

AN EXCLUSIVE SOLUTION TO THE MULTITUDE OF PROBLEMS
IN MULTI-FORUM SHAREHOLDER LITIGATION

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I. INTRODUCTION

Since 2001, Delaware’s Court of Chancery has experienced a decline in derivative shareholder suits.¹ Delaware courts are world-renowned for their expertise in corporate law, so why are shareholders fleeing from the jurisdiction? One reason is that stockholders felt they were enduring injustices and limitations under the rulings of Delaware law. For example, in *Zapata Corp. v. Maldonado*, the Delaware Supreme Court held that an “individual stockholder can initiate a derivative lawsuit on a corporation’s behalf, but he has no absolute right under Delaware law to continue suit if the board of directors . . . seeks to dismiss it.”² If this

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¹ Thomas T. McClendon, Note, *The Power of a Suggestion: The Use of Forum Selection Clauses by Delaware Corporations*, 69 WASH. & LEE L. REV. 2067, 2072 (2012).

² R. Franklin Balotti, THE DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS: STATUTORY DESKBOOK, Corp-296-A (Wolters Kluwer Law & Business, 2015 ed. 2014) (complimenting 8 Del. C. 1953, § 327) (quoting *Zapata Corp. v. Maldonado*, 430 A2d 779 (1981)).

occurs, courts apply the business judgment rule whereby defendants are more likely than not to prevail.

One motivation for shareholders is that the Delaware Court of Chancery, although highly revered for its expertise in corporate law, is also well-known for its conservative fee awards and harsh verdicts.³ A second motivation is that there seems to be more advantages for both the plaintiffs' bar and the defendant corporation. Filing in multiple forums, driven by the plaintiffs' bar, creates great leverage among all plaintiff law firms, when it comes time to split attorney's fees.⁴

Defendants have attempted to settle in courts most advantageous to their client corporation, whereas plaintiffs have attempted to sue in as many forums as they can in an effort to increase their fees or chances of reaching a more favorable ruling.⁵ Although there are advantages and disadvantages for the plaintiffs and defendants, ultimately it is the stockholders and the Delaware courts who bear the bruises from all the fighting. Within the past decade, Delaware courts have upheld what may be an effective solution to the issue: exclusive forum provision bylaws.⁶

This note argues that exclusive forum provisions benefit both defendants and plaintiffs. To increase the effectiveness of exclusive forum bylaw provisions (hereinafter referred to as "provisions"), I suggest the provisions should: (1) require issues involving inter-business relationships to be litigated in the state of incorporation;⁷ and (2) be contained within the corporation's governing documents.⁸

Part II analyzes the harms that Delaware courts and corporations have endured due to the rise in multi-forum litigation. Part III discusses whether the proposed and currently enforced provisions are working to solve the issue. Part IV suggests exclusive forum bylaw provisions can be improved by requiring litigation in the state of incorporation and addresses whether these provisions are better suited within corporate bylaws or

³ Edward B. Micheletti & Jenness E. Parker, *Multi-Jurisdictional Litigation: Who Caused This Problem, and can it be Fixed?*, 37 Del. J. Corp. L. 1, 39 (2012).

⁴ *Id.* at 9; See also Leo E. Strine, Jr., Lawrence A. Hammermesh, & Matthew C. Jennejohn, *Putting Stockholders First, Not the First-Filed Complaint*, 69 BUS. LAW. 1, 2 (2013) ("[counsel is] often motivated by a desire to secure a role in litigation that will justify a share in potential fee awards, plaintiffs' lawyers often bring parallel actions against the sane defendant in multiple jurisdictions hoping to become the lead plaintiff's attorney [or gain a piece of the settlement as co-chair in the higher settlement claim].").

⁵ Micheletti & Parker, *supra* note 3, at 23.

⁶ See generally Joseph A. Grundfest and Neil Miller, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. 333 (2012).

⁷ Verity Winship, *Shareholder Litigation by Contract*, 96 B.U. L. REV. 485, 501 (Mar. 2016).

⁸ See generally McClendon, *supra* note 1.

governing documents. Finally, Part V, the Conclusion, addresses how courts should deal with multi-forum litigation and which solution the Delaware Court of Chancery and other jurisdictions should enforce.

II. MULTIPLE HARMS TO DELAWARE COURTS AND CORPORATIONS

A major problem with multi-forum litigation is the competition between plaintiff and defense counsel to obtain higher fees or higher settlement agreements. This competition hurts both client shareholders and corporations. Plaintiffs filing multiple suits, with nearly identical complaints, cause disorder to shareholders and courts.⁹ First and foremost, shareholders have realized the advantages of filing identical claims in more than one forum and competing with each other for a position at the settlement table.¹⁰ The focus of both parties' attorneys turns from maintaining affordable fees for their clients, to obtaining the highest attorney fees for themselves because out of state courts award higher fees to plaintiffs' attorneys as an incentive to keep cases out of the state of incorporation.¹¹ Suits in multiple forums allows competition for higher fees and leads to more opportunities for plaintiffs to be lead counsel. For example, plaintiffs like those in, *In re Compellent Technologies*, filed claims in a different jurisdiction, after filing claims in Delaware, in an attempt to gain control of the case.¹² Filing in another forum allows for more control over the case by forcing defendants to deal with plaintiffs in a forum in which a higher settlement can be reached.¹³ This also creates the greatest leverage among the multitude of plaintiffs' firms when attorney's fees are divvied up; increasing the cost of litigation and elevating the risk of an adverse decision for corporate defendants.¹⁴ For example, a plaintiff shareholder may find it beneficial to file outside of the state of incorporation, particularly outside of Delaware whose awards tend to be conservative, in hopes of higher attorney fees and a more favorable ruling. Defendants are forced to settle claims that may not have otherwise existed, and so plaintiffs have tactical leverage "to increase the costs of litigation and elevate risk of an adverse decision for corporate defendants."¹⁵ Plaintiffs may see an advantage to filing outside of their

⁹ See generally Minor Myers, Note, *Fixing Multi-Forum Shareholder Litigation*, ILL. L. R. 467 (2014).

¹⁰ *Id.* at 470-71.

¹¹ *Id.* at 490.

¹² Micheletti & Parker, *supra* note 3, at 12 and 13.

