Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

ON TRANSINDIVIDUAL SUITS: FROM DERIVATIVE, THROUGH AGGREGATIVE, TO COLLECTIVE LITIGATION[1]

AÇÕES TRANSINDIVIDUAIS: DAS AÇÕES DERIVATIVAS, PASSANDO PELAS AÇÕES AGREGATIVAS, ATÉ OS LITÍGIOS COLETIVOS.

Ángel R. Oquendo[2]

George J. and Helen M. England Professor of Law, University of Connecticut; Ph.D., M.A. (Philosophy), A.B. (Economics and Philosophy), Harvard University; J.D., Yale Law School.

ABSTRACT: Transindividual litigation has revolutionized modern law. It has altered the ad-judication of legal claims to the bone. Beyond their impact on a large number of people, the underlying actions operate in a unique fashion. In particular, they call for the constant protection of the interests of the parties under the plaintiffs' deputization. Not surprisingly, corporate law has partaken in this phenomenon. For instance, derivative suits allow individuals to sue for a larger collectivity, somewhat along the lines of citizen suits from over a century later. Of course, they turn on the assertions of the corporation, rather than those of society as a whole. Likewise, stockholders have deployed class actions on a regular basis. Thereby, they have for the most part aggregated their claims against the corporative entity besides the board of directors. This Article will concentrate on (1) derivation suits alongside (2) shareholder class actions. It will surface a deep divergence underneath a surface resemblance between them. Most significantly, complainants aim at the vindication of a genuinely collective, indivisible right in the former. They exert themselves for the enforcement of an aggregation of individual entitlements upon the latter. Consequently, these mechanisms contradistinguish themselves at the core. They differ in several cardinal respects: from their representative mode, onto their objective, through their internal construction of fairness, to their perspective on adequate representation. An appreciation of their dichotomous opposition can contribute to an understanding of the inner workings of each of them. It additionally irradiates the relationship among the internal players: from the corporation itself, onto the directorate, through the investors, to the stakeholders. Upon a grasp of the dichotomy, one gains invaluable insights into group entitlements generally. Moreover, a new interpretation of the key contradistinction, omnipresent in the caselaw, of (1) derivative from (2) direct corporate assertions will become

[1] Artigo recebido em 05/11/2024 e aprovado em 20/12/2024.
[2]The author would like to thank Owen Fiss, Ben. Haldeman, Lauren Kinell, Alexi Lahav, Alan Palmiter, and Claudia Schubert for their invaluable contribution to the development of the ideas of this Article.

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

necessary. Specifically, it will require a focus on the nature of the right at stake.

KEYWORDS: Trans-individual Litigation; Derivative Suits; Shareholder Class Actions; Stakeholders; Corporate Law.

RESUMO: O litígio transindividual revolucionou o direito moderno. Houve alteração profunda das reivindicações adjudicadas. Além do impacto a grande número de pessoas, essas ações operam de forma única. Possuem a particularidade de exigir a proteção constante dos interesses das partes representadas pelos legitimados. Não surpreendentemente, o direito empresarial tomou parte nesse fenômeno. Por exemplo, as ações derivativas permitem que indivíduos processem uma coletividade maior. Naturalmente, voltam-se para os intesses corporativos em vez de se voltar aos da sociedade como um todo. Do mesmo modo, acionistas têm implantado ações coletivas regularmente. Assim, agregam, em grande parte, suas reivindicações contra a corporação e do conselho de diretores. O objetivo deste artigo é analisar (a) ações derivativas juntamente com (2) as ações coletivas de acionistas. Isso revelará divergência profunda sob uma semelhança superficial entre elas. Mais significativamente, os reclamantes visam à reivindicação de um direito genuinamente coletivo e indivisível nas primeiras. Eles se esforçam para a aplicação de uma agregação de direitos individuais. Consequentemente, esses mecanismos se contradizem no cerne. Eles diferem em vários aspectos cardeais: de seu modo representativo, para seu objetivo, através de sua construção interna de justiça, para sua perspectiva sobre representação adequada. A apreciação de sua oposição dicotômica pode contribuir para uma compreensão do funcionamento interno de cada um deles. Adicionalmente, irradia o relacionamento entre os participantes internos: da própria corporação, através da diretoria, e por meio dos investidores, além dos *stakeholders*. Ao compreender a dicotomia, ganham-se insights inestimáveis sobre direitos de grupo em geral. Além disso, uma nova interpretação do ponto-chave, onipresente nas situações concretas, entre as pretensões societárias (1) derivativas e as (2) diretas, torna-se necessária. Especificamente, exige seja considerada a natureza do direito em jogo.

PALAVRAS-CHAVE: Litígios Transindividuais. Ações Derivativas. Ações Coletivas de Acionistas. Stakeholders. Direito Empresarial.

INTRODUCTION

Transindividual litigation has revolutionized modern law. It has altered the adjudication of legal claims to the bone. Beyond their impact on a large number of people, the underlying actions operate in a unique fashion. In particular, they call for the constant protection of the interests of the parties under the plaintiffs' deputization.

Not surprisingly, corporate law has partaken in this phenomenon. For instance, derivative suits allow individuals to sue for a larger collectivity,

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

somewhat along the lines of citizen suits from over a century later. Of course, they turn on the assertions of the corporation, rather than those of society as a whole. Likewise, stockholders have deployed class actions on a regular basis. Thereby, they have for the most part aggregated their claims against the corporative entity besides the board of directors.

