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**COMMENT**  
**A REPUTATION TO UPHOLD: MARYLAND COURTS AND THE  
CONTINUED DEVELOPMENT OF REIT LAW**

SPENCER C. EBACH\*

Just as Delaware is known for articles of incorporation,<sup>1</sup> Maryland is known for Real Estate Investment Trusts<sup>2</sup> (“REIT” or, collectively, “REITs”).<sup>3</sup> REITs are entities that own income producing properties—of which eighty percent of the public-traded variation are based in Maryland<sup>4</sup>—and they offer investors the ability to invest in tax-favored diversified portfolios of real estate assets that provide returns historically competitive with stock indices.<sup>5</sup> Critical to Delaware’s reputation, the Court of Chancery—the State’s court of equity specializing in corporate litigation<sup>6</sup>—has provided a rich and detailed body of case law that has helped the state bolster and maintain its status as the preferred state in which to incorporate

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1. See, e.g., Marcel Kahan, *Delaware’s Peril*, 80 MD. L. REV. 59, 61 (2020) (explaining that “Delaware accounts for the bulk of incorporations by publicly traded firms”); Christopher M. Bruner, *Leveraging Corporate Law: A Broader Account of Delaware’s Competition*, 80 MD. L. REV. 72, 74 (2020) (“[E]mpirical studies have concluded that Delaware faces little meaningful competition among U.S. states when it comes to attracting incorporations . . .”).

2. REITs are companies that own and often operate income-producing real estate or related assets, including office buildings, shopping malls, apartments, hotels, resorts, self-storage facilities, warehouses, and mortgage loans. They do not develop property for sale, but instead buy and develop primarily to operate them as part of an investment portfolio. *Real Estate Investment Trusts (REITs)*, INVESTOR.GOV, <https://www.investor.gov/introduction-investing/investing-basics/investment-products/real-estate-investment-trusts-reits> (last visited Apr. 24, 2021).

3. Natalie Sherman, *For Some Businesses, Maryland is Actually Very Friendly*, BALT. SUN (Sept. 4, 2015, 6:30 PM), <https://www.baltimoresun.com/business/bs-bz-reit-haven-20150904-story.html>.

4. James J. Hanks, Jr., *Federally Tax-Qualified Real Estate Investment Trusts Formed Under Maryland Law*, NAREIT, <https://www.reit.com/sites/default/files/FederallyTaxQualifiedRealEstateInvestmentTrustsFormedUnderMarylandLawbyJamesJHanksJr11-24-15.pdf> (last visited Nov. 15, 2020).

5. *What’s a REIT (Real Estate Investment Trust)?*, NAREIT, <https://www.reit.com/what-reit> (last visited Nov. 3, 2020).

6. See Kahan, *supra* note 1, at 63 (describing the Court of Chancery as a “de facto specialized corporate court”).

new businesses.<sup>7</sup> As the nation's leader in REIT formation, Maryland plays an essential role in the development of legal rules and standards for REIT management and administration. Though the state's reputation in the REIT field is based in the state's statutory law, to maintain that role and lead the development and administration of REIT laws across the country, Maryland needs a strong and experienced judicial mechanism. In the mold of Delaware's Court of Chancery, Maryland should sanction a REIT-specific judicial body of expertise within the state's court system. This judicial body should exercise exclusive jurisdiction over REIT litigation to centralize the state's case law and influence for posterity. Though the procedures and structure of such a judicial body may bear little resemblance to the world's foremost corporate-centric judiciary, the profound and long-lasting influence the Court of Chancery has wielded in Delaware provides a blueprint that Maryland should aspire to emulate.

## I. BACKGROUND

Mirroring Delaware's own corporate law history, Maryland's place in REIT law is based on a strong and attractive statutory scheme dictating the rules and procedures for formation and operations. However, Maryland does not have a judicial system comparable to Delaware's. The Court of Chancery has been Delaware's primary judicial body for corporate legal disputes since the state became an early adopter of general corporation statutes.<sup>8</sup> Since the passage of Title 8, Chapter 1 of the Delaware Code, the court has provided a rich and detailed body of case law that has helped the state bolster and maintain Delaware's reputation as the preferred state in which to incorporate new businesses.<sup>9</sup> Built on the foundation of an attractive incorporation statute, the relationship between that statute and the state's corresponding case law has reinforced the importance of Delaware to the nation's corporate business structure. Section I.A will discuss the development and text of Maryland's statutory REIT laws.<sup>10</sup> Then, Section I.B will explore the

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7. See *supra* note 1.

8. Delaware passed the General Corporation Law in 1899. S. Samuel Arsh, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1, 6 (1976). Though not the first state to pass an incorporation statute particularly friendly to corporate interests, Delaware stepped into place after then-New Jersey Governor Woodrow Wilson took measures to severely limit the powers of trusts and corporations under state law in 1913. *Id.* A number of factors likely contributed to Delaware's subsequent ascent to its position as the home of incorporation, but New Jersey's reforms cleared the path for a state, especially one close to New York at the turn of the century, to pick up where it left off. *Id.*; see also Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 271 (1976) (describing the history and evolution of Delaware's incorporation statutes).