¹³ *Id.*

¹⁴ *Id.* at 9-10.

¹⁵ *Id.* at 12.

state of incorporation, if Delaware, because Delaware is known for harsh rulings on weak cases.¹⁶ However, defendants can attempt to do the same by dragging plaintiffs into a forum more inclined to rule on a lower settlement, in hopes of having the law applied differently than how Delaware courts would.¹⁷

Some courts, in an attempt to deal with this issue and competition between companies, have rewarded the plaintiffs who are first to file. This seems to only to aggravate injury to courts and stockholders however, because weak claims are likely to be rewarded, as opposed to more meritorious and thoroughly investigated cases. The shareholder's attorney who files first, and perhaps does the least amount of work, is likely to be rewarded, and could potentially become lead plaintiff's attorney, receiving a larger "piece of the pie" at settlement.¹⁸ As Vice Chancellor Laster stated, entrepreneurial plaintiffs' counsel "maximize by getting the most fee for the least work," so plaintiffs' counsel "ha[s] an incentive to do less."¹⁹ This is why, as Micheletti and Parker argue, the plaintiffs' bar usually uses multi-forum litigation as a "leverage tactic," as opposed to what is collectively rational for the system.²⁰

Although there are advantages and disadvantages for plaintiffs and defendants in multi-forum litigation, the trend impedes corporate law development.²¹ The Court of Chancery believes that this multi-jurisdictional litigation phenomenon is a problem.²² One notable concern is that multi-forum litigation allows weaker claims to proceed because "no single court can throw them out."²³ This leaves a court with little control over its precedent or the case at hand. Vice Chancellor Laster explained that, "[d]efense counsel is forced to litigate the same case, often identical claims, in multiple courts. Judicial resources are wasted as judges in two or more jurisdictions review the same documents and at times are asked to decide the exact same motions."²⁴

When a plaintiff rushes through procedure and discovery in hopes of a reward for having the first-filed suit, weaker cases are not screened out by the court. For example, in *In re Wal-Mart Stores, Inc. Delaware*

¹⁶ *Id.* at 13.

¹⁷ *Id.* at 9.

¹⁸ *Id.* at 12; *See also* Strine, Jr., Hammermesh, & Jennejohn, *supra* note 4, at 2.

¹⁹ Micheletti & Parker, *supra* note 3, at 28.

²⁰ *Id.* at 12.

²¹ Myers, *supra* note 9, at 499.

²² Micheletti & Parker, *supra* note 3, at 25–6. (citing *In re Allion Healthcare Inc. S'holders Litig.*, C.A. No. 5022–CC, 2011 WL 1135016, at *4 (Del. Ch. Mar. 29, 2011).

²³ Myers, *supra* note 9, at 475.

²⁴ Micheletti & Parker, *supra* note 3, at 27. (citing *In re Allion Healthcare Inc.*, 2011 WL 1135016, at *4.

Derivative Litigation, the Delaware Court of Chancery ruled that the claims of the Delaware shareholders were collaterally estopped from being heard in Delaware due to the faster-to-file Arkansas plaintiffs.²⁵ The shareholders in this case sued when *The New York Times* alleged that Wal-Mart Stores, Inc., incorporated in Delaware, had bribed Mexican government officials in order to expand WalMex, its Mexican chain, more quickly.²⁶ Shortly after, fifteen derivative claims in Arkansas and Delaware were filed in April 2012. The Arkansas plaintiffs filed suit three years earlier than the Delaware plaintiffs, as the Delaware plaintiffs diligently requested and investigated the books and records involved in the *Wal-Mart* scandal.²⁷ Because the Arkansas court found that the complaint lacked specific allegations of knowledge, the court held that the Arkansas plaintiffs failed to adequately allege demand futility, and granted the defense's motion to dismiss. While Arkansas shareholders were filing suit, Delaware shareholders were filing seven derivative cases and investigating the books, until they were finally instructed by the Delaware Court of Chancery to consolidate the seven cases into an amended complaint.²⁸ In May 2015, a month after the Arkansas complaint was dismissed, Delaware shareholders filed a complaint alleging a single breach of fiduciary duty claim.²⁹ Defendants moved to dismiss arguing that the Arkansas decision collaterally estopped plaintiffs from alleging demand futility, and the Delaware Court of Chancery granted their motion.³⁰ In granting the motion, the court reiterated that a court is confined to the face of the complaint.³¹ The court must also take judicial notice of prior litigation and their holdings "only to establish the existence of the opinion, and not for the truth of the facts asserted in the opinion."³²

The lack of ability to be heard by the Delaware Court of Chancery, in Wal-Mart Stores's own state of incorporation, seems a harsh punishment by the Delaware Court of Chancery. As Chancellor Bouchard alleges, "concerns about fast filers precluding future plaintiffs align with the state's policy of ensuring the parties to be precluded have received a full and fair opportunity to be heard."³³ I strongly disagree. Plaintiffs who file quickly and thus do not make a diligent effort to allege their claim

²⁵ See generally C.A. No. 7455-CB, 2016 Del. Ch. LEXIS 75 (Del. Ch. May 13, 2016).

²⁶ *Id.* at *22.

²⁷ *Id.*

²⁸ *Id.* at *21.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* (quoting *M&M Stone Co. v. Pennsylvania*, 388 F. App'x 156, 162 (3d Cir. 2010)).

³³ *In re Wal-Mart Stores, Inc.*, 2016 Del. Ch. LEXIS 75 at *54.

prevent other shareholders who diligently pursue their claims and file a similar suit within the state of incorporation from being heard.³⁴ What is even more discouraging to the Delaware shareholders in this case is Chancellor Bouchard's dismissal of the complaint even though the Delaware claim contained additional factual details. The Court of Chancery, "[t]o hold otherwise would mean that issue preclusion would almost never apply—subsequent plaintiffs could simply add more allegations . . . and then claim there was no identity of issues."³⁵ This note asserts that the first-to-file rule discourages more diligent plaintiffs from being heard in court in favor of quick-to-file plaintiffs. This leads to two problems. First, weaker claims get through the courthouse doors, precluding more meritorious claims from being heard. Second, discouraging diligence encourages attorneys to be less mindful of the rules of professional conduct because they are rewarded for including fewer facts and conducting a less thorough investigation for their client. It is counsel's duty to investigate if a claim is meritorious in the first place and to put forth the best argument on the shareholders' behalf. However, this duty seems to be incidentally penalized by the courts in the practice of multi-forum litigation.