This Article will concentrate on (1) derivation suits alongside (2) shareholder class actions. It will surface a deep divergence underneath a surface resemblance between them. Most significantly, complainants aim at the vindication of a genuinely collective, indivisible right in the former. They exert themselves for the enforcement of an aggregation of individual entitlements upon the latter. Consequently, these mechanisms contradistinguish themselves at the core. They differ in several cardinal respects: from their representative mode, onto their objective, through their internal construction of fairness, to their perspective on adequate representation.

An appreciation of their dichotomous opposition can contribute to an understanding of the inner workings of each of them. It additionally irradiates the relationship among the internal players: from the corporation itself, onto the directorate, through the investors, to the stakeholders. Upon a grasp of the dichotomy, one gains invaluable insights into group entitlements generally. Moreover, a new interpretation of the key contradistinction, omnipresent in the caselaw, of (1) derivative from (2) direct corporate assertions will become necessary. Specifically, it will require a focus on the nature of the right at stake along the delineation below.[3]

A conventional view of the two procedural instruments at issue will unroll anon.[4] It will spotlight a seeming coincidence between them in their essence, atop a difference in their technical detail. In the next partial subdivision,[5] an alternative conception of them will emerge. It will punctuate a deep deviation between them despite their superficial overlap. The terminal segments will build on this punctuation.[6] They will, in turn, recast the demarcation of derivative from direct claims and re-conceptualize collective rights.

1. A CONVENTIONAL VIEW

On first impression, one might view derivative suits and shareholder class actions as essentially similar. In particular, one might regard them as collective procedures that serve to vindicate the joint rights of stockholders. Accordingly, both devices allow one or several corporate investors to litigate in the name of the collectivity.

Someone taking this approach might maintain that these two types of litigation seek to correct managerial failure. She might add that the judge must simply resolve a dispute as to whether the managers indeed failed to safeguard the entitlements of the shareholders. Thus construed, these adjectival mechanisms resemble each

[3] *See* Part IV *infra*.
[4] *See* Part II *infra*.
[5] *See* Part III *infra*.
[6] *See* Parts IV & V *infra*.

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

other not only in how they operate but also in what they pursue.

From this outlook, suits that unfold derivatively and stockholder class actions enable, along parallel lines, an extraordinary alteration in the *status quo* to take place. Specifically, they empower a single investor to displace the directorate as the speaker for shareholders as a group, whether conceived as the corporation itself or as a self-standing class. Ordinarily, the board holds the prerogative to speak for the corporative entity and to care for the investors' economic well-being.

The relevant procedural parameters tend to reinforce this standpoint. For example, Federal Rule 23.1 of Civil Procedure authorizes "one or more shareholders . . . to bring a derivative action to enforce a right" of "the corporation."[7] It explicitly requires that the plaintiffs "fairly and adequately represent the interests of shareholders . . . who are similarly situated."[8] Rule 23, in turn, entitles "[o]ne or more members of a class," including a stockholder class, to "sue . . . on behalf of all members."[9] It expressly demands that "the representative parties . . . fairly and adequately protect the interests of the class."[10]

Of course, Rule 23.1 zeroes in on the entitlements of the corporation and Rule 23, in the context of corporate law, on those of the individual investors. Nonetheless, both provisions suggest that the nominal claimants act in representation of the interests of the stockholders. This convergence should not come as a surprise because, in a sense, a corporation possesses no interests of its own other than those of its investors.

Consistently, the two rules overlap in compelling the complainant to secure judicial endorsement prior to settling, voluntarily dismissing, or compromising the claim.[11] Thus, they evidently aim to assure the rights of other, absent stockholders. In fact, the suitor in a derivation suit must transmit "[n]otice of [the] proposed settlement, voluntary dismissal or compromise . . . to shareholders . . . in the manner that the court orders."[12] Likewise, the representatives in a class action must send "notice in a reasonable manner to all class members who would be bound by the proposal."[13]

While premised on the overall coincidence of the two kinds of litigation, the position under consideration could readily recognize certain undeniable "technical" dissimilarities. For instance, different regulatory provisions govern each of these procedures: in a federal tribunal. Rule 23.1 applies to derivatively filed suits and Rule 23 controls class actions. While these provisions overlap on the points just discussed, they differ in many of their details.

[7] Fed. R. Civ. P. 23.1(a).
[8] *Id*. According to the Advisory Committee, this "sentence recognizes that the question of adequacy of representation may arise when the plaintiff is one of a group of shareholders or members." Fed. R. Civ. P. 23.1 advisory committee's note (1966 Amendment).
[9] Fed. R. Civ. P. 23(a).
[10] Fed. R. Civ. P. 23(a)(4).
[11] Fed. R. Civ. P. 23.1(c); Fed. R. Civ. P. 23(e).
[12] Fed. R. Civ. P. 23.1(c).
[13] Fed. R. Civ. P. 23(e)(1).

