INSIDE: Nevada vs. Delaware ◆ Q&A with Vice Chancellor Glasscock ◆ Book Review: *What's the Matter with Delaware?*

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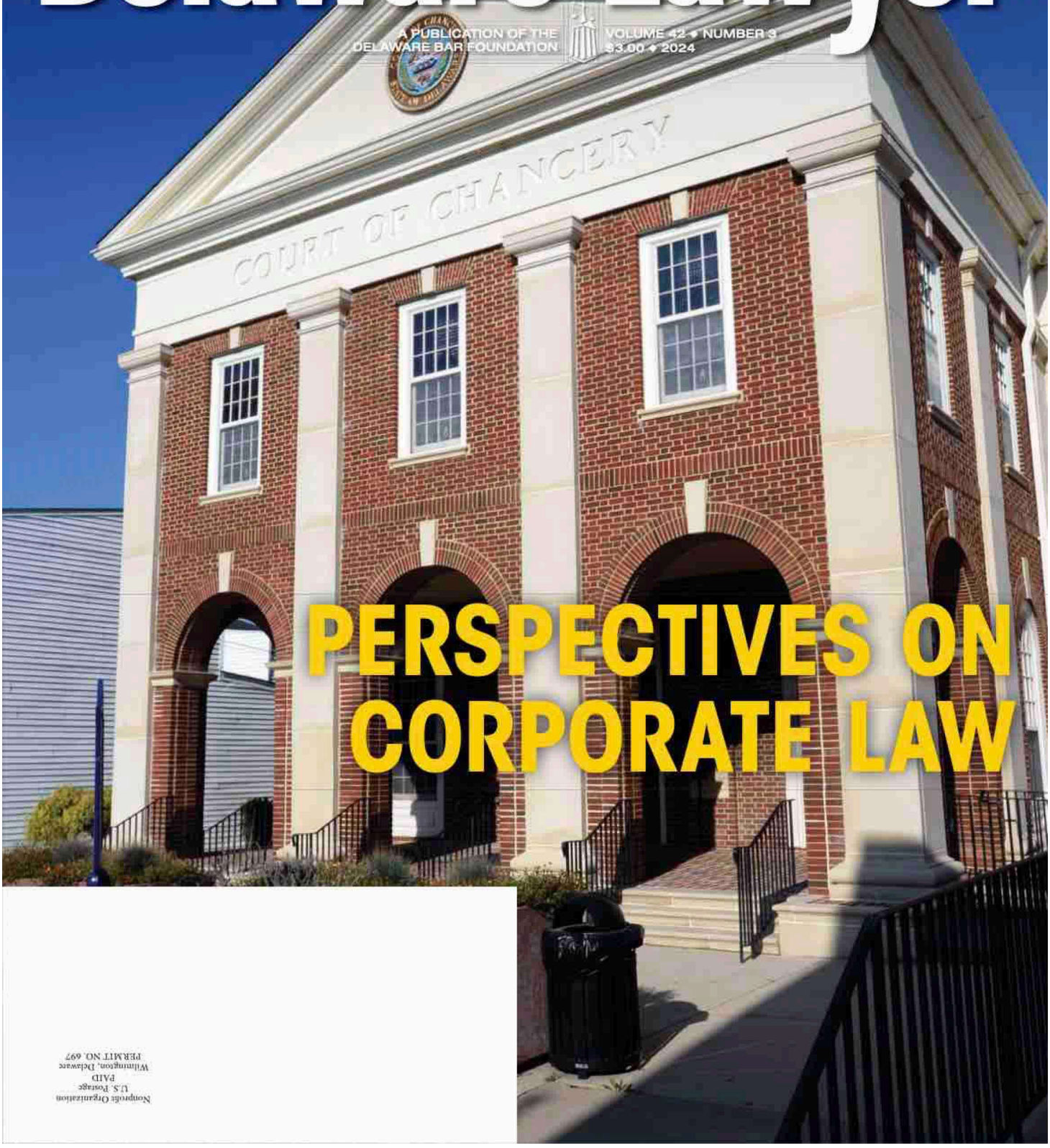

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Ryan Lindsay

It seems particularly fitting that this latest issue of *Delaware Lawyer* follows directly after the prior issue on "The Delaware Way."

First and foremost, it is fitting because this issue includes a pre-retirement interview with Vice Chancellor Sam Glasscock III, who serves as a perfect example of the Delaware Way. As readers may already know, Vice Chancellor Glasscock is retiring in January 2025. The hallmarks of the Delaware Way — courtesy, civility, collegiality, professionalism — are the same attributes that have characterized Vice Chancellor Glasscock's judicial career and longstanding service to the State of Delaware.

The Delaware Way not only makes Delaware a jurisdiction that lawyers want to live and work in, but also impacts how law is practiced in Delaware and, by extension, how substantive law, including corporate law, is developed. As Vice Chancellor Glasscock explains, this process is really about developing a system of law that appropriately balances relevant interests, that meets reasonable expectations of the various parties involved, and that thereby returns value in the corporate marketplace. The process is continual and incremental, and frequently sparks debates on issues concerning Delaware's role and the body of corporate law for which is it well known throughout the world. In this magazine edition focusing on corporate law, we highlight some of these issues.

In our first article, Professor Michal Barzuza of the University of Virginia School of Law discusses key differences between the substantive corporate law of Nevada and Delaware. Professor Barzuza highlights her conclusion that Nevada corporate law was primarily crafted and has been actively marketed as a deliberate contrast to Delaware, specifically as being more favorable to corporate fiduciaries. These issues have been pushed to the forefront of corporate law debates due to recent decisions by a handful of Delaware corporations to reincorporate in Nevada. Lawsuits brought by stockholders to challenge these decisions have caused the Delaware courts to have to consider if such a decision by corporate fiduciaries is one to which "entire fairness" applies.

As previewed above, our second article is an interview with Vice Chancellor Glasscock. In addition to touching on the debates and recurring issues relating to Delaware's role and place in the corporate marketplace, Vice Chancellor Glasscock also shares his lessons and observations from more than 25 years of judicial service on the Court of Chancery, as well as the trajectory of his own life and legal career. With his characteristic blend of humor and humility, Vice Chancellor Glasscock touches on everything from his almost-career path at a chicken plant and his current favorite reads to what he is most looking forward to in retirement and what he hopes his judicial legacy will be.