Additionally, the Delaware Court of Chancery agrees with the notion of this comment, by refusing to hold defendants who push to file outside of the state of incorporation in high regard. The Delaware Court of Chancery found that when the plaintiff races to petition the court for a "scheduling hearing, it signals that they are 'trying to get control of the case, not that they're acting for benefit of stockholders.'"³⁶ Vice Chancellor Laster opined that the strategic game of multi-forum jurisdiction "undermines legitimacy of the entire representational litigation process."³⁷ The Delaware Court of Chancery's preference for fiduciary disputes to be brought in the state of incorporation can be seen

³⁴ Strine, Jr., Hammermesh, & Jennejohn, *supra* note 4, at 13 ("[P]laintiff's counsel who opts for investigation and deliberation may find herself the 'loser' under rules of jurisdictional priority that favor the first-filed lawsuit.").

³⁵ *In re Wal-Mart Stores, Inc.*, 2016 Del. Ch. LEXIS 75 at *31.

³⁶ Micheletti & Parker, *supra* note 3, at 28 (citing Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 23, *In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL, 2011 WL 6382523 (Del. Ch. Dec. 9, 2011)).

³⁷ *Id.* (citing Transcript of Courtroom Status Conference at 30, *Scully v. Nighthawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL (Del. Ch. Dec. 17 2010) (unreported)); *See also* Robert Borowski, Note, *Combatting Multi-forum Shareholder Litigation: A Federal Acceptance of Forum Selection Bylaws*, 44 SW. L. REV. 149, 153–54 (2014) ("Shareholders are harmed because any remedy they receive, e.g., additional disclosures, is inequitable to the financial compensation afforded to their attorneys when considering the overall costs of shareholder litigation. Corporations are harmed because of the correlating increase in settlement costs").

in *Scully v. Nighthawk Radiology*.³⁸ In *Scully*, the court questioned defense counsel's attempt to settle pending deal litigation in a non-Delaware forum, and declared that the defense "knowingly induce[d] a fiduciary breach," and acted as "an aider and abettor. Not an arm's-length negotiator."³⁹ The court made it clear that there were meaningful process claims in the deal, but that plaintiffs' "arms were twisted" to settle in the non-Delaware forum of Arizona, harming the on-going suit in the Delaware court. The defense's choice of a non-Delaware forum showed the court its lack of effort to address the claims of Delaware law, and left the Delaware court with no control over its own state law issues.⁴⁰ The court's disdain towards the defendants in *Scully* reinforced its belief that "the state of incorporation has a paramount interest in the internal governance of the corporation."⁴¹ The court was denied the right to oversee proceedings regarding legitimate questions of Delaware's corporate law and found that the defendants strategically played multiple shareholders against each other in this case.⁴²

Finally, two different court rulings on similar issues can leave the law in a confused state and poses *Full Faith and Credit Clause* issues.⁴³ Multi-forum litigation harms the *Full Faith and Credit Clause* which the United States Supreme Court imposed on the state and federal courts. This poses a grave issue because there is the risk that a state court, outside of the state of incorporation, may misapply the state of incorporation's law.⁴⁴ Two separate judges could apply the law differently, resulting in inconsistent precedent.⁴⁵ *Pyott v. Los Angeles Municipal Police Employees Retirement System* serves as an example of the court's priority in keeping order of its case precedent. *Pyott* emphasized that Delaware's interest in governing the internal affairs of its corporations must yield to national interests and that all state and federal courts must respect each other's judgments.⁴⁶ When it was discovered that Allergan, Inc., a Delaware corporation, was facing \$600 million dollars in civil and criminal damages for its unlawful marketing of BOTOX for off-label uses, shareholders sued in Delaware and the United States District of California. Unfortunately for the Delaware shareholders, the California Federal Court

³⁸ C.A. No. 5890-VCL.

³⁹ Transcript of Courtroom Status Conference, at 22, *Scully*, C.A. No. 5890-VCL.

⁴⁰ Micheletti & Parker, *supra* note 3, at 22–23.

⁴¹ *Id.* at 29; *see also In re Compellent Techns.*, 2011 WL 6382523.

⁴² Micheletti & Parker, *supra* note 3, at 23.

⁴³ *Id.* at 27.

⁴⁴ *Pyott v. L.A. Mun. Police Emps. Ret. Sys.*, 74 A.3d 612, 612 (2013).

⁴⁵ Micheletti & Parker, *supra* note 3, at 27.

⁴⁶ *Pyott*, 74 A.3d at 612.

dismissed the California suit with prejudice.⁴⁷ Again, the Delaware Court of Chancery was faced with the issue of collateral estoppel. The United States Supreme Court has held, under the *Full Faith and Credit Clause*, a state court is required to give a federal judgment the same force and effect it had in federal court. under the preclusion rules of the state in which it sits.⁴⁸ What further confounded this case for the Delaware plaintiffs was one of the more profound problems faced by shareholders and courts in multi-forum litigation: because California used the internal affairs doctrine to interpret Delaware law on the issue of fiduciary breaches, the case was dismissed as a matter of Delaware law.⁴⁹ Furthermore, there was no “public policy exception” to allow Delaware to refuse to give full faith and credit to California’s judgment, denying the Delaware plaintiffs “the full and fair opportunity to be heard” in the corporation’s own state of incorporation.⁵⁰

Multi-forum litigation, as exemplified in *Pyott*, causes the law to become disorganized and confused and poses problems under the *Full Faith and Credit Clause*. Moreover, the state of incorporation’s law is misapplied at times when used outside of its jurisdiction. Each state has an advantage over other states in applying its own state law, as Ted Mirvis noted, “[for a judge outside of Delaware] it can be a little unnerving. I mean, you say, ‘[h]ere’s five recent decisions each of which are 94 pages long and you can sort of get a basic idea of the vocabulary.’”⁵¹ Judges in Delaware’s Court of Chancery are more familiar with the state’s corporate law and how it has been applied, enhancing and maintaining order in the continuing application of its corporate laws. This It is detrimental to both the Delaware Court of Chancery and shareholders when a court is denied the right to oversee matters involving its own law, and shareholders are denied their right to bring certain internal affairs claims in the court that is most familiar with the laws regarding those claims.⁵²

III. ARE THE EXCLUSIVE FORUM PROVISION BYLAWS WORKING?

Chancellors in Delaware’s Court of Chancery have voiced their opinions that “stockholders don’t have any reason to want multiple forums,” because of the problems highlighted above and because the

⁴⁷ *Id.* at 614.