9. DEL. CODE ANN. tit. 8, §§ 101–398 (2021).

10. See *infra* Section I.A.

litigation of REIT cases in Maryland and the role different courts play in that process.<sup>11</sup> Section I.C will discuss the Delaware Court of Chancery's reputation and influence in corporate law, particularly with respect to its appeal for those businesses looking to incorporate.<sup>12</sup> Lastly, Section I.D will describe notable Delaware Court of Chancery and Delaware Supreme Court decisions and their significance on the corporate landscape.<sup>13</sup>

#### A. *Maryland's REIT Law*

Maryland's REIT law originates in Title 8 of the Corporations and Associations article of the Maryland Code.<sup>14</sup> Much like Delaware, the attractive statutory provisions within Title 8 were a primary catalyst for Maryland's reputation as the state in which to form REITs.<sup>15</sup> These provisions were adopted shortly after federal legislation was signed into law by President Eisenhower sanctioning the formation of REITs to facilitate the "widely dispersed public ownership of real estate in the United States."<sup>16</sup> Most importantly, these new investment vehicles were created with the intention that they would receive preferential tax treatment.<sup>17</sup> To this day, REITs are still not required to pay corporate income tax as long as they distribute at least ninety percent of their taxable income to shareholders.<sup>18</sup> Maryland's Title 8 itself expanded directly on the federal rules, operationalized through the Internal Revenue Code, and three years later the Maryland legislature enacted a statute "providing for a separate, free-standing vehicle at state law, known as a real estate investment trust, to take advantage[] of the new REIT provisions of the Internal Revenue Code."<sup>19</sup>

At that moment, Maryland was on the cutting edge of REIT law, one of the very first states to embrace the new investment vehicle, just as Delaware was an early leader in developing a "liberal" incorporation statute that attracted new businesses at the turn of the twentieth century.<sup>20</sup> The statute is particularly attractive to new trusts because of the protections it provides for investors. Title 8 codifies provisions validating the REIT share ownership

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11. *See infra* Section I.B.

12. *See infra* Section I.C.

13. *See infra* Section I.D.

14. MD. CODE ANN., CORPS. & ASS'NS §§ 8-801 to 8-901 (West 2020).

15. Heather Harlan, *REITs Find a Comfortable Home in Md.*, BALT. BUS. J. (Mar. 27, 2000, 12:00 AM), <https://www.bizjournals.com/baltimore/stories/2000/03/27/story4.html>.

16. James Hanks & Sharon Kroupa, *Why Maryland is the Favored Jurisdiction for Forming REITs*, CSC GLOBAL (Mar. 13, 2019), <https://www.cscglobal.com/service/webinar/maryland-reit-dominance/>; 26 U.S.C. §§ 856–859.

17. Hanks & Kroupa, *supra* note 16.

18. *Id.*

19. *Id.*

20. Seligman, *supra* note 8, at 271.

and transfer limitations outlined in the Code's 5/50 Test.<sup>21</sup> One of the key structural features of REITs, this test prohibits more than fifty percent of a trust from being held by five or fewer individuals.<sup>22</sup> Title 8 further provides REIT shareholders with broad liability protections, flexible voting provisions, relaxed bylaw amendment provisions, easy stock issuance procedures, and protections against hostile takeovers.<sup>23</sup>

With respect to hostile takeovers, maneuvers activist investors often deploy against the wishes of public companies' management teams, Maryland law "provide[s] some support for the use of an excess share provision to deter a coercive bid."<sup>24</sup> This type of provision is a particularly fruitful benefit of the 5/50 test, wherein, "any shares acquired by a shareholder in excess of the ownership threshold are stripped of excess voting rights or any right to receive dividends until the excess shares are transferred to a holder who can own them without violating the ownership restriction."<sup>25</sup> Furthermore, Maryland's "control share and fair price statutes and the constituency provisions in the Maryland Unsolicited Takeover Act permit directors . . . to consider the interests of the corporation's shareholders, employees, customers, creditors, suppliers and communities in which the corporation is located or does business."<sup>26</sup> The key point in these ownership and equity transfer limitations is that they may be used to protect the tax status of the REIT against takeovers, among other enumerated protections.<sup>27</sup> With the statutory codification of the 5/50 test, Maryland has put into law specific protections against both hostile takeovers and proxy contests with provisions making it particularly difficult to accumulate controlling shareholder positions.<sup>28</sup> Just as Delaware's status in incorporation is related to its business-friendly statutory structure, Maryland's REIT provisions provide statutory language friendly to the interests of those forming REITs for either residential or commercial purposes.<sup>29</sup>

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21. See 26 U.S.C. § 856(h) (stating that a real estate investment trust may not be closely held in accordance with § 542(a)(2)'s requirement that at any time during the last half of the taxable year, more than fifty percent of the entity's outstanding stock cannot be owned by not more than five individuals).

22. Hanks & Kroupa, *supra* note 16.

23. Harlan, *supra* note 15.

24. David M. Einhorn, Adam O. Emmerich, Robin Panovka, William Savitt & David B. Silva, *Hostile Takeovers of REITs* 49 (Samuel Zell & Robert Lurie Real Est. Ctr., Working Paper No. 539).

25. *Id.* at 48.

26. *Id.* at 53.