In our third article, Delaware practitioner Ben Lucy addresses the shortcomings of at least one recent "drive-through" criticism of Delaware, which came in the form of Hal Weitzman's 2022 book, *What's the Matter with Delaware.* Lucy notes how such critics tend to fixate on Delaware's preeminent role in corporate law and — in an oversimplified way — attempt to explain how Delaware favors corporate interests, particularly those of corporate management, over others. With respect to corporate law, this outside perspective frequently ignores important nuance and the rich, ongoing debate about corporate law in favor of a facile argument that Delaware is primarily driven by the desire to protect its status as the favored corporate jurisdiction.

Running through all of these articles is the common theme of asking what Delaware does (or does not do) that differentiates it from the other jurisdictions that corporations could decide to call their legal home. Delaware's favored status in the corporate marketplace, and challenges from other jurisdictions to that preeminence, is an evergreen issue. Supporters of Delaware's primacy may take comfort in Vice Chancellor Glasscock's conclusion on the current iteration of this debate: Delaware is not in trouble. But he wisely notes that Delaware's advantage is due to its longstanding commitment to finding the right balance between corporate fiduciaries and the stockholders they serve. That is a task to which prior generations of Delaware lawyers have dedicated their time, talent and legal careers, and it remains the ongoing task for those of us privileged to practice corporate law in this state.

Ryan Lindsay

Delaware Lawyer

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JASON MINTO

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The Delaware Bar Foundation serves to identify, fund and promote programs that improve the administration of justice in Delaware, enhance public respect for the law and foster knowledge of citizenship rights and responsibilities. In addition to administering IOLTA for the Supreme Court, a program that has provided over $38 million to fund legal services for low-income citizens, the Foundation also supported various programs including new collaborations and partnerships this year:

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- Supporting a program to educate teens and foster positive interactions with law enforcement
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- Publishing & providing *Delaware Lawyer* magazine free to members of the Delaware bar

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Michal Barzuza is a Professor of Law at the University of Virginia School of Law and the Director of the John W. Glynn Jr. Law and Business Program. Her scholarship studies the optimal balance between regulation and laissez-faire in corporate law, focusing on issues such as the effects of interstate competition on the shape of corporate law, firm heterogeneity and the choice of corporate governance terms, cross-listing, boardroom dynamics, outside directors and the general counsel, and firms with controlling shareholders. Her research analyzing Nevada's attempt to compete with Delaware over incorporations by offering lax law was selected as one of the top 10 papers in corporate and securities law for 2012 in a national survey of corporate law professors and was reprinted in the *Corporate Practice Commentator*.

The Honorable Sam Glasscock III was appointed as Vice Chancellor in 2011 after having served as Master in Chancery from 1999 to 2011. He was born in Erie, PA and spent most of his youth in Lewes, DE. He received a B.A. in History from the University of Delaware in 1979, a J.D. from Duke University in 1983 and a master's degree in Marine Policy from the University of Delaware in 1989. Before coming to the Court of Chancery, he worked as a judicial clerk, as an associate at Prickett, Jones, Elliott, Kristol & Schnee in the litigation section, as a Superior Court special discovery master and as a Deputy Attorney General in the Appeals Unit of the Department of Justice.

Ryan Lindsay is counsel at Chipman Brown Cicero & Cole, LLP. He focuses his practice on corporate and complex commercial litigation in Delaware's state and federal courts, including the Delaware Court of Chancery and the Delaware Supreme Court. His experience includes representing corporations, alternative entities and their directors, officers and advisers in merger and acquisition-related litigation, derivative suits, corporate statutory proceedings, federal securities litigation and other stockholder disputes. His practice also involves advising corporations and their boards of directors on corporate governance matters involving the Delaware General Corporation Law, the fiduciary obligations of directors and officers, and other corporate law issues.

Ben Lucy is an associate with Abrams & Bayliss LLP, where he practices corporate and commercial litigation. He holds J.D. and M.B.A. degrees from the University of Virginia. After clerking on the Delaware Court of Chancery from 2020-2022, Lucy worked in the Washington, D.C. office of a global law firm, where the excellence of the Delaware counsel quickly enticed him back to the First State.

FEATURE

Michal Barzuza

Nevada vs. Delaware

Key Differences in Corporate Law

Nevada has emerged as a noticeable alternative state for incorporation in recent years, drawing increased attention from the business community and legal experts. Despite this growing interest, much of the current discussion around Nevada's corporate law remains uncertain. Questions persist regarding the extent and the specific ways Nevada's corporate law diverges from Delaware's.

These differences have come to the forefront in a high-profile interlocutory appeal before the Delaware Supreme Court involving Tripadvisor's attempt to reincorporate in Nevada. Delaware Chancery Court, in *Palkon v. Maffei*, determined that the plaintiff's alleged facts were sufficient to establish that a reincorporation to Nevada was a self-dealing transaction. Nevada's Secretary of State, Francisco V. Aguilar, submitted an *amicus* arguing that the differences between Nevada and Delaware law are not material and reflect different policy choices.[1]

In this article, I describe the differences between Nevada and Delaware corporate law as I view them after researching Nevada law for over a decade.[2]

JASON MINTO

To summarize my main findings. First, Nevada's corporate law was shaped by a dominant guiding principle: offering stronger liability protections to attract incorporations from Delaware. That is, rather than aiming at a particular balance of protections and accountability, Nevada law was shaped by what Delaware doesn't provide. Accordingly, Nevada seized each of Delaware's judicial scrutiny standards as an opportunity to differentiate.

Where Delaware imposes rigorous accountability, the Nevada legislature has entered to provide more protection from liability. As a result, the differences between the states' laws cover all the areas in which Delaware applies judicial scrutiny — self-dealing, board oversight and takeovers. Second, Nevada law deprives shareholders of a right provided to them in all states — inspection of books and records. Third, Nevada replaced Delaware *Unocal* and *Revlon* duties with the business judgment rule. Fourth, Nevada has marketed itself as a lax corporate law regime.

Directors' and Officers' Exculpation in Nevada

Delaware enacted its exculpation statute, Section 102(b)(7), in response to the *Smith v. Van Gorkom* decision. This statute permits exculpation from liability for breaches of the duty of care but expressly bars exculpation for violations of the duty of loyalty and duty of good faith.

In contrast, Nevada's exculpation statute, N.R.S. 78.138(7), introduced in 1987, was explicitly designed to be broader than Delaware's. Nevada's statute allows for exculpation from liability for breaches of both the duty of loyalty and duty of good faith, so long as the actions do not amount to *intentional misconduct, fraud or a knowing violation of law*. Legislative records indicate that these broad protections were meant to make Nevada more appealing to corporations. For example, bill sponsors argued:

"[the proposed bill] *broadens the immunity of directors to include the 'breach of duty of loyalty to the corporation or its shareholders, … this matter is …essential for the State of Nevada if it continues to be a leading state for incorporation.'*"[3]

Further reinforcing this approach, Nevada made its exculpation statute mandatory in 2001 and the default for all corporations in 2003. Unlike Delaware and other states that require shareholder approval, thus, Nevada's exculpation applies automatically, reflecting the state's emphasis on appealing to corporate management.