⁴⁸ *Id.* at 615.

⁴⁹ *Id.*

⁵⁰ *In re Wal-Mart Stores, Inc. Del. Derivative Litig.*, C.A. No. 7455–CB, 2016 Del. Ch. LEXIS 75, at *52 (Del. Ch. May 13, 2016).

⁵¹ McClendon, *supra* note 1, at 2079–80.

⁵² *City of Providence v. First Citizens Bancshares, Inc.*, 99 A.3d 229, at 234.

corporations in which they have stock are wasting money and resources in litigating multiple cases over the same issue.⁵³ Further, Minor Myers argues, “multi-forum litigation threatens to impair the usefulness of the shareholder suit and deprive incorporation states of important cases.”⁵⁴ Courts and corporations throughout the nation have implemented many solutions, and many legal scholars have suggested remedies to this corporate harm. Their effectiveness, however, remains questionable, as the proposed solutions do not encompass the main problems addressed in Part I.

A proposed solution to the disadvantages of the defendant(s) is that they could argue that the Delaware action was first-filed (however, this could lead to a race to the courthouse and a lack of a screen of merit on the part of the courts) and the common-sense notion that a Delaware court is a more appropriate forum to address an important matter of Delaware corporation law.⁵⁵ The defense could also make a “one forum motion,” in hopes of having the court grant their litigation in the state of incorporation. However, the defense is then leaving the choice of forum in the hands of the courts, in hopes that they will not face multiple suits, and with the risk that the chosen forum will not be the state of incorporation.⁵⁶

Myers, along with other legal scholars, has also proposed a hierarchical method for shareholders to choose their forum. However, this does not resolve the problems of the courts’ and corporations’ wasted resources and finances, nor does it prevent the problems associated with the *Full Faith and Credit Clause*, as exemplified in *Pyott v. Los Angeles Municipal Police Employees’ Retirement Systems*.⁵⁷ A method that prioritizes litigation would coordinate shareholder litigation in different forums and prioritize cases in the incorporation state.⁵⁸ It is suggested that the coordination mechanism promotes the deterrent effect of shareholder litigation, allowing plaintiff’s attorneys to press for strong cases and allowing courts to eliminate meritless cases quickly.⁵⁹ While prioritizing litigation in the state of incorporation benefits American corporate law, I argue that it fails to force the shareholder or the defense to respect that the shareholder must be the first to come to the state of incorporation. Simply

⁵³ Micheletti & Parker, *supra* note 3, at 28. (quoting Transcript of Motion to Consolidate and Organize Counsel and the Court’s Ruling, at 19, *In re Compellent Techs., Inc. S’holder Litig.*, C.A. No. 6084-VCL, 2011 WL 6382523 (Del. Ch. Dec. 9, 2011)).

⁵⁴ Myers, *supra* note 9, at 538.

⁵⁵ Micheletti & Parker, *supra* note 3, at 14, 15.

⁵⁶ *Id.* at 18.

⁵⁷ See generally *Pyott v. L.A. Mun. Police Emps. Ret. Sys.*, 74 A.3d 612 (2013).

⁵⁸ Myers, *supra* note 9, at 531.

⁵⁹ *Id.*

because there is a suggested “rule of priority,” nothing exists to prevent a defendant or shareholder from removing the case to a different forum outside the state of incorporation on *forum non conveniens* grounds. While prioritization may be beneficial in providing “improved judicial oversight [to] screen out weak claims,” if the defense should dismiss the case, the courts still face the same issues regarding misapplication of laws under the *Full Faith and Credit Clause*, as stipulated in Part I.⁶⁰

Also, courts have suggested that in order to address the problem of court oversight or lack of order in court rulings over inter-relational corporate disputes, the parties could be ordered to present the Delaware Court of Chancery’s transcript to the non-Delaware court, demonstrating its concern over the possibility of forum shopping for higher fee awards.⁶¹ Similar arguments include urging all parties to keep the Delaware Court of Chancery informed of settlements in non-Delaware jurisdictions, or for judges to keep each subsequent judge informed of the proceedings of the case.⁶² While this appears facially efficient, the realistic application of these solutions requires more effort on the part of the court system, flooding the courts with tedious tasks, wasting resources, and taking from the judges’ time, when in reality subsequent judges should be informed by precedent and the law itself.⁶³ Suggesting that non-Delaware forums are less receptive to large fee awards may harm external courts and may infringe upon the rights of shareholders or defendants if the party moves in favor of a better holding for their client. Further, a proposal requiring defendants and shareholders to file in the corporation’s state of incorporation, without any other options, must be universally accepted to be globally applied.⁶⁴ This approach seems unrealistic because the likelihood is low that each state court will surrender its ability to hear corporate cases from outside of its forum. Also, to an extent, this would harm the company and the shareholders, denying them of their right to have the choice of forum.

It appears that the most effective solution in effect right now are exclusive forum provision bylaws. Due to multi-forum litigation, there was a demand for a contractual provision that could restore the pre-existing jurisdictional stability with which each state’s courts interpreted the state’s corporate law.⁶⁵ Of these forum selection provisions, “58.6%

⁶⁰ Myers, *supra* note 9, at 533.

⁶¹ Micheletti & Parker, *supra* note 3, at 34.

⁶² *Id.* at 34, 38.

⁶³ *Id.* at 27.

⁶⁴ *Id.* at 46.