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

In particular, the pleading requirements vary. In derivation suits, for example, suitors must verify the complaint. [14] In stockholder class actions, in contrast, they need not do so.[15] Litigants launching the latter type of process must "provide a sworn certification" declaring, *inter alia*, that they "reviewed" the filing, that they did not "purchase" their stock "at the direction of" their attorney or for purposes of litigation, and that they will not collect any compensation for their services.[16] They must additionally state whether they have recently lodged any other class suits. [17] Finally, a shareholding plaintiff who initiates a derivative as opposed to a class complaint must submit specific statements as to share ownership,[18] as to the absence of "collusive" intent, [19] and as to "any effort to obtain the desired action from the directors."[20]

The case law has interpreted this last pre-requisite to mean that claimants in a derivatively conducted suit—but not in a stockholder class action—must first "exhaust[] . . . intracorporate remedies."[21] In other words, they must request the directorial board to prosecute the assertion, unless they show the futility of any such demand in light of the body's conflict of interest.[22] With such a request, the complainant constructively concedes the directors' "independence"[23] and may proceed only if she demonstrates a "wrongful refusal."[24]

The judiciary has thus pushed derivative suits away from the notice-pleading model that prevails in a class action and in litigation as a whole.[25] It

[14] Fed. R. Civ. P. 23.1(b) ("The complaint must be verified . . . .").
[15] *See* Fed. R. Civ. P. 11(a) ("Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit.").
[16] 15 U.S.C. §77z-1(a)(2) (2006) (Private Securities Litigation Reform Act).
[17] *Id*.
[18] Fed. R. Civ. P. 23.1(b)(1). *See also* Del. Ct. Ch. R. 23.1(a); Del. Code Ann. tit. 8, § 327 (West 2011).
[19] Fed. R. Civ. P. 23.1(b)(2).
[20] Fed. R. Civ. P. 23.1(b)(3) *See also* Del. Ct. Ch. R. 23.1(a)
[21] Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).
[22] Beam v. Stewart, 845 A.2d 1040, 1048 (Del. 2004) (A "stockholder may not pursue a derivative suit to assert a claim of the corporation unless: (a) she has first demanded that the directors pursue the corporate claim and they have wrongfully refused to do so; or (b) such demand is excused because the directors are deemed incapable of making an impartial decision regarding the pursuit of the litigation.").
[23] Levine v. Smith, 591 A.2d 194, 212 (Del. 1991), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).
[24] *Id*. at 200.
[25] *See id*. at 210 ("Rule 23.1 is an exception to the general notice pleading standard of the Rules."); *see also* Brehm v. Eisner, 746 A.2d 244, 254 (Del. 2000) ("Pleadings in derivative suits are governed by Chancery Rule 23.1 . . . . Those pleadings must comply with stringent requirements of factual particularity that differ substantially from the permissive notice pleadings governed solely by Chancery Rule 8(a). Rule 23.1 is not satisfied by conclusory statements or mere notice pleading."). *Cf.* Fed. R. Civ. P. 8(a)(2) ("A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief."). "The liberal notice pleading of Rule 8(a)," according to the United States Supreme Court, "is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim." Swierkiewicz v. Sorema N.A., 534 U.S.

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

has basically forbidden a suitor derivatively to institute a complaint that merely notifies the defendants about her contentions and to build her claim through discovery.[26] She must, in effect, either make her case upfront or else face an early motion to dismiss. Specifically, such stockholding litigants "must allege with particularity facts raising a reasonable doubt that the corporate action being questioned was properly the product of business judgment."[27]

In contrast, a plaintiff in a class action and any other non-derivative suit does not have to present "detailed factual allegations."[28] She must plead, at least in a federal forum, "factual content that allows the court to draw the reasonable inference" of liability. [29] Certainly, this requirement considerably thickens the "notice" that the defending parties must receive. It does not imply, however, that the claimant must factually allege the "with particularity."

More generally, derivation suits diverge from class actions, according to Delaware's highest tribunal, with respect to both the locus of the injury and the beneficiary of the redress. [30] As previously pointed out, derivative suits stake a corporative rather than a shareholder assertion. Therefore, they involve harm to and relief for the corporation, in the first instance. [31] Naturally, the damage and the reparation indirectly and ultimately concern the investors as the residual owners. Shareholder direct complaints, for their part, concentrate from the outset on exposing injuries to and gaining damages for the stockholders.[32]

2. AN ALTERNATIVE VIEW

506, 514 (2002). "Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard." *Id*. at 513. "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id*. at 512.

[26] *See, e.g.*, Levine v. Smith, 591 A.2d 194, 211 (Del. 1991) (explaining that allowing a plaintiff whose complaint does not contain particularized allegations to conduce discovery "would be a complete abrogation of the principles underlying the pleading requirements of Rule 23.1.").

[27] Brehm v. Eisner, 746 A.2d 244, 254-255 (Del. 2000).

[28] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In *Ashcroft v. Iqbal*, the U.S. Supreme Court held that "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.*, 550 U.S. at 555).

[29] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The claim must have "facial plausibility," in the sense that "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*.

[30] Derivative suits differ not only from shareholder class actions but also from direct actions, in general, as far as "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually." Tooley v Donaldson, Lufkin & Jenrette, Inc., 845 A2d 1031, 1033 (Del. 2004). *See also* Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1264-1265 (Del. 2012).

[31] *See* Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000). ("The derivative action . . . is a suit by the corporation, asserted by the shareholders on its behalf, against those liable to it.").

[32] *See generally infra*, Part IV.

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

Against the conventional view just delineated, an alternative conception suggests itself. In fact, it leads to a diametrically opposed approach. From this standpoint, as argued in this Part, derivative suits and shareholder class actions converge superficially but diverge more profoundly.