The 2001 amendment was presented as leverage to facilitate another amendment — one that increased Nevada's incorporation tax fees. Bill promoters emphasized that these legal protections would serve as a *quid pro quo* to attract incorporations despite the increased tax rates. The Assembly committee had a letter from S. Craig Tompkins, a director of a number of public companies, stating his belief that the amendment "would increase the attractiveness of Nevada as a state of incorporation for major public companies" and would "mitigate the negative impact of increasing the fees assessed against companies choosing to incorporate in Nevada."[4] Senator Mark A. James noted that "[d]irectors are the ones who decide where to incorporate" and argued that allowing exculpation for directors and officers in the charter, even without a shareholder vote, "will be a major incentive."[5] Attorney Michael J. Bonner emphasized that Nevada must offer more favorable conditions than Delaware due to Delaware's longstanding corporate law framework and judicial expertise.

N.R.S. 78.138(7) Exculpates from Violations of Duty of Loyalty and Good Faith

In Nevada, thus, liability is limited to *intentional misconduct, fraud or knowing violation of the law*. How narrow is this basis for liability?

In his *amicus* to the Delaware Supreme Court, the Secretary of State of Nevada opined that Nevada's exculpation statute does not exculpate most of the breaches of duty of loyalty, including self-dealing transactions. Others have argued that the statute does not exculpate bad faith acts.

Yet, Nevada courts have determined otherwise. In a line of decisions, Nevada courts decided that by adopting 78.138(7), the Nevada legislature rejected the "entire fairness" standard that applies to self-dealing transactions in Delaware.[6] For example, in *McFarland v. Long*, the CEO and the CFO of Payment Data Systems were given latitude by the only independent director, who

relinquished his duties, to set their compensation.[7] Each wrote his compensation contract for himself. Nevada District Court decided that 78.138(7) governs these compensation contracts.

Second, the plaintiff alleged with particularized facts that Kirby, the independent director, and the only compensation committee member, "utterly relinquished his duties." In Delaware, that would be, by definition, a breach of duty of good faith. Yet, the McFarland court decided these facts were insufficient to claim "intentional misconduct" since they do not demonstrate *knowledge of wrongfulness.*[8] It didn't matter that Kirby told the executives they could set their compensation or that Kirby received a large stock award. Showing knowledge of wrongfulness, however, is rarely a viable option due to the pre-discovery stage of demand futility. It is close to a non-existent option in Nevada for another reason — Nevada harshly restricts shareholder inspection rights.

No Shareholder Inspection Rights for Public Companies in Nevada

Nevada law distinguishes itself by restricting shareholder rights to inspect corporate records. In corporate law disputes, shareholders initiating derivative lawsuits must typically provide specific, detailed facts at the motion-to-dismiss stage to demonstrate demand futility. Since many lawsuits are dismissed before reaching discovery, Delaware and other states permit shareholders limited access to certain books and records. This access may include board minutes and, in some instances, emails and electronic messages.

Unlike Delaware and most other states, NRS 78.257(7) does not grant shareholders of publicly traded firms the right to inspect corporate records. This restriction, combined with Nevada's high burden of proof — requiring plaintiffs in derivative suits to allege particularized facts that amount to intentional misconduct, fraud or a knowing violation of the law — creates a formidable barrier for shareholders seeking accountability.

Consequently, derivative lawsuits in Nevada typically succeed only under unusual circumstances, such as when internal conflicts expose a board's knowledge of issues and failure to act. For instance, in the *Wynn Resorts* case, an internal dispute revealed that board members were aware of misconduct allegations and their duty to report them. Without this internal conflict, shareholders would likely have been unable to advance their claims.

Absence of Intermediate Standards for Defensive Tactics

Nevada also diverges from Delaware in how it treats defensive tactics by corporate management. Whereas Delaware employs intermediate standards, such as *Unocal* and *Revlon,* to assess management's actions in takeover situations, Nevada applies the Business Judgment Rule (BJR). Nevada's legislature explicitly rejected intermediate standards in 1999, promulgating that directors would not face heightened duties in takeover scenarios unless their actions restricted stockholders' voting rights. In 2017, Nevada further amended its takeover laws to clarify that Delaware case law and its doctrines imposing enhanced duties on management should not be applied by Nevada courts.

Marketing Nevada

For decades, Nevada has actively marketed itself to corporations as a provider of lax corporate law. This competitive positioning is prominently featured on the Nevada Secretary of State's website, highlighting incentives under the heading "Why Nevada?" Among the advantages listed are:[9]

- "Director Immunity from Lawsuits"
- "Stronger Personal Liability Protection for Officers and Directors: Directors and officers in Nevada corporations are generally not held personally liable for damages to the corporation, shareholders, or creditors unless their conduct involves 'intentional misconduct, fraud, or a knowing violation of the law.'"
- "More Flexibility for Directors' Decisions (Including Takeovers): Nevada law grants directors the benefit of the BJR for actions taken in response to control changes, provided these actions do not disenfranchise stockholders."

These descriptions, summarized on the Secretary of State's website since 2012, provide an accurate picture of Nevada's positioning. Since then, Nevada has only reinforced its differentiation from Delaware, notably by codifying the internal affairs doctrine to secure its competitive stance further.

An Outlier Among States

Nevada's corporate law represents a unique approach. It is important to note that most other states follow Delaware's lead, with some variations in specific provisions. For example, Texas's exculpation statute is similar to Delaware's. Delaware's balance between accountability and protection has set the standard for corporate governance, with other states adopting similar frameworks. Indeed, no other state has positioned itself as a producer of lax law.

Thus, reincorporation to Nevada is not like reincorporation to any other state. For all other states, the legal differences are insufficient to treat reincorporation as a self-dealing transaction. Nevada law is an outlier.

Different Approaches?

Some argue that Nevada represents a distinct policy approach compared to Delaware. However, Nevada's corporate law was primarily crafted not from a vision of balancing costs and benefits but rather as a deliberate contrast to Delaware's, seizing each of Delaware's

judicial scrutiny standards as an opportunity to differentiate. Where Delaware imposes rigorous accountability, Nevada law was entered to provide more protection from liability.