⁶⁵ See generally Grundfest & Miller, *supra* note 6.

appear in a corporation's charters and 41.4% appear in bylaws adopted without prior shareholder consent."⁶⁶ Although some legal scholars argue that multi-forum litigation actually deters shareholder litigation, exclusive forum provisions most effectively deter shareholder litigation.⁶⁷ Further, these provisions are arguably an "effort to restore an equilibrium that had prevailed for decades," before the conundrum of multi-shareholder litigation became so prevalent.⁶⁸

Two cases that exemplify the use of these provisions nationally are *Boilermakers Local 154 Retirement Fund v. Chevron Corp.* and *Galaviz v. Berg*.⁶⁹ In 2010, Chevron Corporation ("Chevron") announced that its board of directors had amended its bylaws to include an intra-corporate forum selection clause without prior shareholder action, provoking other corporations seeking guidance from other large entities to follow suit.⁷⁰ Moreover, Delaware courts encouraged practitioners to refine these provisions, and firms began to advise corporate clients to include them in their bylaws.⁷¹

In *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, the court held that the Chevron's intra-corporate forum selection clause, without prior shareholder action, was valid under Delaware law.⁷² Chevron's board of directors chose Delaware as the exclusive forum for litigation relating to internal affairs.⁷³ When the shareholders challenged the provision, the court granted the board's judgment for motions on the pleadings,⁷⁴ finding that the forum made the most sense, as the board chose the state of incorporation.⁷⁵ Chevron was incorporated in Delaware, where shareholders knew the corporation's internal affairs were governed. To support its holding, the court stipulated that the provision was valid under Delaware law, even without prior shareholder consent because under 8 Del. C. § 109b, "[a] corporation's bylaws "may contain any provision, not inconsistent with law or with the certificate of incorporation, 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

⁶⁶ *Id.* at 333.

⁶⁷ *Id.* at 336.

⁶⁸ *Id.*

⁶⁹ *Boilermakers Local 154 Ret. Fund v. Chevron Corp. (Boilermakers)*, 73 A.3d 934 (Del. Ch. 2012); *Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011).

⁷⁰ Grundfest & Miller, *supra* note 6, at 340.

⁷¹ Winship, *supra* note 7, at 501.

⁷² *Boilermakers*, 73 A.3d at 941.

⁷³ *Id.* at 943.

⁷⁴ *Id.* at 941

⁷⁵ *Id.*

employees.”⁷⁶ The court further stipulated that the bylaws were subject to change according to Delaware General Corporate Law, and that its facial validity pivoted upon the fact that the investors were aware of the bylaws when they purchased stock.⁷⁷

The court’s language clarifies its requirements:

In other words an essential part of contract stockholders’ assent to when they buy stock in Chevron and Fedex is one that presupposes the board’s authority to adopt binding bylaws consistent with 8 Del. C. §109. . . . our Supreme Court has long noted that bylaws . . . form part of a flexible contract between corporations and stockholders, in the sense that the certificate of incorporation may authorize the board to amend the bylaws’ terms and that stockholders who invest in such corporations assent to be bound by board-adopted bylaws when they buy stock in these corporations.⁷⁸

A shareholder who wishes to act outside of an exclusive forum provision in a case such as *Boilermakers*, would have to file outside the exclusive forum and argue that enforcing the clause would be unreasonable.⁷⁹ The court in *Boilermakers* found this to be a reasonable bylaw, noting that it helped alleviate the injury of inefficient costs of defending against the same claim in multiple courts at the same time, and any corporation without these provisions faces litigation in at least two forums.⁸⁰ After *Boilermakers*, some states dismissed cases in favor of the chosen (Delaware) court, and corporations have increasingly adopted these provisions.⁸¹ Approximately 746 exclusive forum clauses have been adopted as of 2014.⁸²

In *Galaviz v. Berg*, a California Federal Court, set limits to its enforcement of exclusive forum provisions in bylaws, concluding that courts may not allow a board to use an exclusive forum provision

⁷⁶ *Id.* at 939.

⁷⁷ *Id.*

⁷⁸ *Id.* at 940.

⁷⁹ *Id.*

⁸⁰ *Id.* at 943.

⁸¹ Winship, *supra* note 7, at 503 (dismissing in favor of the Delaware court based on a forum selection clause in Safeway’s bylaws that designates the Delaware Court of Chancery as “the sole and exclusive forum” for “any action asserting a claim for breach of fiduciary duty owed by, or other wrongdoing by, any director or officer of the corporation.” (quoting *Groen v. Safeway, Inc.*, No. RG14716641, 2014 WL 3405752, at 2 (Cal. Super. Ct. May 14, 2014)).

⁸² *Id.*

amendment to the bylaws (that were not present when shareholders invested) in order to pull the wool over the eyes of its shareholders.⁸³ In *Galaviz*, plaintiffs alleged that the board amended its corporation's bylaws to include an exclusive forum provision only *after* an alleged breach of fiduciary duty had occurred.⁸⁴ The post-breach amendment was unacceptable in the court's eyes.⁸⁵ The court found that there was "no mutual consent at all" from the shareholders who purchased stock prior to the adoption of the bylaw.⁸⁶ The Delaware Court of Chancery emphasized that although shareholders are bound by bylaws, which can be changed at the discretion of the board, they are not bound where they have no notice of an amendment to the bylaws or do not assent to it.⁸⁷

IV. PROPOSED IMPROVEMENTS TO THE EXCLUSIVE FORUM PROVISIONS

Delaware corporations have reacted to holdings such as in *Boilermakers*, in several ways, but most commonly by including exclusive forum provisions in their bylaws. Some corporations have withdrawn their bylaws and some have modified the language in their forum selection provisions to address concerns raised by shareholders. For example, some corporations offer to "fiduciary-out," meaning they would construct the provisions to allow a looser application where shareholders may be harmed by bringing fiduciary claims into that court.⁸⁸ However, this proposal seems to be only a façade of an exclusivity provision forum. The court has recognized that these provisions in bylaws have been assented to by the shareholders through their agreement to purchase stock in the company, therefore they are bound to the board of director's choice of forum.⁸⁹ In the "fiduciary-out" proposal, the bylaws would not act as a method to reset the "equilibrium" traditional in corporate law.⁹⁰ Rather, this type of provision is facially exclusive, yet ineffective in application because it allows for the disorganization of multi-forum litigation to resurrect once the shareholders decide they prefer a more advantageous

⁸³ Grundfest & Miller, *supra* note 6, at 341; *See also* Mark Lebovitch & Jeroen Van Kwawegen, *Of Babies and Bathwater: Deterring Frivolous Stockholder Suits without Closing the Courthouse Doors to Legitimate Claims*, 40 DEL. J. CORP. L. 491, 506 (2016) (suggesting that shareholders' rights are the equivalent to citizens' constitutional rights. These rights include voting, nominating, selling shares, and bringing suit).