On the surface, both procedures unfold collectively. Actually, they operate trans-individually, insofar as they do not concern an individual but, instead, a larger group. [33] Hence, derivation suits deal with the entitlements of the corporation, not of the complainant. Likewise, stockholder class actions relate to the rights of all included investors, not merely to those of the suitor.

Secondly, the two types of litigation involve representation. The nominal plaintiffs generally proceed on the entitlements of others. In particular, they stand in for the corporation in derivative suits and for a large number of corporate shareholders in stockholder class actions.[34]

Thirdly, both procedural mechanisms ostensibly aim at the instrumental objective of resolving a dispute between investors and directors. [35] They also overlap in their reflexive or intrinsic aim, which consists in allowing the former and the latter to interact throughout the proceedings in terms of fairness. [36] Of course, the litigation itself usually becomes an important part of the relationship between these actors.

Finally, the two procedural devices confront the same primary challenge: they must insure representative adequacy. The plaintiffs must clearly and consistently show that they are adequately representing the relevant collectivity—whether the corporative organization or the class of stockholders.[37]

Despite resembling each other from a superficial perspective, these procedures differ at a more fundamental level. In reality, the referenced points of apparent convergence reveal themselves as points of divergence upon deeper inspection. As the United States Supreme Court declared in its 1881

[33] *See supra* notes 2, 3, 4 and accompanying text.
[34] *See supra* notes 1, 3, 25 and accompanying text.
[35] *See* Fed. R. Civ. P. 23.1(a) ("This rule applies when one or more shareholders or members of a corporation . . . bring a derivative action to enforce a right that the corporation . . . may properly assert but has failed to enforce."); Fed. R. Civ. P. 23 advisory committee's note (1966 Amendment) ("[A]ctions by shareholders to compel the declaration of a dividend[,] the proper recognition and handling of redemption or pre-emption rights, or the like . . . should ordinarily be conducted as class actions.").
[36] *See* Ángel R. Oquendo, *The Comparative and the Critical Perspective in International Agreements*, 15 UCLA Pac. Basin L.J. 205, 208 (1997) ("[Contrary to an] exclusively instrumental view, according to which procedure is taken to serve particular ends, . . . a reflexive conception . . . regards procedure as having intrinsic value. The value of procedure [is] thus . . . a function of not only the objectives advanced but also the internal constitution of procedure–*e.g.*, how it processes the arguments made, how it treats the various actors, what kind of power relations it supports.").
[37] *See supra* notes 1, 2, 4 and accompanying text.

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

opinion in *Hawes v. Oakland*, [38] a derivation suit "is a very different affair from a controversy between the shareholder of a corporation and that corporation itself, or its managing directors or trustees, or the other shareholders, who may be violating his rights or destroying the property in which he has an interest."[39] The disparity does not disappear when many investors, rather than one, file the complaint against the corporate entity or board members.

A. Collective Litigation

First, although the two types of litigation do indeed proceed collectively, they do so quite dissimilarly. Derivative suits are truly collective because they involve a collectivity, namely, the corporation, as the genuinely interested party, as well as its rights.[40] In contrast, shareholder class actions aggregate numerous individual assertions. Consequently, they concern individuals and unfold on a group basis only because they affect the entitlements of an aggregation of parties, instead of those of a single person, whether natural or juridical.[41] "In law," the United States Supreme Court has proclaimed, "the corporation and the aggregate members of the corporation are not the same thing . . . ."[42]

Granted, the corporative structure has no life of its own. Its concerns often boil down to those of the investors, who residually and ultimately own the company. Apparently, a complaint on behalf of the corporation does not deviate much from a complaint in the name of all of the stockholders.

Nonetheless, the corporate business normally also embodies the interests of many stakeholders, such as its creditors, its employees, its suppliers, and the communities in which it operates. [43] Ideally, a derivation suit should take into account these "other"

[38] 104 U.S. 450 (1881), *abrogated by* Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90 (1991).
[39] *Id*. at 454 (1881).
[40] *See* Zapata Corp. v. Maldonado, 430 A.2d 779, 784 (Del. 1981) ("Derivative suits enforce corporate rights and any recovery obtained goes to the corporation.").
[41] Some commentators have proposed treating the class as an entity for practical reasons. For instance, Edward Cooper contends that such doing so "may help to sharpen the focus on class-as-client, speaking through one set of agents to another." Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 16. (1996). He maintains that this approach would additionally enable courts to decide, in a more clearheaded fashion, issues of "mootness," counsel conflict of interest, "jurisdiction," "due process," "choice of law," "adequacy of settlement," "preclusion." *Id*. 28-29. *See also* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 Notre Dame L. Rev. 913, 917 (1998) (arguing that the class action "should be viewed as not involving the claimants as a number of individuals, or even as an 'aggregation' of individuals, but rather as an entity in itself for the critical purposes of determining the nature of the lawsuit").
[42] *Hawes*, 104 U.S. at 455 (quoting Foss v. Harbottle, [1843] 2 Hare, 461).
[43] *See, e.g.*, 15 Pa. Cons. Stat. Ann. § 1715 (a)(1) (West 2013) ("[The directors] may . . . consider [t]he effects of any action upon any or all groups affected by such action, including shareholders, employees, suppliers, customers and creditors of the corporation, and upon communities in which offices or other establishments of the corporation are located."); *Conn. Gen. Stat.* § 33-756(d) (3)-(4) (2012) ("[A] director of a corporation . . . may consider . . . the interests of

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

constituencies. [44] Even a close corporation in which the stockholders play most or all of these stakeholder roles does not merely amount to the totality of its investors. It possesses an independent juridical persona, bears liability to the extent of its own assets, and holds its own set of rights.