Thus, Nevada did not create an independent balance; rather, it designed its corporate law to offer protections where Delaware applies scrutiny. In critical areas like self-dealing, takeover defenses and board oversight — where Delaware enforces heightened scrutiny through doctrines such as entire fairness, intermediate standards (*Unocal* and *Revlon*) and the concept of conscious disregard — Nevada imposes a lower threshold, if it applies scrutiny at all.

Moreover, Nevada's approach includes extensively codifying corporate law, minimizing the role of fiduciary duties, and reducing opportunities for judicial interpretation. This strategy is also rooted in competitive considerations. Delaware's specialized judiciary, which has a significant advantage in interpreting nuanced corporate cases, is difficult to replicate. Nevada instead relies on codification, reducing the reliance on judicial oversight and reinforcing its identity as a lower-scrutiny jurisdiction. ◆

NOTES

1. *See* Brief of the State of Nevada, *ex rel.* Francisco V. Aguilar, Secretary of State of Nevada, in his Official Capacity, as *Amicus Curiae*, Supporting Appellant and Reversal *Maffei v. Palkon*, C.A. NO. 125, 2024.
2. *See* Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability Free Jurisdiction*, 98 VA. L. REV. 935 (2012); Michal Barzuza & David C. Smith, *What Happens in Nevada? Self-Selecting into Lax Law*, 27 REV. FIN. STUD. 3593 (2014); Michal Barzuza, *Nevada v. Delaware: The New Market for Corporate Law* (2024).
3. *Hearing on S.B. 46 Before the S. Comm. on Judiciary*, 1987 LEG., 64TH SESS. (Nev. 1987).
4. Letter from S. Craig Tompkins, a director of a number of public companies, in support of S.B. 577, *Hearing on S.B. 577 Before A. Comm. on Judiciary*, 2001 LEG., 71TH SESS. (Nev. 2001) (Exhibit J).
5. *Hearing on S.B. 577 Before the A. Comm. on Judiciary*, 2001 LEG., 71TH SESS. (Nev. 2001).
6. *See e.g., Guzman v. Johnson*, 137 Nev. 126, 483 P.3d 531 (2021) (deciding that NRS 78.138(7) precludes the inherent fairness standard); *McFarland v. Long*, No. 216CV00930RFBPAL, 2017 WL 4582268 (D. NEV. OCT. 7, 2017); *Jacobi v. Ergen*, No. 212CV02075JADGWF, 2016 WL 1089232, at *7 (D. Nev. Mar. 17, 2016) ("*Ezcorp* would not change the outcome of this case because it is nonbinding and applies Delaware's entire-fairness standard, a standard that has not been adopted by the Nevada Supreme Court").
7. *McFarland v. Long*, No. 216CV00930RFBPAL, 2017 WL 4582268 (D. NEV. OCT. 7, 2017).
8. See also *Chur v. Eighth Judicial Dist. Court*, 458 P.3D 336, 342 (Nev. 2020).
9. *See Why Nevada? Legal Advantages: A Comparison with Delaware and California*, Lionel Sawyer & Collins and Parsons Behle & Latimer Law Firms (August 15, 2012). https://www.nvsilverflume.gov/documents/CorporateLawComparison.pdf

Ryan Lindsay with Vice Chancellor Sam Glasscock III

GARY EMEIGH

A Presumption of Candor

Q&A with Vice Chancellor Sam Glasscock III

Q: Thinking back to before your distinguished legal and judicial career, you graduated from the University of Delaware before deciding to attend Duke University School of Law. What led to your decision to attend law school?

Inertia. I was a history major and had been offered a stipend to get a master's degree in history. I was on the UD campus in the summer of 1979 and decided that was not where I wanted to be, and I decided to give up my spot in the program. After that, I ended up working at Prickett Jones as a legal assistant doing mostly civil-suit investigative work. That was fun! I decided to take the LSAT. I was the first lawyer in my family. But I cannot honestly say that I had some burning desire to be a lawyer.

Q: What was your first job out of law school and what are some other legal positions you had before joining the Court of Chancery?

My first job was back at Prickett Jones doing insurance defense. I loved the people there, but did not much enjoy the work, and decided to leave law. I actually have a certificate of retirement from the Delaware Supreme Court — retirement class of '85 — that came with a letter thanking me for my service to the Delaware Bar (all of a couple of years at that point). I spent time traveling the country and worked as a bartender at Kelly's Logan House. But then, I met the woman who would become my wife, and we got married and started a family and I realized I had to do something else. I was about to start at a chicken plant boxing chicken carcasses. The Friday night before the Monday that I was going to start at the chicken plant, my old history professor and mentor invited me to a dinner with Bill Chandler. By the end of that dinner, I became Bill Chandler's law clerk on the Superior Court and forewent the boxing job. I like to think I'd be a shift supervisor at the chicken plant by now, though.

Q: Thinking back to those first few years of your legal practice, do you have advice you would give to young Delaware lawyers about the beginnings of their own careers?

I do. First, my advice for them is do not think that you know what your career will hold, because you do not. So, stay open to opportunities and experiences. You cannot predict where those may lead and where you will end up.

My second piece of advice, which I think you would get from any judge, is that you start off in the courtroom with a presumption of candor and truthfulness. Do not lose that. It is the most valuable thing you have as a lawyer.

Q: You first joined the Court of Chancery in 1999 as what was then called a Master in Chancery, now known as Magistrates in Chancery. Why did you decide to join the Court of Chancery?

So, as I said, I clerked for Bill Chandler on the Superior Court and then in Chancery. After that, the Chancellor was kind enough to appoint me as a special discovery master on some cases during that time. I loved that quasi-judicial work. At that time, there was only one Master in Chancery and Richard Kiger was stepping down. Bill Chandler offered me the job and I was thrilled. My office was the old, long-vacant Chancery chambers in the Sussex County courthouse — it was a neat old space but everything was covered in dust. I pulled an *Atlantic Reporter* off the shelf once and moths literally flew out.

Q: You served in that position for 12 years. What was that experience like and how do you think it differs, if at all, from the current experience of the Magistrates in Chancery?

Well, first of all, the Magistrates in Chancery today are much smarter than the Master in Chancery was back in 1999. They have a much more complex docket. Of course they are still doing the traditional equity work like guardianships, trusts and estates, easements, but they also have more corporate work than before. I really enjoyed the traditional equity docket and those types of cases during my time as a Master in Chancery. It was a great gig.

Q: What was your experience like once you became a Vice Chancellor in 2011? What types of cases made up the bulk of the Court's docket at that time?

At that time, the Court was still doing mostly traditional equity corporate law cases. The LLC boom was just starting to accelerate. The docket when I first started was still mostly made up of common-law fiduciary corporate cases. So, it was not a big stretch for me to go from a traditional equity docket as a Master in Chancery to an equity docket in the corporate arena. I had come from that background. And with the common-law fiduciary duty cases, the law itself is simple. It is the facts that are the challenge and how they comport with fiduciary duties.