27. Hanks & Kroupa, *supra* note 16.

28. *Id.*

29. See Jamie Smith Hopkins, *Md. REIT Returns 329% in 5 Years*, BALTIMORE SUN (Jan. 8, 2004), <https://www.baltimoresun.com/news/bs-xpm-2004-01-08-0401080171-story.html> (noting

*B. REIT Litigation in Maryland Courts*

Currently, Maryland lacks a court or judicial body with specific and sole responsibility to hear REIT cases. The Maryland Court of Appeals, the state's highest court, considers many important and contentious legal issues, but when hearing critical cases about REITs, the court's judges do not have the benefit of subject matter expertise. These proceedings often turn on matters related to executive duties and protections for shareholders, such as *Oliveira v. Sugarman*,<sup>30</sup> in which the court clarified the standard under the business judgement rule applies when a disinterested and independent board of directors decides to deny a shareholder litigation demand.<sup>31</sup> Maryland courts maintain a high degree of deference to corporate board decisions in shareholder disputes, an appealing feature of the state's business law environment to those forming new businesses.<sup>32</sup>

In addition, the Maryland legislature organized the Maryland Circuit Court Business and Technology Case Management Program, a small group of judges at the circuit court level who receive special training to hear certain business-related cases.<sup>33</sup> The program has heard a number of REIT-related cases, litigating issues of board activity,<sup>34</sup> duties between parties,<sup>35</sup> and trust

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Maryland-based REIT had “pulled off the highest five-year shareholder return among the nation’s 21 office real estate investment trusts.”)

30. 451 Md. 208, 152 A.3d 728 (2017).

31. *Id.* at 245, 152 A.3d at 751 (holding that when the board of directors of a REIT consists of a majority of independent directors who make a decision regarding a transaction or who will appoint a special litigation committee to that makes the decision, they do not have a duty to accept a shareholder demand with regard to that transaction).

32. *See* *Shenker v. Laureate Educ., Inc.*, 411 Md. 317, 349–50, 983 A.2d 408, 427 (2009) (stating that when directors use defensive mechanisms to prevent hostile takeovers, there is no higher duty or greater scrutiny than any other acts of directors because the legislative history indicates an intention “to reject in Maryland the ‘heightened scrutiny’ imposed on directors of Delaware corporations in hostile takeover situations by the Delaware Supreme Court . . . a relatively rare rejection in Maryland of Delaware’s acknowledged leadership in . . . corporate law to which we and many other states ordinarily look for guidance”); *see also* *Boland v. Boland*, 423 Md. 296, 336, 31 A.3d 529, 548 (2011) (quoting *Shenker*, 411 Md. at 344, 983 A.2d at 424) (stating that Maryland’s default standard in analyzing corporate decisions “is the deferential business judgment rule, which insulates ‘the business decisions made by the director from judicial review’”).

33. *See infra* Section II.C.

34. *See* *In re Nationwide Health Props.*, No. 24-C-11-001476, 2011 Md. Cir. Ct. LEXIS 3, at \*15 (May 27, 2011) (providing further protections for boards of directors by differentiating the application of state statutory law to “cash-out” transactions versus a “stock-for-stock” transaction proposed by officers and directors); *see also* *In re Aviv REIT Inc. Stockholder Litig.*, No. 24-C-14-006352, 2015 Md. Cir. Ct. LEXIS 16, at \*13–14 (Mar. 20, 2015) (citing the *Nationwide* court’s holding as a persuasive basis for denying plaintiffs’ action against company directors “for breach of [a] duty to maximize shareholder value”).

35. *Corvex Mgmt. LP v. Commonwealth Reit*, No. 24-C-13-001111, 2013 Md. Cir. Ct. LEXIS 3, at \*27 (May 8, 2013) (clarifying the duties parties are bound to through REIT bylaws regarding arbitration).

mergers and sales.<sup>36</sup> Although no state court exercises exclusive jurisdiction over REITs, decisions made across Maryland's judiciary effect specific provisions of the State's REIT laws, directors, and shareholders incorporated or seeking to incorporate in the state.

### C. *The Court of Chancery's Structure and Influence*

The Court of Chancery built a reputation so formidable that it now serves as a leader on both the national and international stages, engaging in a decades-long process of self-reinforcement that has created and maintained its position in the corporate law world. Approximately sixty-five percent of the Fortune 500, an annual list compiling the largest American companies by revenue,<sup>37</sup> was incorporated in Delaware as of 2019.<sup>38</sup> Effectively the nation's corporate capital, "[f]or at least half a century the Delaware courts have been the de facto 'national' U.S. corporate law courts."<sup>39</sup> The Court of Chancery's "ability to provide a unique branded customer experience partly explains its dominant performance within a high-end market segment composed of large, publicly traded firms."<sup>40</sup>

The court had to build its own knowledge and institutional precedents, especially given the desire to "quickly [take] over New Jersey's throne" and the incentive to maintain a "first-mover" advantage as the first and perhaps most visible state to act, to adequately address problems across the spectrum of corporate governance.<sup>41</sup> Otherwise, those large, publicly traded firms would have turned elsewhere in search of assurance of protection in potential litigation. Both in the United States and abroad, multinational corporations present judiciaries with a range of challenging legal issues, including corporate governance, mergers and acquisitions, financial procedures, compliance, risk management, and other commercial and consumer-related matters. Scholars argue that "[b]y routinely deciding these business disputes, Delaware courts—through well-established precedents—influence domestic and foreign courts as well as corporate stakeholders worldwide."<sup>42</sup>

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36. *Frederick v. Corcoran*, No. 370685-V, 2013 Md. Cir. Ct. LEXIS 5, at \*16–17 (Aug. 14, 2013) (parsing the responsibilities of board members in approving and executing a REIT merger or sale under Maryland law).