In these respects, an incorporated enterprise differs from a traditional partnership. Contrary to the former, the latter legally adds up to nothing but the sum of its members.[45] It has no legal personality, property, or entitlements of its own, as opposed to those of its partners.[46] As a result, suits for the benefit of such an association and of the various associates essentially overlap with each other.[47]

Certainly, a traditionally founded partnership does come across as a collectivity, despite lacking official acknowledgment as such. It resembles a corporation in that it seems to enjoy not solely an identity apart from that of its members but additionally its own rights. Not surprisingly, the law has progressed toward conceiving partnerships in these terms.[48]

In any event, an incorporated organization, like a modern partnership, constitutes an entity apart from the persons that form and fund it. It amounts to a distinct group, composed of

---

the corporation's employees, customers, creditors and suppliers, [as well as] community and societal considerations including those of any community in which any office or other facility of the corporation is located."). *See also* Revlon, Inc. v. Macandrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) ("A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) ("[The] directors [must analyze] the nature of the takeover bid and its effect on the corporate enterprise. Examples of such concerns may include: . . . the impact on "constituencies" other than shareholders (*i.e.*, creditors, customers, employees, and perhaps even the community generally) . . . .").

[44] Since a plaintiff in a derivative suit stands in for the directors, she should inherit their authority or obligation to consider these stakeholders. *See supra* note 37 and accompanying text.

[45] *See* Grand Grove of United Ancient Order of Druids v. Garibaldi Grove 130 Cal. 116, 119, 62 P. 486 (1900) ("[Unincorporated associations are not] recognized by the law as persons. They are mere aggregates of individuals called for convenience, like partnerships, by a common name.").

[46] *See id*. ("[Such] associations cannot, therefore, acquire or hold property . . . . All the property said to belong to it is in fact the property of its members and each man's share of it is his own private property.").

[47] *See id*. ("For the same reason such associations cannot sue or be sued. In suits where they are apparently parties, the real parties are the members of the association, who—as in the case of partnerships—are sued by the company name.").

[48] *See* Unif. P'ship Act § 6(1) (1914) ("A partnership is an association of two or more persons to carry on as co-owners a business for profit."), *id*., § 8(1) ("All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property."); *id*., § 8(2) ("Unless the contrary intention appears, property acquired with partnership funds is partnership property."); Unif. P'ship Act § 101(6) (1997) ("'Partnership' means an association of two or more persons to carry on as co-owners a business for profit . . . . "), *id*., § 201(a) ("A partnership is an entity distinct from its partners."), *id*., § 203 ("Property acquired by a partnership is property of the partnership and not of the partners individually.").

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

investors and dressed in corporative form. Whether bare or attired as a corporation, this collective body distinguishes itself from the aggregation of its constituents.

Sometimes class actions function as suits in representation of a collectivity, not of a conglomeration of individuals. They do so particularly under Federal Rule of Civil Procedure 23(b)(2), when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." [49] For example, a school desegregation suit normally aims to realize the entitlements of the excluded race or ethnicity, not those of the various students.[50]

To be sure, a shareholder class ordinarily lacks the cohesiveness and the permanence of a racial or ethnic class. Accordingly, the former rarely amounts to a collective in the same sense as the latter. Moreover, even in a shareholder class action for equitable satisfaction under Rule 23(b)(2), the stockholders do not usually litigate as a cohesive group, but instead as a host of people with separate and interrelated claims.[51]

Still, a 23(b)(2) shareholder class action could pursue an injunction against corporate measures that injure stockholders jointly rather than individually. For instance, it might allege that the board arbitrarily revoked a long-established written commitment to distribute dividends regularly to all investors. Such a suit calls to mind the previously cited controversy over discrimination in education in that it would bear upon a particular community as the real party in interest. Class members could not point to an entitlement that they possessed, to an injury that they had endured, or to a remedy that they could request, independent of and severable from those of their peers.

These specific shareholder-class-actions operate collectively somewhat along the lines of derivatively instituted suits. They also stake an assertion that pertains to stockholders as a group. Nevertheless, the interested party is the investor collectivity in its naked state, so to speak, rather than in the garb of a corporation.

All the same, shareholder class actions typically fall under Rules 23(b)(1) or 23(b)(3), not Rule 23(b)(2).[52] On the one hand, they may launch in cases in which, as expressed in Rule 23(b)(1),

[49] Fed. R. Civ. P. 23(b)(2).

[50] *See* Fed. R. Civ. P. 23 advisory committee's note (1966 Amendment) (Subdivision (b)(2)) ("Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.")

[51] *See, e.g.*, *In re Celera Corp. Shareholder Litigation*, 59 A.3d 418, 433 (Del. 2012) (In a suit on behalf of a large number of stockholders, "certification under Rule 23(b)(2) is appropriate when the rights and interests of the class members are homogeneous. A Rule 23(b)(2) class may seek monetary damages in addition to declaratory or injunctive relief, so long as the claim for equitable relief predominants [*sic*].").