Q: Over your approximately 13 years as a Vice Chancellor, what are the biggest changes you have noticed in terms of the Court's docket and case load?

It is a much more contract-heavy docket now. And those cases tend to go to trial more so than the fiduciary cases. As you know, in the fiduciary duty cases, the standard of review is so important that once the parties know whether entire fairness applies, it is not atypical for a settlement to occur. That is a rational decision by the parties.

For the contract-based cases, if there is some contractual ambiguity that the Court needs to address and it cannot be decided as a matter of the law, then those cases go to trial much more frequently. So, we have more trial work. We are also seeing many more earnout cases, and those also tend to go to trial.

Another big difference is that Chancellor Bouchard did away with the disclosure-only settlement cases with the *Trulia* decision. That decision completely changed the routine practice of bringing those cases.

Q: Throughout your time as a Vice Chancellor, you have obviously presided over many, many cases and written countless judicial opinions, orders and rulings. Thinking back over your body of judicial work, what are some of the most noteworthy changes in substantive Delaware law that you think have occurred during that time period?

GARY EMEIGH

Vice Chancellor Glasscock in his Sussex County courtroom with law clerks Amanda Di and Clare DaBaldo.

As I said, *Trulia* was really big. And *Trulia* was an anomalous thing. Generally, the common law develops incrementally. That's what you want for common-law decision making. There is a body of existing case law and the judge visits that body of common law in deciding the case before him or her. So, change is incremental. *Trulia* was an abrupt departure, but I think what made that appropriate in that instance was that the Court was setting a market for these cases. After every large deal, these fiduciary actions were filed almost as a matter of routine. If there were no facts to support a lucrative litigation opportunity for the plaintiff's counsel, then the parties would seek a disclosure-only settlement. It was a bad system, not because the participants were bad, but because the incentives were bad. So the Court said, we are not doing these anymore.

The other big change, again, is that generally the focus of many of the Court's decisions involves contract law now. And specifically, to what extent to allow self-ordering and whether that self-ordering is prohibited by equitable common law or statutory law.

Q: Due to the broad range of matters on your docket and the variety of issues they raise, you have a unique perspective on the cutting-edge issues for Delaware corporate law. Broadly speaking, what are some of these issues you see on the horizon that you think your colleagues will have to address in the years to come?

As just mentioned, I think the big one is the interplay between self-ordering via contract and the idea of what a traditional corporation is. You have LLCs and alternative entities and then traditional corporations. And I've always thought of the difference between an LLC and a traditional corporation as the difference between just living with someone versus marrying someone. When you live with someone, the couple can make its own rules. When you are marrying someone, that comes with a whole suite of rights, duties and responsibilities. And so, in the traditional corporation, the question is, and will be, to what extent to allow self-ordering.

Magistrate David said something on this point recently that I fully agree with. And that is that this dispute is not a moral question. It is about what regime is best for wealth enhancement and what will be a fair system from the point of view of the expectations of the various parties. When designing a system, there are two extremes on either end of the spectrum. On one end, you can have a system where there are no fiduciary duties or limits on conduct. People may still invest under that system, maybe in their nephew's business, if they trust their nephew; but, overall, you will destroy the corporation as a means of wealth enhancement. On the other end, you could have a system that encourages nuisance litigation against the corporation, which is also destructive of wealth maximization. So, you have to find the system that gets the balance right. In the civil realm, justice is about what people's expectations are going in and then meeting those expectations. In the end, corporate law is about maintaining and creating a system through which wealth creation can be maximized and fairly distributed.

Q: One recurring issue that is presently on the minds of many and being discussed a lot is potential challenges from other jurisdictions to Delaware's historical role as the favored legal home for corporate entities. Is this a discussion you have seen arise in the past and how, if at all, has it differed from the current iteration of the discussion and debate? What, in your view, has allowed Delaware to retain its status as the favored corporate domicile for so long?

As you say, this is not a new topic. It is cyclical. Delaware is the beneficiary of the excellent legal system it has created with respect to corporations. And Delaware has an inertial advantage, but that does not prevent us from losing our position. Corporations can incorporate and can go

wherever they want to fairly easily. And as we were discussing, different corporate law regimes are possible. So, jurisdictions will find somewhere along that spectrum of options that they believe is fair and efficient.

Delaware of course has an enormous body of case law that is helpful due to the certainty it provides. This is the case law that law students learn in law school and so are familiar with when their clients come to them to ask about corporate jurisdictions. Certainty is usually a first priority for corporations.

Delaware also has a very good judicial nominating and approval process. Everyone in the state, including the governor and the legislature, know it is of enormous importance to Delaware to have good judges. And, even if someone like me slips by every once in a while, we have had and continue to have excellent judges.

But if you're asking do I think Delaware is in trouble, I do not. We have seen this before. I wish the other jurisdictions well. But I think Delaware and its body of case law and service will continue to predominate. Ultimately, it's a market, and as long as Delaware law is returning value in the market, it will remain strong. If we do not get the balance right between holding corporations and their fiduciaries accountable and limiting nuisance litigation, then the market will tell us that and we will not maintain our advantage and someone else will pick it up.

Q: Your written opinions are renowned for being extremely well-written and I think it is fair to say that you are known for using colorful and interesting metaphors and references to enhance your written decisions. Looking back over your written work, do you have a metaphor or reference that is your favorite or one that members of the bar frequently tell you they most enjoyed reading?

Judges have very little direct feedback; if people enjoy reading my opinions, that is great.

But I will tell you the incident from which I never recovered on this. When I first came on the bench and had my first two regular law clerks, we had a case in which a controller had been stymied by the board. And this controller went through the whole range of emotions. First, he could not accept it, then he was angry about it, then he was sad, and then he resigned himself to the fact. And my law clerk and I said, hey, that is right out of Elisabeth Kübler-Ross. So, I asked the law clerk to see if he could fit the facts into her "death and dying" framework and we did, and I could not resist doing that. It is admittedly self-indulgent, but I have had a lot of fun.

Q: On that same theme, you are known for being very well read, and pulling your references from literature and books that you have read. What are you currently reading and/or what is the best book you have read this year?

I think if I'm known for being well read it's because I've had 63 years to read. But I do love reading. I am just finishing *A Month in the Country* by J.L. Carr. It is about two damaged World War I veterans and their time spent in the northern part of England. Beautiful. I am also reading *The Devil's Dictionary* by Ambrose Bierce. It's one I've just taken little sips of here and there. It's very cynical, but very fun.