⁸⁴ *See generally* *Galaviz v. Berg*, 763 F.Supp.2d 1170 (N.D. Cal. 2011).

⁸⁵ Grundfest & Miller, *supra* note 6, at 341.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 379.

⁸⁹ *Id.* at 383.

⁹⁰ *Id.*

jurisdiction. With effective provisions in the bylaws, the only time the shareholders are not bound—under Delaware law—is when the shareholder did not have notice of the provision *before* the alleged wrong occurred.⁹¹ Delaware courts appear to be upholding bylaw provisions, along with the corporations, due to their effectiveness in preventing the wasted resources of both courts and corporations that generally results from multi-forum litigation. For example, twelve class action suits were recently brought in Delaware concerning intra-forum laws approved by corporate boards not submitted to a shareholder vote. This provoked the defendant board of directors to revoke or modify the provisions to specifically address the concerns of the shareholders.⁹²

Even though the state of incorporation seems to be the most beneficial forum, Delaware's Court of Chancery has respected exclusive forum provisions and emphasized their effectiveness, even in cases where the exclusive forum was not Delaware, the state of incorporation.⁹³ In *City of Providence v. First Citizens Bancshares, Inc.*, the court found an exclusive forum provision valid, which allowed for a Delaware corporation to be sued only in North Carolina, where its headquarters were located.⁹⁴ The City of Providence challenged those bylaws because there was no Delaware availability. However, the Delaware Court of Chancery found that the board did not breach any duties in adopting the provision because shareholders had notice of its existence when they purchased stock. Additionally, the shareholders failed to show that it was unreasonable, unjust, or inequitable to enforce the forum selection bylaw.⁹⁵

⁹¹ See generally Galaviz v. Berg, 763 F. Supp. 2d 1170 (N.D. Cal. 2011).

⁹² Grundfest & Miller, *supra* note 6 at 390.

⁹³ See Borowski, *supra* note 37 (asserting Delaware corporations “face exceptional circumstances” through their shareholders abilities to have easy access to multiple jurisdictions outside of the state of incorporation, in its headquarter state and federal courts). This is notable as Delaware corporation shareholders receive benefits that give them the liberty to take part of a Delaware corporation and yet flock away from the Delaware Court of Chancery and its laws in litigation, as “less than one percent” of the Delaware corporations have their headquarters in the state of Delaware. The author opines that because bylaws form a contract between corporations and their shareholders, the effectiveness of an exclusive forum provision bylaw would give corporations and board of directors the benefits they chose when they decided to incorporate in Delaware, while limiting the possibility of shareholders pulling them out of the state under whose law they originally chose to incorporate. Further, this would protect a corporation who chose to incorporate in Delaware for the benefit of operating under Delaware law, from being slapped with a judgment from an outside jurisdiction, that must stick due to first-to-file or *Full Faith and Credit Clause* reasons.

⁹⁴ *City of Providence v. First Citizens Bancshares, Inc.*, 99 A.3d 229, 230-31 (2014).

⁹⁵ *Id.* at 231.

The court reiterated the principle that the “board itself may act unilaterally to adopt bylaws addressing those subjects.”⁹⁶ Although the court acknowledged that the stockholders could exercise their right to bring certain internal affairs claims against the corporation, the directors’ still have the right to include a choice of forum when notice was provided to the shareholders.⁹⁷ Additionally, the provision was in the bylaws. The court compared this case to its holding in *Boilermakers*, where it held that the state of incorporation, as the exclusive forum, “was the most obviously reasonable forum for internal affairs cases because those ‘cases would be decided in the courts whose supreme court has the authoritative final say as to what the governing law means,’” the corporations are not prohibited under Delaware law from creating its exclusive forum elsewhere.⁹⁸ The only claim a shareholder may bring to invalidate an exclusive forum provision outside of the state of incorporation is that the provision was executed by fraud, undue influence, or overweening bargaining power.⁹⁹ The decision to place an exclusive forum provision in a corporation’s bylaws contractually binds shareholders to leave the decision to the board of directors, under Delaware law.

The debate over whether it is most effective for corporations to include exclusive forum provisions in their operating documents, as opposed to introducing them in material contracts, favors placement in the bylaws, because bylaws can be amended.¹⁰⁰ While there were vastly more corporations including the provisions in material contracts as opposed to their governing documents, Vice Chancellor Laster found in *In re Revlon, Inc. Shareholders Litigation* that corporations can adopt an intra-forum selection bylaw in their charter provisions, prior to the decision to go public, without prior shareholder action.¹⁰¹ The theory was that the charters would be amended prior to the decision to go public, which would provide large-scale notice of the bylaws. A motivation behind the proposal may be that a primary reason for corporations to have bylaws is so that courts will not have to “divine [an] appropriate forum” for their disputes to be heard.¹⁰² Leaving the bylaws more flexible, or on a hierarchy scheme to appease certain shareholders or defendants, takes away a corporation’s rights and creates an incentive to have a facially invalid exclusive forum provisions that do not deter shareholders from

⁹⁶ *Id.* at 233.

⁹⁷ *Id.*

⁹⁸ *Id.* (quoting *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 953 (Del. Ch. 2012)).

⁹⁹ *Boilermakers*, 73 A.3d 934, at 957.

¹⁰⁰ Grundfest & Miller, *supra* note 6, at 338.

¹⁰¹ *Id.* at 339.