[52] For purposes of this article, Lauren Kinell conducted a survey on Westlaw of United States District Court decisions certifying shareholder class actions for a twelve-month period starting on June 2, 2012. She found that certification

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

"prosecuting separate actions . . . would create a risk of: (A) . . . incompatible standards of conduct for the party opposing the class; or (B) adjudications . . . that, as a practical matter, would . . . impair [the] ability [of other claimants] to protect their interests." [53] On the other hand, shareholder class actions may address situations in which, as phrased in Rule 23(b)(3), "questions of law or fact common to class members predominate over any questions affecting only individual members . . . and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[54]

The Advisory Committee on the key 1966 Amendments to Rule 23 mentioned the possibility of processing "actions by shareholders to compel the declaration of a dividend[,] the proper recognition and handling of redemption or pre-emption rights, or the like" under Rule 23(b)(1)(B). [55] It further cautioned that "the matter has been much obscured by the insistence that each shareholder has an individual claim." [56] Presumably, these suits could rest on Rule 23(b)(2), as maintained earlier. Significantly, the advisors distinguished such "shareholders' actions . . . from derivative actions by shareholders dealt with in . . . Rule 23.1."[57]

Beyond the scenarios discussed in the previous paragraph, shareholder class actions mostly call for certification under the catch-all Rule 23(b)(3).[58] After all, they combine a multiplicity of discrete assertions. The judiciary could adjudicate the case satisfactorily

always took place either under 23(b)(1) or 23(b)(3). *See* Erica P. John Fund, Inc. v. Halliburton Co., 718 F.3d 423, 427 (5th Cir. Apr. 30, 2013) (certifying a class of shareholders under Rule 23(b)(3)); Davis v. Cent. Vermont Pub. Serv. Corp., No. 5:11-CV-181, 2012 WL 4471226, at 6-7 (D. Vt. Sept. 27, 2012) (certifying class of shareholders under Rule 23(b)(1)); *In re* Winstar Commc'ns Sec. Litig., No. 01 CIV. 3014, 2013 WL 1700993, at *3 (S.D.N.Y. Apr. 17, 2013) (certifying a class of shareholders under Rule 23(b)(3)); *In re* Smith Barney Transfer Agent Litig., 290 F.R.D. 42, 45 (S.D.N.Y. Mar. 21, 2013) (certifying a class of shareholders under Rule 23(b)(3)); *In re* Merck & Co., Inc. Sec., Derivative & ERISA Litig., Nos. 05-1151 & 05-2367, 2013 WL 396117, at *1 (D.N.J. Jan. 30, 2013) (certifying a class of shareholders under Rule 23(b)(3)); *In re* Smart Techs, Inc. S'holder Litig., No. 11 CIV. 7673 KBF, 2013 WL 139559, at *1 (S.D.N.Y. Jan. 11, 2013) (certifying a class of shareholders under Rule 23(b)(3)); Katz v. China Century Dragon Media, Inc., 287 F.R.D. 575, 583 (C.D. Cal. 2012) (certifying a class of shareholders under Rule 23(b)(3)); Vinh Nguyen v. Radient Pharmaceuticals Corp., 287 F.R.D. 563, 575 (C.D. Cal. 2012) (certifying a class of shareholders under Rule 23(b)(3)); *In re* Schering-Plough Corp./ENHANCE Sec. Litig., No. 8-397, 2012 WL 4482032, at *7 (D.N.J. Sept. 25, 2012) (certifying a class of shareholders under Rule 23(b)(3)).

[53] Fed. R. Civ. P. 23(b)(1).

[54] Fed. R. Civ. P. 23(b)(3).

[55] Fed. R. Civ. P. 23 advisory committee's note (1966 Amendment) (discussing Subdivision (b)(1); Clause (B)).

[56] *Id*.

[57] Fed. R. Civ. P. 23 advisory committee's note (1966 Amendment) (Subdivision (b)(1); Clause (B)).

[58] *See* Joseph A. Grundfest & Michael A. Perino, *The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litigation*, 38 Ariz. L. Rev. 559, 564 n. 22 (1996) ("Shareholder class actions are most often certified under Rule 23(b)(3) . . . ."). In Lauren Kinell's survey, undertaken for the benefit of this Article, class certification took place under Rule 23(b)(3) in eight out of nine United States District Court cases during a twelve-month period starting on June 2, 2012. *See supra* note 46.

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

through "separate actions;"[59] yet it could do so more effectively through a single class action.

In sum, plaintiffs in these and in most other shareholder class actions do not engage in collective litigation in the manner of their counterparts in derivation suits. The latter seek to vindicate the rights of a true collectivity, to wit, the corporative concern. The former, for their part, purport to enforce the personal entitlements of numerous investors in one swoop.

Derivatively run suits relate to shareholder class actions, in this regard, as citizen suits to ordinary class actions. In derivative and citizen suits, the respective real party in interest is a coherent group: the corporation and society as a whole. In shareholder- and standard-class-actions, the interested parties are actually the affected persons.

As an illustration, someone may litigate for the profit of the community at large against a pharmaceutical conglomerate that is allegedly contaminating the air and, hence, the communal quality of life. She may alternatively sue the same defendant in her own name and that of the many others whose homes have similarly depreciated due to the pervasive pollution. The first litigation would recall a derivation suit in that it focuses on the indivisible entitlements of a collectivity. The second would bear a resemblance to a shareholder class action in that it turns on the discrete rights of a mass of persons.