37. *Methodology for Fortune 500*, FORTUNE, <https://fortune.com/franchise-list-page/fortune-500-methodology-2020> (last visited Jan. 4, 2021).

38. DELAWARE DIVISION OF CORPORATIONS: 2019 ANNUAL REPORT STATISTICS (2020).

39. Omari Scott Simmons, *Delaware's Global Threat*, 41 J. CORP. L. 217, 220 (2015) (quoting John Armour, Bernard S. Black & Brian R. Cheffins, *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1349 (2012)) (internal quotation marks omitted) (alteration in original).

40. *Id.*

41. William J. Moon, *Delaware's New Competition*, 114 NW. U. L. REV. 1403, 1412 (2020).

42. Simmons, *supra* note 39, at 222.

Consider the following statement from Chief Justice Rehnquist, delivered in Wilmington, Delaware at the bicentennial celebration for the Court of Chancery:

Corporate lawyers across the United States have praised the expertise of the Court of Chancery, noting that since the turn of the century, it has handed down thousands of opinions interpreting virtually every provision of Delaware’s corporate law statute. No other state court can make such a claim. As one scholar has observed, “[t]he economies of scale created by the high volume of corporate litigation in Delaware contribute to an efficient and expert court system and bar.”<sup>43</sup>

The Court of Chancery has benefited immensely under the “internal affairs doctrine,” a conflict of laws principle that “recognizes that only one [s]tate should have the authority to regulate a corporation’s internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands.”<sup>44</sup> Many jurisdictions, including Maryland, recognize the principles underlying the doctrine as primary tools in keeping corporate law matters relegated to their originating state.<sup>45</sup> Recent litigation patterns “have put pressure on this arrangement” with corporate law more often litigated outside of Delaware as the state maneuvers to avoid public pushback to rulings that may result in an increasing pattern of federalization of corporate law.<sup>46</sup> However, “[d]espite changes in the underlying [internal affairs] doctrine, Delaware stakeholders have continued to draw [a] connection between law and forum . . . and commentators argue[] that Delaware successfully attracts incorporations both because of the content of its corporate law and because of its expert, specialized courts and judges.”<sup>47</sup>

Thus, the high volume of corporate litigation in Delaware has proven to be a demonstrably valuable resource in the legal field. Because of the State’s prominence in corporate matters and its reliance on “corporate franchise fees, which constitute approximately sixteen percent of its revenues,”<sup>48</sup> the State has an incentive to ensure the quality of its incorporation code and the case

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43. William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992).

44. *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982).

45. *See Wilkins v. Thorne*, 60 Md. 253, 258 (1883) (“This corporation was created under the laws of another State, and it seems to us that all such controversies must be determined by the Courts of the State by which the corporation was created.”).

46. Verity Winship, *Bargaining for Exclusive State Court Jurisdiction*, 1 STAN. J. COMPLEX LITIG. 51, 57 (2012).

47. *Id.*

48. Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 842 (1995).



law surrounding the field. This incentive exemplifies the idea behind the “commitment theory,” whereby Delaware’s commitment to the maintenance of a responsive corporate code is tied both to its own expenditures and the confidence of the firms incorporated in the State.<sup>49</sup> Furthermore, from the perspective of those firms reliant on the Court of Chancery in this respect, the rich and evolving legal history in Delaware offers positive “network effects,” including lower regulatory, information, and compliance costs with the process of incorporation.<sup>50</sup> With so many issues having been previously acknowledged and decided by the Court of Chancery, those looking to incorporate a new business in Delaware have a foundational set of principles and rules that provide a certainty akin to protections against legal action. Chief Justice Rehnquist emphasized this phenomenon and its potential results in his bicentennial address:

Perhaps most importantly, practitioners recognize that “[o]utside the takeover process . . . , most Delaware corporations do not find themselves in litigation. The process of decision in the litigated cases has so refined the law that business planners may usually order their affairs to avoid lawsuits.” As one commentary concluded, “[t]ime is the best test of an institution and, over time, Delaware’s law has earned respect and emulation. Such success is not dramatic, but the result of careful, conservative, long time attention.” Judicial efficiency and expertise, a well-paid and well-respected judiciary, innovative judicial administration, courageous leadership—these hallmarks of the Delaware Court of Chancery provide a fine example of a somewhat specialized state court system in action.<sup>51</sup>

That efficiency, expertise, and innovative judicial administration has empowered the Delaware courts to lead by facilitating equitable outcomes across the corporate spectrum. Judges, especially those on the Court of Chancery, are highly specialized in corporate law and are faced with a “large number of cases and write numerous opinions that provide a large body of data on the meaning of Delaware’s law[,]” achieving what in “modern academic parlance [] has been characterized as a network effect—a positive externality produced by the large number of corporations incorporated in Delaware and litigating in their courts.”<sup>52</sup> In addition, the Court of Chancery sits without juries, so corporations incorporate in Delaware with the

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49. *Id.* at 842–43 (citing ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 14–24 (1993)).

50. Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1069 (2000).

51. Rehnquist, *supra* note 43, at 354.

52. William J. Carney & George B. Shepherd, *The Mystery of Delaware Law’s Continuing Success*, 2009 U. ILL. L. REV. 1, 28–29 (2009).

knowledge that any legal disputes related to corporate matters that may arise will be heard and decided by these experts in the field.<sup>53</sup>

Indeed, there are tremendous advantages to sharing among the already large pool of Delaware corporations, as “[l]egal experience from one Delaware corporation is readily transferable to another Delaware corporation because they operate under a common set of rules.”<sup>54</sup> This transfer of institutional knowledge reinforces over time, as “[t]he quality of future case law depends on the number and diversity of lawsuits brought before the courts. These factors, in turn, depend on the number of firms incorporated in the state.”<sup>55</sup> As the home of such a rich and varied collection of corporate entities, Delaware’s corporate law has thus become tremendously influential far beyond its own borders, appealing to lawyers and executives looking to do business worldwide.

#### *D. Important Delaware Precedent*

The Court of Chancery’s decisions have broad influence within the field of corporate law. Because so many major corporations are incorporated in Delaware, cases within both the Court of Chancery and the Delaware Supreme Court apply to businesses with name-brand recognition across the Global 2000.<sup>56</sup> For example, in *Akorn, Inc. v. Fresenius Kabi AG*<sup>57</sup> the Court of Chancery found, and the Delaware Supreme Court affirmed, the ability of a buyer to terminate a merger based on a post-trial determination that a material adverse effect occurred.<sup>58</sup> The holding, by virtue of Delaware’s role as the home of incorporation for so many major companies, necessitates the attention and careful consideration of parties negotiating merger agreements or litigating over agreement provisions. Though the decision would appear to indicate that “buyers will continue to bear an extremely heavy burden in

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53. Fisch, *supra* note 50, at 1096.

54. David Porter, *Competing with Delaware: Recent Amendments to Ohio’s Corporate Statutes*, 40 AKRON L. REV. 175, 177 (2007).

55. *Id.* at 177–78 (Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition Over Corporate Charters*, 112 YALE L.J. 553, 556 (2002)) (internal quotation marks omitted).

56. Forbes compiles its “Global 2000 list using data from FactSet Research systems to screen for the biggest public companies [around the world] in four metrics: sales, profits, assets and market value.” Andrea Murphy, Hank Tucker, Marley Coyne & Halah Touryalai, *GLOBAL 2000: The World’s Largest Public Companies*, FORBES (May 13, 2020, 6:00 AM), <https://www.forbes.com/global2000/#2f6bcddf335d>.

57. No. 2018-0300-JTL, 2018 WL 4719347 (Del. Ch. Oct. 1, 2018), *aff’d* No. 2018-0300-JTL, 2018 WL 6427137 (Del. Dec. 9, 2018).

58. In the case, German pharmaceutical company Fresenius Kabi had signed a merger agreement to purchase the U.S. drug manufacturer Akorn, which was followed by a steep decline in Akorn’s financial performance which Fresenius cited as a material adverse effect as they withdrew from the agreement. *Akorn, Inc.*, 2018 WL 4719347, at \*39.

establishing a stand-alone [material adverse effect] to avoid their obligations to close,” it raised a numbers of questions moving forward, including the importance of a buyer’s access to information prior to the close of a transaction.<sup>59</sup> A 2017 case, *Shawe v. Elting*,<sup>60</sup> exemplified a perhaps even more dramatic holding by the Court of Chancery, wherein upon finding the presence of a deadlock between shareholders and directors, the court appointed a custodian to essentially force a sale of TransPerfect Global, a massively profitable corporation, to a third party.<sup>61</sup> For those involved in proxy contests, shareholder activism, and even retail investing, this case represented an uncommon and drastic judicial remedy for corporate disputes.

Prior decisions from the Delaware Supreme Court illustrate the depth and relevance of the state’s judicial rulings in shaping corporate law and practices within the United States. In *Revlon, Inc. v. Macandrews & Forbes Holdings, Inc.*,<sup>62</sup> the court held, in a landmark decision, that when a company is up for sale, the board of directors has a duty to maximize the value of that sale for shareholders’ benefit, changing the scope of directors’ fiduciary duties and their approach to their company’s position before the sale occurs.<sup>63</sup> The ramifications of a decision of this magnitude can be long-lasting, with directors’ duties heightened in the course of corporate transactions involving Delaware corporations and a subsequent judicial history determining when the new doctrine will apply.<sup>64</sup> The Delaware Supreme Court continues to hear and rule on consequential cases, such as *KT4 Partners LLC v. Palantir Technologies Inc.*,<sup>65</sup> where the court clarified the duty of a company to produce emails among its management to stockholders, reiterating the importance of maintaining formal corporate records for board-level actions.<sup>66</sup> As Delaware’s corporate law continues to reign influentially both in the United States and abroad, the courts will play a central role in the

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59. Douglas N. Cogen, Ken S. Myers, & Stephen M. Fisher, *Akorn v. Fresenius: Important Practical Lessons from First-Ever Material Adverse Effect*, FENWICK (Oct. 24, 2018), <https://www.fenwick.com/insights/publications/akorn-v-fresenius-important-practical-lessons-from-first-ever-material-adverse-effect>.