I love buying used copies of books from Amazon. I like to see what people have written in the margins and handling old volumes. Amazon's rise as a secondhand bookstore has been great for me.

Q: One interesting aspect of your judicial service is that you have served in the community you grew up in. In what ways has that been a rewarding experience for you?

It *has* been rewarding. Particularly, I have had lots of guardianship cases and I am undoubtedly the last-serving judicial officer to have imposed a guardianship on someone born in the 19th century. And that was a grandparent of a high-school classmate of mine. So, although I don't consider myself to have done some big public service, I have had opportunities to do things affecting my community and have tried to reach the right results.

Q: What are you most looking forward to about retirement? And what do you expect you will miss the most about serving on the Court of Chancery?

It will be nice to get out from under pressure, particularly of the 90-day clock. There will be more time to travel, more time to think. However, I will miss the colleagues with whom I am so fortunate to work. Great people.

I will also greatly miss the law clerks. I have become so close to every set of law clerks. I actually tend to be a shy person, except, of course, on the bench. I was a little nervous when appointed as a VC about having two law clerks all of the time. But I've discovered that if I have one talent as a judge, it is picking good people to be law clerks.

Q: What do you hope people say about you in the future when seeing your name among the illustrious list of names of former Chancellors and Vice Chancellors?

I hope they say that, despite whatever limits he might have had, he treated the people in front of him with respect and attempted to give them a fair shake. ◆

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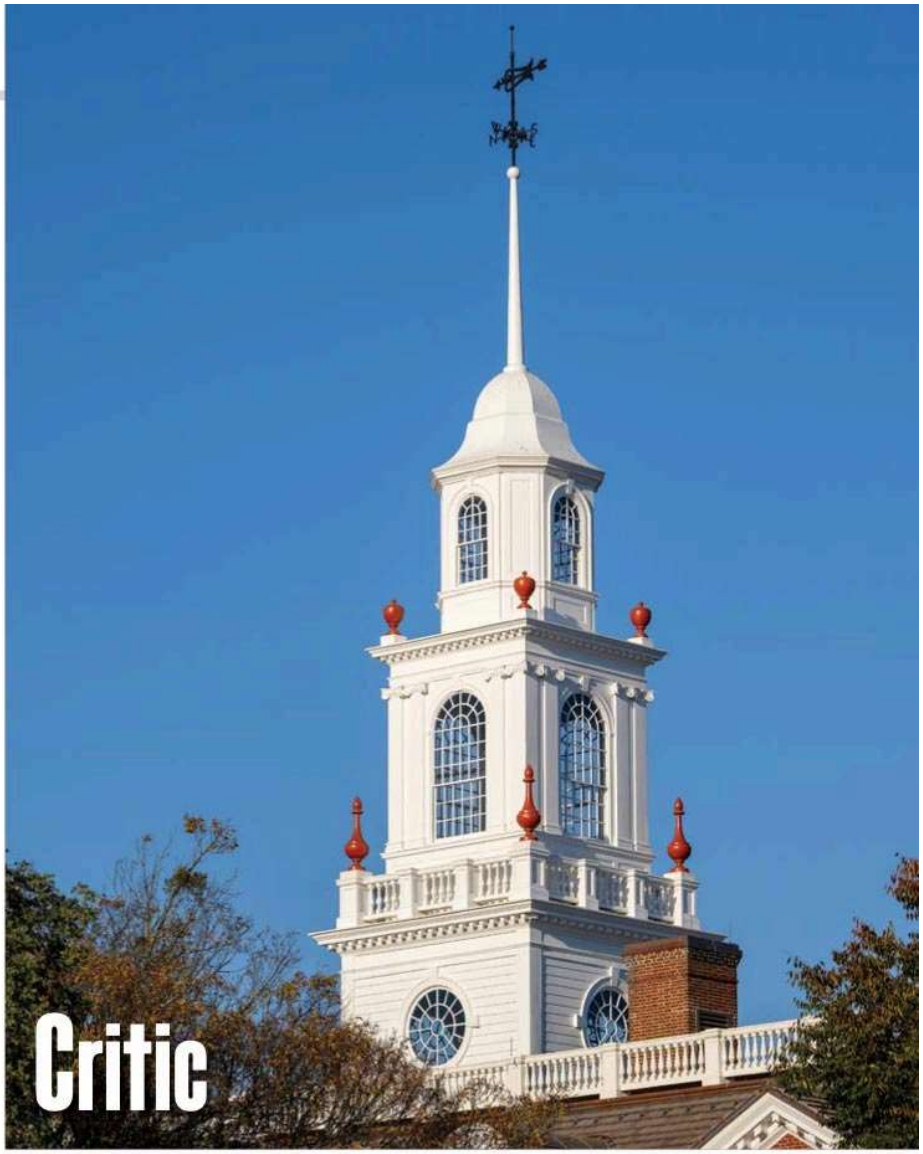

JASON MINTO

Drive-Through Critic

Hal Weitzman's Take on Delaware Is Entertaining But Facile

A flyover critic is a pundit who calls the Midwest flyover country and publishes flyover criticism: breezy takes on places where the critic has never lived or worked that confirm the preconceptions of readers who will never live nor work there.

Given its small size, Delaware doesn't attract flyover critics. But with I-95 cutting through the state, it does attract drive-through critics.

Take congenital explainer Jonathan Chait. After experiencing a traffic jam on I-95, Chait noted that Delaware funds some of its highway expenses with tolls. Going big, Chait claimed that the tolls "epitomize the state's entire ethos" — namely, "to subsidize its people at the rest of the country's expense."[1] Chait then pointed to what he called "Delaware's biggest scam," offering corporations the "most pro-management" laws and "laxest possible standards of disclosure, shareholder rights, and fiduciary responsibility."[2] Having suffered the inconvenience of a traffic jam, Chait leapt to the drive-through critic's seemingly inevitable conclusion: *Delaware is bad.*

Delaware's latest drive-through critic is Hal Weitzman, who closed out the pandemic with his 2022 book, *What's the Matter with Delaware? How the First State Has Favored the Rich, Powerful, and Criminal—and How It Costs Us All.* Weitzman stands firmly in the

drive-through tradition: a well-pedigreed sophisticate[3] who fixates on Delaware's preeminent role in corporate law. Like his fellow commentators, Weitzman describes Delaware as "customer friendly" — as if that is a bad thing. He then describes a "chummy," "clubby" culture that he argues has caused Delaware to favor corporate interests over ordinary Delawareans and everyone else.[4]

That is an all-too familiar take. But Weitzman surpasses his drive-through predecessors by driving through slowly and talking with people along the way. Rather than serving up an opinion column or magazine feature, his 241-page book attains a new level of historical and factual depth. Weitzman also brings a degree of epistemic humility to his project. He acknowledges the complexity of his question, and he (mostly) does not pretend to have found the answer. Instead, he offers a vaguely progressive and civic-minded critique rooted in a professional bias (he's an economist): Bad things come from market failures, and elected officials should offer solutions that carry democratic legitimacy.[5] Best of all, Weitzman has an entertaining style that makes his book a pleasure to read.