¹⁰² *City of Providence*, 99 A.3d at 238.

going outside the Delaware courts. Further, the proposal to place the provision in the bylaws, like in *Revlon*, provides shareholders notice through the operating documents to which they assent upon joining the corporation. This notion is further affirmed in the belief that, ‘if boards of directors 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 . . . for intra-entity disputes.’¹⁰³ Courts, even outside of Delaware, have upheld such provisions.¹⁰⁴ Since *Revlon*, 195 Delaware corporations have included a forum selection clause in their governing documents.¹⁰⁵ Further, sixty-eight publicly traded entities adopted forum selection clauses including thirty-eight charter provisions, twenty-three bylaw amendments, and seven LLC or LLP agreements.¹⁰⁶

V. THE BEST SOLUTION FOR THE DELAWARE COURT OF CHANCERY AND DELAWARE CORPORATIONS

It has been suggested that “[e]liminating multi-forum litigation would deprive incorporation states of “an important pressure-relief valve for avoiding such situations.”¹⁰⁷ But this cannot be the case as multi-forum litigation has wasted public money, corporate and court resources, and confused the state of the law. Eliminating multi-forum litigation would revive the stability of corporate litigation as the courts traditionally intended.

This note contends, first, exclusive forum provisions are the most effective way to prevent the tangled mess of multi-forum litigation, and second, the state of incorporation as the exclusive forum for a corporation, “makes the most sense,” especially in Delaware.¹⁰⁸ Delaware corporations as well as the Delaware Court of Chancery recommend Delaware as the chosen exclusive forum because of the Court of Chancery’s expertise in

¹⁰³ Winship, *supra* note 7, at 502.

¹⁰⁴ Grundfest & Miller, *supra* note 6, at 341.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 342.

¹⁰⁷ Myers, *supra* note 9, at 537.

¹⁰⁸ *Id.*; See also Strine, Jr., Hammermesh, & Jennejohn, *supra* note 4, at 3 (“[G]iving the courts of the state of incorporation more authority will help them ensure that corporate representative litigation better serves the interests of stockholders. There is strong evidence of excess agency costs in the results of corporate representative litigation. Unless a consistent incentive system can be implemented that encourages representative litigation that benefits stockholders . . . litigation may on balance hurt investors more than it protects them.”).

corporate law. Finally, I argue that placing exclusive forum provisions inside governing documents makes the provision most effective.¹⁰⁹

Exclusive forum provisions in bylaws help Delaware corporations address the phenomenon of plaintiffs attorneys filing lawsuits arising out of same facts in multiple jurisdictions.¹¹⁰ In *Revlon*, bylaws were held presumptively valid, as affirmed under section 109(b) of Delaware's General Corporation Law: "the bylaws direct how the corporations, their boards, and their stockholders may take certain actions"¹¹¹ Exclusive forum provision bylaws do not tell stockholders whether they may sue or which remedies they may seek, instead they simply indicate which forum is most appropriate for claims against the corporation. Furthermore, Delaware courts have held that these provisions in bylaws are valid and subject to situational challenges, as mentioned above, in cases of duress or unfairness to the shareholders.¹¹²

Further, other proposals, like those suggested in *Boilermakers*, have included ideas such as a "one forum motion," where judges would make the ultimate decisions.¹¹³ However, placing these provisions in bylaws would eliminate the extra work and time courts need to deliberate and communicate between one another in various forums. Finally, including the provisions in the bylaws may be the most effective approach because it would place all parties on notice well in advance of any breach of fiduciary duty.¹¹⁴

In *Boilermakers*, then-Chancellor Strine said that the most "obviously reasonable forum [was] the state of incorporation, Delaware—so that internal affairs cases will be decided in the courts whose Supreme Court has the authoritative final say as to what the governing law means."¹¹⁵ Certain legal scholars have advocated that the best approach would be to allow claims involving corporate internal affairs to be raised only in the state of incorporation. If the company is incorporated in Delaware the litigation would be filed and resolved in the Delaware Court of Chancery, a court known for its experience in handling such matters.¹¹⁶

¹⁰⁹ Grundfest & Miller, *supra* note 6, at 350.

¹¹⁰ Claudia H. Allen, *Bylaws Mandating Arbitration of Stockholder Disputes?*, 39 DEL. J. CORP. L. 751, 756 (2015).

¹¹¹ *Id.* at 761.

¹¹² *Pyott v. L.A. Mun. Police Emps. Ret. Sys.*, 74 A.3d 612, 614 (2013).

¹¹³ *See Boilermakers Local 154 Ret. Fund. v. Chevron Corp. (Boilermakers)*, 73 A.3d 934 (2013); Micheletti & Parker, *supra* note 3, at 14-20.

¹¹⁴ Grundfest & Miller, *supra* note 6, at 343.

¹¹⁵ *Boilermakers*, 73 A.3d at 953.

¹¹⁶ Lebovitch & Van Kwawegen, *supra* note 83, at 507 (discussing that where directors impede shareholders' right to sue for director misconduct, "courts should apply a similarly stringent test" as that applied when stockholders are prevented from selling shares).

Delaware corporations would be wise to make the state of incorporation their exclusive forum because Delaware courts resolve complex corporate claims efficiently, with expertise, and have a “well-developed body of state corporate law.”¹¹⁷

While agreeing strongly with the proposed ends, this comment proposes the means of achieving this end is through encouraging corporations to name the state of their incorporation as their exclusive forum in their bylaws. How else will a corporation or court enforce this rule without placing an exclusive forum provision into its bylaws, where the shareholders will undoubtedly receive notice?

What is needed is a tool that provides “a single, predictable, authoritative answer.”¹¹⁸ One means of achieving this is for Delaware courts to incentivize corporations to include a provision identifying the state of incorporation as the exclusive forum in which they can be sued. Stockholders must be able to file credible claims of board misconduct and so effectively deter misconduct of directors.¹¹⁹ One means can be derived from the problem defendants and shareholders faced that pushed them out of the jurisdiction in the first place. Delaware courts are known to award strict attorney fees and rulings for cases of intra-relational matters.¹²⁰ Delaware courts could increase fee awards for board settlements in an effort to compete with the courts outside its jurisdiction.¹²¹ Another incentive may be to award higher fees (more than traditionally available) to shareholders who bring more meritorious claims, to deter first-to-file harms.

Addressing potential shareholder opposition to these suggestions, and the state of incorporation as the exclusive forum, the United States Supreme Court found in *Atlantic Marine Construction Co.*, that forum selection clauses should have the controlling weight in decisions to transfer cases absent “extraordinary circumstances unrelated to convenience of parties.”¹²² Second, there is no easy way to prevent the issue of multi-forum litigation outside of encouraging litigation within the state of incorporation.¹²³ To this end, Delaware courts have repeatedly upheld charters with bylaws including exclusive forum provisions, where

¹¹⁷ Borowski, *supra* note 93, at 156.