60. 157 A.3d 152 (Del. 2017).

61. *Shawe v. Elting*, 157 A.3d 152, 167 (Del. 2017).

62. 506 A.2d 173 (Del. 1986).

63. *Revlon, Inc. v. Macandrews & Forbes Holdings, Inc.*, 506 A.2d 173, 185 (Del. 1986).

64. See James D. Cox & Randall S. Thomas, *Delaware’s Retreat: Exploring Developing Fissures and Tectonic Shifts in Delaware Corporate Law*, 42 DEL. J. CORP. L. 323, 331 (2018).

65. 203 A.3d 738 (Del. 2019).

66. *KT4 Partners LLC v. Palantir Techs Inc.*, 203 A.3d 738, 758 (Del. 2019) (addressing a demand by a stockholder for corporate books and records, including emails and electronically-stored information (“ESI”) among management, to allow the stockholder to investigate possible wrongdoing, such as the reasons behind amendments to an Investors’ Rights Agreement that severely reduced the original rights granted under that agreement).

development of rules and standards pertinent to matters relevant to both directors and shareholders of corporations.

## II. ANALYSIS

As the nation's leader in REIT formation, Maryland plays an essential role in the development of legal rules and standards for REIT management and administration. Looking to Delaware, where the relationship between the State's statutory and case law on corporate matters has reinforced the importance of the State to the nation's corporate business structure, Maryland has an ideal example to follow. As the home of a majority of the publicly-traded REITs in the United States, Maryland has an opportunity to lead the development and administration of REIT laws across the country by implementing a strong and experienced judicial mechanism. The creation of a REIT-specific judicial body of expertise within Maryland's court system with exclusive jurisdiction over REIT litigation—in the spirit of Delaware's Court of Chancery—can serve as a vehicle for effective REIT administration. Section II.A will describe the benefits of modeling a new judicial body after the Court of Chancery.<sup>67</sup> Then, Section II.B will describe how such a body would be formed within the State of Maryland, highlighting specific questions lawmakers should focus on.<sup>68</sup> Lastly, Section II.C will discuss the logistics and functionality of developing a REIT-focused judicial body in Maryland through the lens of the currently implemented Business and Technology Case Management Program.<sup>69</sup>

### *A. The Benefits of Modelling Delaware's Court of Chancery*

Maryland's judiciary, state legislators, and practicing attorneys have a vested interest in the continued success of the State's REIT law administration. The development of a legal structure for REIT law procedures and evaluation—in the spirit of Delaware's continued self-enforcing success in the corporate field—is critical to Maryland's long-term status as a preferential state in which to form trusts.<sup>70</sup> The beneficial consequences of the procedures and principles that underly the first-mover advantage, internal affairs doctrine, commitment theory, and the corresponding network effects of all three would provide forward-looking momentum and support for Maryland's legal infrastructure. The Maryland General Assembly has maintained an interest in the benefits that a pro-

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67. See *infra* Section II.A.

68. See *infra* Section II.B.

69. See *infra* Section II.C.

70. See *supra* Section I.C.

business environment provides,<sup>71</sup> and the favorable, user-friendly REIT statutes in place have facilitated positive revenue outcomes for the state. Though Maryland, unlike Delaware, does not charge a franchise tax for businesses,<sup>72</sup> the state does charge fees for filing articles of incorporation and other documents pertinent to corporate matters.<sup>73</sup> Furthermore, a strong reputation in REIT law already provides some support and opportunities for Maryland's legal field, just as Delaware's status in corporate law, due to the Court of Chancery's role, has bolstered the State's legal profession.<sup>74</sup>

Delaware and Maryland law differ in important respects to those evaluating opportunities to incorporate.<sup>75</sup> However, the internal machinery and posturing of the states' judicial systems appear to suggest parallel structural mandates. Just as the Court of Chancery benefits from an experienced and knowledgeable bench, the Maryland General Assembly has placed an emphasis on crafting a "[g]reater efficiency resulting from the specialized training and education of judges, clerks, and staff," seeking to deploy modern technologies to streamline the filing and processing of cases.<sup>76</sup> This efficiency and expertise within Maryland's courts would lead to "[m]ore timely, rational, legally correct, and . . . predictable rulings from judges who are better trained[,] educated[,] . . . and comfortable in handling these cases."<sup>77</sup> In analyzing business-focused courts across the country, commentators note that practitioners emphasize that a "consistency regarding judges hearing . . . cases as well as their business sophistication has created trust in the system, which they cite as a crucial element to the success of a specialized court system."<sup>78</sup> Without a specialized judicial body, Maryland

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71. See *infra* Section II.C.