Of course, social and corporate formations ultimately consist of their citizenry and stockholders, respectively. Furthermore, one could assess the value of any asset or any entitlement of either of these collectivities, divide it by the number of constituents, and thus translate any joint claim on it into an assortment of discrete assertions. Nonetheless, such a complex operation would underscore, rather than cast doubt upon, the significance of the distinction between the collective and the individual. In reality, it would lend some support to the notions that people come to exercise unprecedented and only artificially translatable group-rights when they build a nation and that investors position themselves analogously when they incorporate their undertaking.

B. The Nature Of The Representation

The second superficial point of similarity between derivative suits and shareholder class actions—their representative character—also exposes itself as a point of dissimilarity upon deeper inspection. In particular, these two procedural mechanisms differ in the kind of representation they entail. In derivation suits, the claimants speak for a party other than themselves and to which they relate as investors.[60] In shareholder class actions, they litigate for themselves and for other, comparably concerned stockholders.[61]

Federal Rule of Civil Procedure 23.1 might generate some confusion on

[59] Fed. R. Civ. P. 23(b)(3)(A).
[60] *See supra* note 1 and accompanying text.
[61] *See supra* note 3 and accompanying text.

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

this front. It asserts: "The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association." [62] This provision insinuates, incorrectly, that the complainant, in derivatively prosecuted suits as well as in class actions, acts as the proxy of other, equally entitled investors.

The history of derivation suits may help explain this requirement of adequate representativeness *vis-à-vis* parallelly positioned investors.

> *Historically, the derivative suit was conceived of as a double suit, or two suits in one: The plaintiff (1) brought a suit in equity against the corporation seeking an order compelling it (2) to bring a suit for damages or other relief against some third person who had caused legal injury to the corporation.*[63]

In the first action, the complainant proceeded for herself and other stockholders in an attempt to constrain the company to take action. She therefore had to perform her deputized function properly with respect to her fellow investors. In the second procedure, the actual derivation suit, the suitor stepped into the shoes of the corporate enterprise and assumed no specific duties in relation to other stockholders.

Presently, the two actions seem to unfold more tightly together as one. According to the Delaware Supreme Court, however, a derivative suit still consists of two components: "the stockholder's suit to compel the corporation to sue and the corporation's suit." [64] In other words, "[t]he nature of the action is two-fold. First, it is the equivalent of a suit by the shareholders to compel the corporation to sue. Second, it is a suit by the corporation, asserted by the shareholders on its behalf, against those liable to it." [65] Consequently, the claimant stands in, on the one hand, for all of her fellow investors in demanding litigation and, on the other hand, for the incorporated organization in vindicating its entitlements.

In the initial stage, the complainant lodges her complaint in the name of stockholders as a group, not of discrete investors. She plays a role analogous to that of someone who launches a 23(b)(2) class action for an injunction against segregation in elementary schools. In both scenarios, the collectivity holds the right, not its members individually. Requiring that derivative suitors "fairly and adequately

[62] Fed. R. Civ. P. 23.1(a).
[63] Robert Charles Clark, Corporate Law 639-40 (1986).
[64] Zapata Corp. v. Maldonado, 430 A.2d 779, 784 (Del. 1981).
[65] Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000). *See also* Harff v. Kerkorian, 324 A.2d 215, 218 (Del. Ch.1974) ("The nature of the derivative suit is twofold: first, it is the equivalent of a suit by the stockholders to compel the corporation to sue; and second, it is a suit by the corporation, asserted by the stockholders in its behalf, against those liable to it.").

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

represent the interests of shareholders . . . who are similarly situated"[66] may blur but does not actually alter this fact. The federal regulatory provision on class actions speaks more clearly of fair and adequate representation of "the interests of the class."[67]

In truth, the opening phase amounts to a genuinely collective class action, like many of those processed under Rule 23(b)(2). Hence, the claimants appear for themselves and other stockholders, not as an aggregation of individuals, but instead as a cohesive community. They posit a claim that belongs to the group as a whole and that allows no apportionment among the various investors.

Once again, citizen suits and ordinary class actions may serve to illustrate the divergence at issue in this subsection. The former, like derivation suits, empower a complainant to substitute herself for a separate entity, which counts her as one of its many constituents. The latter, like stockholder class actions, involve a suitor who acts as a spokesperson for a multiplicity of interested individual class-members, as well as herself.

Accordingly, the plaintiff in the environmental citizen suit evoked earlier undertakes the representation of the society in its entirety. She does not really represent her likewise affected peers among the citizenry or, rather, represents them only as a collectivity. In contrast, the claimant in the parallel class action does file for the benefit of the landowners whose property, like hers, lost value due to the pollution.

C. Instrumental And Reflexive Procedural Aims

Regarding the third point of comparison, namely the underlying aim, derivative suits differ from shareholder class actions in that they instrumentally pursue, beyond the settlement of a dispute between stockholders and directors, the structural reform of the corporation.[68] In particular, they seek to alter the power structure in order to grant investors more of a say in corporate decision-making, at least with respect to the derivatively asserted claims.[69] More generally, the introduction of the derivative procedure constitutes a considerable shift of control from the directorate back to the stockholders.