¹¹⁸ Strine, Jr., Hammermesh, & Jennejohn, *supra* note 4, at 3.

¹¹⁹ Lebovitch & Van Kwawegen, *supra* note 83, at 528.

¹²⁰ Micheletti & Parker, *supra* note 3, at 39-40.

¹²¹ *Id.*

¹²² *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. Tex.*, 571 U.S. 49, 62 (2013); *see also* Winship, *supra* note 7, at 499.

¹²³ Micheletti & Parker, *supra* note 3, at 35.

that provision requires stockholder approval.¹²⁴ Further, shareholder litigation pushes managers to act in the best interest of the corporation as a whole, and litigating in Delaware, as a Delaware corporation, is usually in the best interest of the corporation.¹²⁵

Moreover, shareholders would have already consented to the charter that included these terms when they became a shareholder. It has also been asserted that “other states courts applying Delaware law is ‘like taking Gallatorie’s secret recipes and giving them to a Jack-in-the-Box short-order cook.’”¹²⁶ The need for exclusive forum provisions are seen in the trend of Delaware’s corporate litigation: of 119 merger transactions involving Delaware corporations fifty were litigated in multiple jurisdictions.¹²⁷ Additionally, Delaware’s position as the exclusive forum has declined drastically.¹²⁸ An exclusive forum will designate a decision maker for this complicated problem, leaving it in the hands of the shareholders as courts have expressly desired.¹²⁹ Exclusive forum provisions in Delaware allow for uniform decisions and good public policy, “deciding novel questions of Delaware corporate law uniformly and authoritatively.”¹³⁰

Having the state of incorporation be the exclusive forum would prevent issues like those presented in *Galaviz*, where California misapplied Delaware law. Delaware courts’ expertise would provide uniformity. Moreover, shareholders should not be so quick to oppose these provisions in bylaws, because maintaining the litigation within the state of incorporation’s court could ultimately safeguard shareholders’ claims. Exclusive forum provisions could prevent plaintiffs’ attorneys from losing sight of the shareholders’ best interests in the race to get the higher-fee award or more favorable judgment. When jurisdictions offer increased fee awards to attract attorneys, lawyers search for the forum offering the highest fee awards and often lose sight of their clients’ claims.¹³¹

¹²⁴ *Id.*

¹²⁵ *Winship*, *supra* note 7, at 493.

¹²⁶ McClendon, *supra* note 1, at 2069 (quoting Ted Mirvis, *Anywhere But Chancery: Ted Mirvis Sounds an Alarm and Suggests Some Solution*, 7 M&A J. 17, 17 (2007)).

¹²⁷ *Id.* at 2071.

¹²⁸ *Id.* at 2072.

¹²⁹ *Winship*, *supra* note 7, at 517.

¹³⁰ *City of Providence v. First Citizens Bancshares, Inc.*, 99 A.3d 229, 238 (Del. Ch. 2014).

¹³¹ Borowski, *supra* note 93, at 152 (quoting Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325, 341 (2013)).

Furthermore, the Delaware Court of Chancery reiterated that, “[i]t is not in the interest of diversified investors to . . . have litigation in three different places [Where] there is a choice between two forums, the forum whose law is at stake ought to go forth.”¹³² Although this note acknowledges that it is within the board of directors’ right to choose an exclusive forum, and that under Delaware law a non-Delaware forum is permissive, I would argue that it is most reasonable for companies to limit the exclusivity provision to the state of incorporation.¹³³

Exclusive forum provisions would be most beneficial placed in the governing documents of a corporation. This would ensure that shareholders have advance notice that an exclusive forum has been named, which would help a board avoid issues like “director nominations and other matters being proposed from the floor of a stockholders’ meeting.”¹³⁴ Further, the Delaware Court of Chancery has found that bylaws most effectively provide notice to shareholders, and will make them aware of possible changes to come: “where a corporation’s bylaws put all on notice that the bylaws may be amended at any time, no vested rights can arise that would contractually prohibit an amendment.”¹³⁵ If a stockholder does believe the directors have been unfair in their adoption of an exclusive forum provision they can amend or challenge it in the governing documents.¹³⁶ Because bylaws placed in governing documents put shareholders on notice in advance of any breaches, this should eliminate any ambiguity in future disputes as to whether the provision was implemented and whether implementation constitutes a breach of fiduciary duty.

VI. CONCLUSION

This article proposes that the best solution for the Delaware Court of Chancery, and Delaware corporations, is to leave the choice of forum to the corporations themselves and, in doing so, the shareholders who assented to the contract by buying stock in the corporation.¹³⁷ Furthermore this article argues that placing such provisions in corporate bylaws produces a plethora of benefits for Delaware courts and corporations and provides corporations the right to decide their exclusive forum. This

¹³² Micheletti & Parker, *supra* note 3, at 30 (citing Transcript of Hearing on Motion to Expedite at 16–17, *In re* RAE Sys., Inc. S’holders Litig., C.A. No. 5848-VCS (Del. Ch. Nov. 10, 2010) (unreported)).

¹³³ *Id.* at 30–31.

¹³⁴ Allen, *supra* note 110, at 761.

¹³⁵ *Id.* at 762, (quoting *Kidsco Inc. v. Dinsmore*, 674 A.2d 483, 492 (Del. Ch. 1995)).

¹³⁶ *Id.*

¹³⁷ *Id.* at 761–62.

article proposes that creating and adopting an exclusive forum provision into a corporation's bylaws is the most effective solution to combat multi-forum litigation, and further, that the state of incorporation would be the best forum choice. Additionally, incentivizing corporations to choose Delaware as their exclusive forum may be the best means-to-an-end, on the part of the Delaware courts. Exclusive forum provisions can reduce litigation costs, encourage efficient contracting and "enhance functional specialization in the judiciary."¹³⁸ Lastly, exclusive forum provisions would be most effective when included in a corporation's governing documents.

¹³⁸ Grundfest & Miller, *supra* note 6, at 335.