Despite its virtues, *What's the Matter with Delaware?* eventually succumbs to the faults of the genre, too often serving up facile innuendo and conspiratorial suspicion, plus a fair share of errors, misstatements and inconsistencies. Often, Weitzman *over*focuses on Delaware, acting as if the flaws it shares with other states reflect unique pathologies, or missing non-Delawarean causes for policies the First State has adopted.

I. Weitzman on Corporate Law

Drive-through critics inevitably assert that Delaware attracts corporations by favoring management over the public interest. Weitzman falls into that camp. In a chapter titled "Don't Screw It Up," Weitzman reports that the state budget depends heavily on corporate franchise fees (true) and that representing those many corporations employs thousands of Delaware lawyers (also true).

But Weitzman then claims that these aspects of the Delaware franchise distort the content of corporate law, citing as the smoking gun a practice in which a stockholder would sue to enjoin a merger, then settle with the defendants in exchange for supplemental disclosures about the transaction and attorneys' fees. Weitzman ignores that members of the Court of Chancery began addressing disclosure-only settlements in 2009, first cutting fee awards, then refusing to approve individual settlements, then ultimately curtailing them in the *Trulia* decision from 2016.[6] Despite that response, Weitzman claims that the settlements "still stand as a powerful example of a system that works well for lawyers but offers no significant benefit to shareholders" or "society as a whole."[7] Citing a problem that Delaware fixed is not a compelling attack. More like compelling evidence that Delaware judges care about more than just Delaware lawyers.

Weitzman next cites basic features of corporate law as if they were uniquely Delawarean. He asserts that the "overriding principle of Delaware corporate law is the 'business judgment rule,'" which he correctly describes as meaning that "essentially . . . the law trusts the judgment of corporate leaders."[8] The impulse to flatten corporate law into an overriding principle is a hallmark of drive-through criticism. Stumbling over the nuances of the business judgment rule is another.[9]

Weitzman is correct that the business judgment rule is significant. Unfortunately for Weitzman, simply identifying a significant principle is not a self-executing indictment.

The business judgment rule is part of a larger fabric of Delaware law. Corporate law imposes fiduciary duties on directors because they act as stewards of the stockholders' investment.[10] Those duties require that directors act loyally (by putting stockholders' interests above their own) and carefully (by not doing anything reckless with other people's money). The business judgment rule specifies the conditions that must exist before a court will question whether directors are fulfilling their duties. If directors are sufficiently informed, face no conflicts of interest, and seem to have a good faith belief that their decision will benefit the corporation and its stockholders, then a court will not step in.[11] Why? Not because Delaware courts let directors run rampant, but because in that setting, there is no reason for a court to substitute its judgment for the decision made by those charged with running the corporation.[12] Comparable approaches pervade Anglo-American law.[13]

Missing this basic point, Weitzman claims that the business judgment rule is indeterminate and that Delaware courts sometimes rule for plaintiffs to protect their status as "the chief venue for shareholder litigation."[14] He argues that the Court of Chancery has a "vested interest in not making its rulings too predictable" so that lawyers can charge their clients big fees for advice.[15] Those conspiratorial criticisms contradict Weitzman's earlier praise for Delaware's "long record of case law," which he acknowledges offers "a useful guide for corporations about the likely outcomes of cases."[16]

Weitzman also fails to justify his indeterminacy claim with citations to Delaware cases. Instead, he quotes law professors who profess confusion at the meaning of good faith.[17] But determining when someone acts in good faith always requires an assessment of their state of mind. Why we think someone acted as they did depends on the facts


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of a particular case. It is not something that an economist can reduce to a formula and graph. So while some level of uncertainty might exist, characterizing good faith as a connivance to attract litigation is unjustified.

Equally important, the concept of good faith operates within a larger system of standards of review that balance society's interest in policing misconduct against limited judicial resources and the inevitable errors that result from trying to read minds. The business judgment rule and the associated deference for director decision-making is only the default standard of review. If directors face a decision that involves actual self-interest, like setting their own compensation, then the directors must prove that the transaction is fair to stockholders. And if directors face a decision that involves indirect conflicts of interest, such as voting on a merger proposal that could cost them their jobs, then the directors must show that they acted reasonably.

These are not only problems for corporate law. Similar questions arise in criminal law (did the accused act with criminal intent?), tort law (did the defendant intentionally hit the victim or was it an unpreventable accident?) and constitutional law (did the legislators have a compelling justification for interfering with a protected right?). The outcomes in Delaware cases reflect reality, which is messy. Fallible humans should welcome debates over whether a legal system operates effectively. Only authoritarian states claim invariably to reach the right result.[18]

Weitzman also criticizes what he regards as the outsized role of individual Chancery judges, who he claims "clearly bring their own perspective to cases."[19] As support, he cites the *Gatz* case, where the Delaware Supreme Court chastised the trial judge for using dictum to express his personal views about fiduciary duties.[20] But Weitzman stops his account too soon. Weeks later, another trial judge followed the first judge's reasoning in a case that squarely presented the issue. And several months later, the Delaware General Assembly codified both trial court rulings.[21] The real story is not about trial judges expressing personal opinions, but a dynamic system of checks and balances. Weitzman misses the bigger story.

II. What's the Matter with Everything?

It's easy enough for a Delaware lawyer writing in a publication called *Delaware Lawyer* to argue that someone else's characterization of Delaware law is flawed. That's what we do here! But Weitzman has a bigger problem: His categorical suspicion of Delaware obscures broader accounts of political economy that have greater explanatory power but lack Delaware-specific causes. Many features of Delaware that Weitzman targets are local manifestations of national and global trends. By missing the big picture, Weitzman's account falls short.