72. Hanks & Kroupa, *supra* note 16.

73. See STATE DEPARTMENT OF ASSESSMENTS AND TAXATION, FEE SCHEDULE FOR DOCUMENTS RELATING TO CORPORATE CHARTERS (2020) (detailing fees for corporate filings in the state of Maryland).

74. Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 472 (1987) (describing how "the rules that Delaware supplies often can be viewed as attempts to maximize revenues to the bar, and more particularly to an elite cadre of Wilmington lawyers who practice corporate law in the state").

75. See Jason E. Dunn, Yaacov M. Gross & Kenneth E. Sicklick, *What's Market? Update: Maryland REIT*, GOULSTON & STORRS (Oct. 2015), <https://www.goulstonstorrs.com/publications/whats-market-update-maryland-reit/> (stating that "acts of directors of Maryland corporations relating to acquisitions or potential acquisitions of control of such corporations are not subject to higher duties or greater scrutiny than any other acts of such directors[,] which cuts against the established Delaware precedent under *Revlon* requiring greater scrutiny and directors' duties under certain circumstances).

76. MARYLAND BUSINESS AND TECHNOLOGY TASK FORCE, MARYLAND BUSINESS AND TECHNOLOGY TASK FORCE REPORT 6 (2000).

77. *Id.*

78. AMELIA PARSONS & BRETT BURKA, REPORT ON BUSINESS COURTS, RECENT DEVELOPMENTS, AND RELATED ISSUES COURTS 25 (2015).

is not in a position to consolidate its influence on REIT law and wield a judicial authority akin to the Court of Chancery's.<sup>79</sup> Furthermore, the consistently present threat of arbitration and forum selection clauses applied in REIT litigation may come to inhibit Maryland's ability to set standards in the field if the state was to lose its reputation as the premier jurisdiction for REIT incorporation and public policy.<sup>80</sup> Contractual provisions precluding questions of REIT law from being litigated in Maryland would undercut the state's vitality to the industry, and a strong, REIT-focused judicial body would serve to aid in the prevention of such a situation occurring.

*B. Developing a REIT-Focused Judicial Body in Maryland*

Developing a new, REIT-centric judicial body in Maryland would not require a process foreign to state lawmakers. In 2000, the 421st Maryland General Assembly passed House Bill 15, kicking off the process that eventually led to the creation and implementation of the Maryland Circuit Court Business and Technology Case Management Program with the creation of an investigatory task force.<sup>81</sup> The program, born out of a perception that the state had become anti-business, began operation by late 2002, suggesting a relatively short lag-time in the creation of a new judicial program.<sup>82</sup> The task force first heard testimony from business people, judges, lawyers, legislators, and representatives of business courts established in other states. And, though there was not a clear consensus on the specifics of implementation, it "determined that there exist[ed] a general consensus that if rules making Maryland's courts more efficient and effective [could] be drafted, such rules should be adopted."<sup>83</sup>

Critically, the task force emphasized "that the inefficiencies and the reductions in the timeliness and quality of judicial decision-making . . . inevitably result[ing] from advocates with specialized knowledge presenting cases to generalist trial judges . . . will grow to a level which is intolerable."<sup>84</sup> Consequently, the task force recommended "[s]pecialized training and education for those judges with experience in business and technology issues, as well as the application of specialized case management techniques and technology for the handling of . . . cases."<sup>85</sup>

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79. See *infra* Section II.C.

80. See generally Jennifer L. Permesly & Stephanie Sado, *Shareholder Litigation and Forum Selection Provisions*, 33 NYSBA INSIDE 25, 26 (2015) (noting the growing importance of mandatory arbitration provision enforcement in the context of shareholder disputes).

81. H.B. 15, 414th Gen. Assemb., Reg. Sess. (Md. 2000).

82. Judyth Pendell, *Maryland's Ground-Breaking Technology Court*, 5 CASE POINT 1, 12 (2006).

83. MARYLAND BUSINESS AND TECHNOLOGY TASK FORCE, *supra* note 76, at 5.

84. *Id.* at 7.

85. *Id.* at 6.

C. *The Business and Technology Case Management Program*

A relatively new, statutorily sanctioned judicial body for REIT law and administration has the potential to be particularly fruitful to the maintenance of Maryland's reputation. But a still-open question is whether Maryland's Circuit Court Business and Technology Case Management Program fits this proposed model.<sup>86</sup> In the early 2000s, the General Assembly observed other states moving towards specialized business courts that improved efficiency and addressed perceptions that business-related cases were unsatisfactorily handled.<sup>87</sup> They prioritized the creation of a business and technology programing in an effort to overcome the perception that Maryland was anti-business and to encourage technology companies to form and remain in the state.<sup>88</sup> The task force honed in on the robust growth of cutting-edge technologies as making up a vital part of Maryland's economy, and recognized that the potential of a technology court "to specialize in the administration of disputes involving complex technology issues."<sup>89</sup> The task force ultimately recommended the implementation of a statewide business and technology case management program within the existing circuit court system, as opposed to the creation of a separate business and technology body.<sup>90</sup>

The existing Business and Technology Case Management Program presents logistical and procedural challenges to its being the state's REIT-focused judicial body. Maryland law does not narrowly dictate the type of case that falls within the program's purview, and the assigning judge is instead tasked to determine whether an action presents "commercial or technological issues of such a complex or novel nature that specialized treatment is likely to improve the administration of justice."<sup>91</sup> The law includes a seven-factor list designed to measure a case in determining its

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86. See *supra* Section II.B.

87. Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147, 191 (2004).

88. Maryland's General Assembly created and mandated a Maryland business and technology task force "to consider the feasibility of establishing a specialized court function within Maryland's circuit courts to adjudicate business and technology disputes" and included in its makeup members of the state's judiciary, legislature, bar association, business community, and academic community. *Id.* at 190-91 (quoting MARYLAND BUSINESS AND TECHNOLOGY TASK FORCE, MARYLAND BUSINESS AND TECHNOLOGY TASK FORCE REPORT 1 (2000)) (internal quotation marks omitted).

89. *Id.* at 191 (quoting Judge Steven I. Platt, Vice Chairman, Business and Technology Task Force, *Remarks on Business and Technology Court Task Force*, at 5 (Nov. 16, 2000)).

90. MARYLAND BUSINESS AND TECHNOLOGY TASK FORCE, *supra* note 76, at 7 ("[For] the same reason it was not practical to establish Family Divisions in all of the circuit courts of this State (*i.e.*, those circuit courts having less than seven (7) judges), it would not be practical to establish 'Business and Technology Divisions' in those same courts.")

91. MD. R. 16-308(c).

suitability for inclusion in the program.<sup>92</sup> In addition, the Maryland State Bar Association has noted that the program's efficacy has been hampered by issues including the non-uniformity in the program as administered in the various circuits, the inconsistency in forms and case management procedures, and a lack of coordination of, and accessibility to, information, opinions and resources.<sup>93</sup>

The case management program has taken measures to provide transparency and promote its role in Maryland's business law landscape, listing information and resources on its website.<sup>94</sup> There is a "consensus among interviewed Judges that there should be required training for new [business and technology] judges and then a secondary training piece consisting of [the] collaboration of all [business and technology] judges on an ongoing basis."<sup>95</sup> However, in building a judicial body with the intention of maintaining and growing Maryland's reputation as the home of REIT formation, the current Business and Technology Case Management Program best serves as a reference point. Its development provides a ready example for the deployment of a new, free-standing REIT program, perhaps modeled after the existing program itself. The benefits from the Court of Chancery's status in the world of corporate law suggest that Maryland needs a REIT-focused body.<sup>96</sup> Whether through a separate court or a REIT-specific case management program integrated into the judiciary, Maryland's rich statutory scheme and case law warrant an apparatus that carries the Maryland REIT law brand.

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92. Factors that the judge may consider in making the determination include: (1) the nature of the relief sought, (2) the number and diverse interests of the parties, (3) the anticipated nature and extent of pretrial discovery and motions, (4) whether the parties agree to waive venue if assignment of the action to the program makes that necessary, (5) the degree of novelty and complexity of the factual, legal, or evidentiary issues presented, (6) whether business or technology issues predominate over other issues presented in the action, and (7) the willingness of the parties to participate in alternative dispute resolution procedures. *Id.*

93. MSBA BUSINESS LAW SECTION AD HOC TASK FORCE, FINAL REPORT AND PROPOSED RECOMMENDATIONS: BUSINESS & TECHNOLOGY CASE MANAGEMENT PROGRAM 1 (2017).

94. *Maryland Business & Technology Case Management Program*, MARYLAND COURTS, <https://www.courts.state.md.us/businesstech> (last visited Dec. 9, 2020).

95. MSBA-UB BUSINESS LAW CLERKSHIP FELLOWS, THE MARYLAND BUSINESS AND TECHNOLOGY CASE MANAGEMENT PROGRAM: EVOLUTION AND CURRENT FUNCTIONING 23 (2016),

[https://cdn.laruta.io/app/uploads/sites/7/legacyFiles/uploadedFiles/MSBA/Member\\_Groups/Sections/Business\\_Law/Evolution%20and%20Current%20Functioning%20Report%20By%20the%20MSBA-UB%20Business%20Law%20Clerkship%20Fellows.pdf](https://cdn.laruta.io/app/uploads/sites/7/legacyFiles/uploadedFiles/MSBA/Member_Groups/Sections/Business_Law/Evolution%20and%20Current%20Functioning%20Report%20By%20the%20MSBA-UB%20Business%20Law%20Clerkship%20Fellows.pdf).

96. *See supra* Section I.C.



### III. CONCLUSION

The development of a REIT-specific judicial body of expertise within the Maryland court system, in the mold of Delaware's Court of Chancery, would bolster the state's reputation and ability to shape this niche area of law. The benefits to Maryland in developing such a judicial body after the Court of Chancery are evident through Delaware's own success and influence in the legal world.<sup>97</sup> Furthermore, the formation of a new judicial machine is not novel to the state and would not necessitate deviation from standard practices.<sup>98</sup> Though the Business and Technology Case Management Program offers a shining example of the General Assembly's powers and ability to facilitate effective judicial expediency and expertise, it alone does not provide the adequate judicial infrastructure necessary.<sup>99</sup>

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97. *See supra* Section II.A.

98. *See supra* Section II.B.

99. *See supra* Section II.C.