask a question. When it was done, just say, "I'll take it under advisement." That's what I'm prepared to do at this point.

CHIEF JUSTICE VEASEY: You can be feisty and scholarly, too.
MR. BROWN: It's all right. I think under the circumstances this is a tough act to follow, to clean up after these three gentlemen with all we just heard in the past hour-and-a-half. I'm not going to make any effort or attempt to run overtime and get your attention with anything because I'm not sure there's anything more I could add.

I think as far as the role of the courts in corporate litigation in the next century, we certainly have to be aware of all of this technological avalanche that's hit upon us. And I certainly hope that the Delaware courts maintain, as I'm sure they will, their sensible approach to everything and not let it get completely out of hand.

When it comes down to it, the results of litigation boil down to common sense and the quicker and simpler we can get to that result, I think is what made the Delaware court system what it has been over the past century. I see no reason to change it in the future.

I think, Mr. Chief Justice, I'll defer to anyone who might have a question of Professor Dooley or yourself or anyone else in the time that's remaining. I have no prepared remarks. I came prepared to say nothing. I'm not offended by speaking briefly after you. Thank you.

CHIEF JUSTICE VEASEY: Any questions out there for.

AN AUDIENCE MEMBER: May I just say something? I don't want to take any time, but I concur entirely with what Bill Prickett said. I don't want anyone to assume that because I'm not taking your time adding some comments to what Bill Prickett said that I agree with anything Professor Dooley said. I'm awfully glad he's not sitting on the Court of Chancery.

MR. PRICKETT: No chance of that, Joe.

CHIEF JUSTICE VEASEY: Craig?

MR. SMITH: If I may, this is really not a question but a comment. Listening to the role of litigation, Delaware has wonderfully flexible business law statutes and our partnership law, our limited liability company law and our corporation law, they are deliberately so. And I've been privileged over the last 18 years to have a hand in some of that drafting.

And I want to suggest that perhaps with flexibility there comes, at least presently, litigation. It may be a price for flexibility and maybe in the future we can fix that price. But I just want to comment as a draftsman of some of the statutes that are at issue, everything from 102(b)(7)\(^6\) to some others.

When we draft, we give tremendous power to the board of directors, to general partners, to managers of limited liability companies. And an issue that always comes up is with that power comes the potential for abuse. Are we giving too much power, too much discretion to these people? And the

answer is, well, maybe. Anything can be abused and if it is, you can go to court.

So in some respects in drafting these statutes, the legal system and the litigation become sort of the touchstone or the check on abuse of power. And if representative actions such as derivative actions and, to a certain extent, class actions are curtailed or done away with, we will lose what is, at least in my mind, a very important and, in fact, an essential aspect of our very flexible business statutes.

CHIEF JUSTICE VEASEY: Any other questions or comments?

AN AUDIENCE MEMBER: Question, Professor Dooley. You mentioned in your remarks that a more principle way of awarding attorneys' fees might be to quantify the benefit to the class or corporation, etcetera. How would you go about quantifying qualitative benefits as disclosure addendums, etcetera?

PROFESSOR DOOLEY: A qualitative benefit that — give me a for example. Let's suppose —

AN AUDIENCE MEMBER: Imagine a case where a plaintiff's attorney comes in and points to an error or an omission that may or may not be one of serious significance, but the corporation decides to ask through a proxy statement and, therefore, a benefit has been conferred that both sides agreed to ask for information. How would the Court go about trying to understand, trying to identify a dollar value of that?

PROFESSOR DOOLEY: Well, there may be a reason why you'd want some state statutory fee payment schedule. A cap, for example, shall not exceed dollar sign blank if you can't put a monetary value on it. I'm really very suspicious that something that is so wonderful that we can't put a dollar figure on it, it's priceless as the credit card commercials would say, is really all that priceless or really all that wonderful.

CHIEF JUSTICE VEASEY: Do you want to comment on anything that your scholarly friend Mr. Prickett said?

PROFESSOR DOOLEY: Well, my scholarly friend Mr. Prickett and I — and incidentally, if you think these are dulcet tones, you ought to hear me when I don't have laryngitis.

When you come right down to it, we don't agree to disagree on that much. Nor do I disagree with this gentleman on the necessity from time to time to resort to courts.

Now, I've done a lot of statutory drafting myself and while we have sometimes been a little more direct than the Delaware law, anyone who's ever tried to . . . knows that there's only so far you can go. You simply cannot write a statute that covers all situations, which is why I think, also, that the European argument that we'd be better off with a codified system just isn't going to work in this country, not only because of our own experience and culture, but because we are a very diverse, very complicated
country and so are many of our transactions. At some point, you have to go to court.

Mr. Prickett cited cases that he thought were worthwhile bringing and, as it turns out, they are milestones of Delaware jurisprudence and American jurisprudence. I think Weinberger\(^7\) is a very important case. I think that Smith against Van Gorkom\(^8\) was captured very well by Chancellor Allen yesterday as perhaps the worst decision in the history of corporate law that may have had the most benefits over a long period of time.

So there's no disagreement from me that you cannot get rid of the representative suit.

There is a question, I think, of exercising somewhat more control. Now, it may well be, again, as Mr. Prickett said, that these things don't go on in Delaware. They sure go on someplace. Right? I mean, otherwise, Roberta Romano didn't make up those statistics. And those statistics tell a story that is the story that is told by people who are very critical of derivative suits that these are being brought solely for the purpose of generating a lawyer's fee. Not all of them, obviously. And note that I was smart enough to stay away from the use of the word "frivolous." I quite agree also with Mr. Prickett that people don't bring frivolous cases, but they do bring cases of sometimes dubious merit.

Again, I think that is the primary difference between us and isn't that why. But it's an important one. I, again, think of corporations and think the basic assumption of our system is that you are self-governing until such point as you run afoul of something or until such point as you begin to abuse the authority that has been given to you by a statute. But that's the explanation for the enabling corporation statutes. It's the explanation, I think, of the business judgment rule.

And, again, I think the differences between us are really pretty slight. And thank you.

MR. PRICKETT: Chief Justice, I never thought that I would end up finding Professor Dooley with agreement —

CHIEF JUSTICE VEASEY: He's a nice guy.

MR. PRICKETT: I agree. The Court faces the problem of how do you fix a fee for a disclosure. Okay.

First of all, it's a question of arm's length bargaining at the conclusion of the case once it's been settled. And so that the Court has, first of all, it has the arm's-length bargaining between the attorneys of the plaintiff and the corporation. And it's a separate thing from what is settled.

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\(^7\)Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).

\(^8\)Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).
Secondly, the Court is armed with the information of how much time has gone into that.

Third, the Court has never done this, but it could well say, Mr. Defendant, what are you paying your attorneys? Well, that's a measure of what the effort was and how does that fit with what the application is before me? Because that would be one way of doing it. Not impossible. It's one of the tough jobs that the Court has to do.

CHIEF JUSTICE VEASEY: You've maneuvered yourself into the last word. Congratulations.

MR. PRICKETT: I could never do that in the court, Your Honor.

CHIEF JUSTICE VEASEY: Well, I think we need to thank Professor Dooley and Bill Prickett and Grover Brown for participating in this panel. And we'll now take a 15-minute break.