A. Delaware's Shifting Jobs Mix

Weitzman mourns the shift in Delaware's job mix away from manufacturing and towards services. According to Weitzman, Delaware prioritized its pursuit of corporate charters, rather than protecting its manufacturing base.[22]

But that shift reflected a ***national*** trend caused by ***global*** changes. The 1970s saw the United States and other leading economic powers replace the Bretton Woods system that facilitated trade through capital controls with a new vision of free trade and unrestrained capital mobility. Manufacturers moved to lower-cost jurisdictions, strengthening the financial economy at the expense of the real economy in developed nations.[23] Deregulatory trends during the 1980s accelerated the hollowing out of America's industrial base. Banking deregulation in the 1990s and accommodative monetary policy further empowered capital at the expense

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Delaware did not lose manufacturing jobs to neighboring Maryland or Pennsylvania;[24] *America* lost manufacturing jobs to lower-cost foreign jurisdictions.[25] Weitzman questions Delaware's choices without considering the macro trends that framed them.[26] That makes for an edgier book about Delaware, but a less accurate one.

B. Delaware's Expert-Authored Corporate Law

Weitzman next objects to how Delaware maintains its corporate law. A group of lawyers known as the Council of the Corporate Law Section of the Delaware State Bar Association (the "Council") examines Delaware's law annually and proposes changes. Weitzman criticizes them as an unelected group of experts and regards the process as undemocratic.

Weitzman again misses the bigger picture. He acknowledges that experts write many laws[27] and that ordinary Delawareans are not eager to weigh in on corporate questions,[28] only to claim that the "level of public interest is not an indication of whether an issue should be debated publicly."[29] Yet civic apathy is natural in a depoliticized world where ordinary people increasingly feel their agency slipping away, along with their ability to hold power accountable.[30] Financialization and globalization eroded the New Deal institutions that mediated an uneasy but prosperous settlement between public and private interests,[31] elevating capital's policy preferences over those of ordinary people.[32] Powerful financiers also led or forced a massive consolidation of newspapers and other sources of local news, which has been shown to have further reduced civic engagement.[33] Those larger forces came from outside of Delaware, not from within it.[34]

To Weitzman's credit, he offers two constructive suggestions: expanding the Council to include more voices, with Weitzman suggesting "legal experts specifically representing stakeholders other than shareholders,"[35] and making the Council's proceedings public.[36] This embrace of stakeholderism appears on the last page of Weitzman's book — an unearned payoff for a work that mostly ignores the rich, ongoing debate about corporate purpose. Nor does Weitzman explain why greater transparency would change legislative outcomes that he claims constituents do not care about.

C. Entity Anonymity

Similar problems affect Weitzman's criticisms of Delaware for allowing individuals to form entities anonymously, which he says facilitates money laundering and tax evasion.[37] But this too is not a Delaware-specific problem. Many states offer anonymity to business incorporators. Delaware is the biggest facilitator only because it has the biggest market share, not because it is doing something different than other states. Delaware also did not create the demand for anonymous entities. That grew with the removal of restrictions on the free flow of capital.[38] The decisionmakers who adopted those policies lived in New York, Washington, D.C., and other world capitals, not Dover.[39]

Delaware could not have addressed these issues alone. If Delaware had required disclosure, then individuals who demanded anonymity would go elsewhere. The problem required a federal solution, and Congress eventually provided one by passing the Corporate Transparency Act.[40]

D. The Delaware Loophole

Weitzman stands on firmer ground when he criticizes the "Delaware Loophole," which deprives other states of tax revenue.[41] Delaware does not tax income from property not located in Delaware, nor does Delaware tax corporations whose purpose is to own and monetize intellectual property.[42] Out-of-state businesses can take advantage of that by forming a Delaware affiliate to own intellectual property, entering into a licensing agreement to pay fees for the use of the intellectual property, and thereby turning revenue generated in other states into a cost (the licensing fee) that leads to revenue not subject to tax in Delaware. Once again, any other state could do the same thing, as Nevada did in 2020.[43]

Weitzman asserts that the Delaware Loophole cost other states "between $6.6 billion and $9.5 billion in lost revenues between 1995 and 2009."[44] That sounds like a lot, but not as a percentage of total U.S. state and local income tax revenue: 0.3% at the high end, or $13.8 million per state excluding Delaware.[45] Jurisdictions worldwide lose an estimated $480 billion in tax revenue, largely attributable to favorable laws in the United Kingdom, its current or former colonies (excluding the one where we live), and three European states.[46]

Tax evasion is a major problem, and Weitzman is right to focus on it, but it is a national and international problem. It requires a national or international solution.[47]

III. Conclusion

What's the Matter with Delaware? remains an example of drive-through criticism, but Weitzman gets credit for elevating the genre. He does a commendable job describing Delaware's peculiar role to a lay audience, but he presents an incomplete picture. A better effort might have been *What's the Matter with the Neoliberal Order and Delaware's Role in It.* ◆

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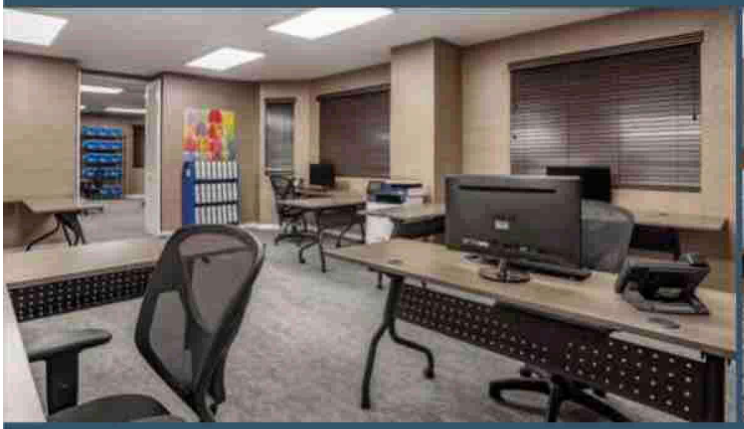

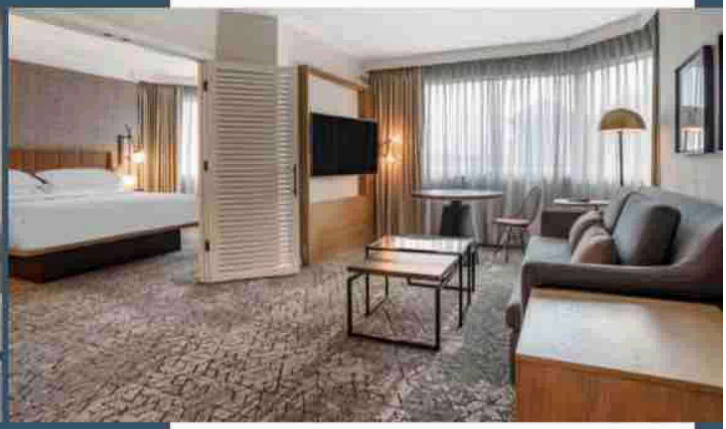

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