[66] Fed. R. Civ. P. 23.1.
[67] Fed. R. Civ. P. 23(a)(4).
[68] *See, e.g.,* Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 Wm. & Mary L. Rev. 1749, 1754 (2010) ((explaining that derivative suits more often lead to "reform [in] corporate governance practices" through settlement rather than to "meaningful financial benefit" to the corporation).
[69] *See* Bryant G. Garth *et al.*, *Empirical Research and the Shareholder Derivative Suit: Toward a Better-Informed Debate*, 48 Law & Contemp. Probs. 137, 158 (1985) ("[In derivative suits, the] real question is about controlling economic power. [Therefore], the derivative suit represents a complex social institution that helps regulate power conflicts."). *See also* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 548 (1949) ("This remedy born of stockholder helplessness was long the chief regulator of corporate management and has afforded no small incentive to avoid at least grosser forms of betrayal of stockholders' interests. It is argued, and not without reason, that without it there would be little practical check on such abuses.").

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

In this sense, derivation suits tend not only to distance themselves from shareholder class actions but also to come closer to public-law litigation.[70] For instance, they focus on creating a completely new state of affairs rather than on reestablishing the *status quo ante*.[71] Upon a favorable ruling, the stockholders as a collectivity end up themselves making the contested decision to sue and augmenting their influence within the corporation.

Furthermore, derivatively prosecuted suits, like public-law litigation and as opposed to shareholder class actions, mostly aim at structurally injunctive, as well as compensatory, satisfaction.[72] Beyond merely procuring any unclaimed reparation., they purport to compel the corporative organization to stake the assertion at issue.[73] As previously suggested, stockholder class actions may indeed pray for an equitable remedy; yet they normally do not call for significant interference in the board's exercise of authority.

Finally, judges usually become more profoundly engaged in derivative and public-law suits than in shareholder class actions. They must go beyond protecting the interests of absent class members in order to do justice to the investors as a group and to the corporation itself. In a derivation suit, the ultimate judgment must strike a delicate balance among the interests of investors, directors, and stakeholders.[74] In an ordinary shareholder-class-action, however, the adjudicator must simply assess whether the corporate enterprise has encroached upon the shareholders' entitlements and how best to distribute the compensation in case of liability.[75]

---

[70] *See generally* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976) (explaining the necessity of judicial involvement in public-law litigation in an increasingly regulated society); Owen M. Fiss, *The Political Theory of the Class Action*, 53 Wash. & Lee L. Rev. 21 (1996) (explaining that civil class actions can serve a public as well as a private purpose); Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 L. & Hum. Behav. 121 (1982) (discussing the role of adjudication in enforcing constitutional values).

[71] *See* Erickson, *supra* note 67, at 1754.

[72] *See, e.g.*, Emerald Partners v. Berlin, 787 A.2d 85, 88 (Del. 2001) ("[Plaintiff] filed . . . [the] action . . . to enjoin the consummation of a merger."); MCA, Inc. v. Matsushita Elec. Indus. Co., Ltd., 785 A.2d 625, 629 (Del. 2001) ("[P]laintiffs . . . filed an amended complaint seeking preliminary injunctive relief against consummation of the Tender Offer."). *See also* Stephen P. Ferris *et al.*, *Derivative Lawsuits as a Corporate Governance Mechanism: Empirical Evidence on Board Changes Surrounding Filings*, 42 J. Fin. & Quantitative Analysis 143, 146 (2007) ("The derivative lawsuit might serve its purpose by publicizing the firm's agency problems, thus leading the firm to institute governance changes not directly captured in the litigation process.").

[73] *See* Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000); Zapata Corp. v. Maldonado, 430 A.2d 779, 784 (Del. 1981).

[74] *See Zapata*, 430 A.2d at 788 (quoting Maldonado v. Flynn, 485 F. Supp. 274, 285 (1980)) ("[W]e recognize that 'the final substantive judgment whether a particular [derivative] lawsuit should be maintained requires a balance of many factors—ethical, commercial, promotional, public relations, employee relations, fiscal as well as legal.'").

[75] Rule 23 of the Federal Rules of Civil Procedure "provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class . . . and refers to the measures which can be taken to assure the fair conduct of these actions." Fed. R. Civ. P. 23 advisory committee's

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

Of course, derivatively filed suits and stockholder class actions equally entail complex litigation. Therefore, they both demand substantial judicial engagement, which the law defines in almost identical terms. On the one hand, the "court has inherent power to provide for the conduct of the proceedings in a derivative action, including the power to determine the course of the proceedings and require that any appropriate notice be given to shareholders or members."[76] On the other hand, in "conducting [a class] action, the court may issue orders that (A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument [or that] (B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members . . . ."[77]

Nonetheless, derivation suits distinguish themselves from stockholder class actions in that they saddle the tribunal with a qualitative, instead of quantitative, challenge. Specifically, they call on the judge to adjudicate a qualitatively extraordinary claim, not to entertain a sizeable quantity of standard assertions at once. She must rule, extraordinarily, on the appropriateness of allowing the complainants to displace the directorial board, as well as, rather ordinarily, on whether the corporation should prevail on the merits. In each one of her determinations along the way, she must draw on the entire procedural apparatus at her disposal in order to consider the perspectives of the plaintiffs, investors, the managers, the experts, and the stakeholders and ultimately to promote the company's well-being. In fact, the directors may at any point and repeatedly prior to trial present an independent-committee finding that the litigation no longer serves the interests of the corporative entity and move for dismissal.[78]

This whole discussion suggests that the two mechanisms deviate from each other in their reflexive, as well as instrumental, objective. Derivatively instituted suits, in contradistinction to shareholder class actions, aspire to enable stockholders, not as individuals but as a collective unit, to relate to

note (1966 Amendment). The tribunal must adjudicate on "the claims . . . of the representative parties," as well as on "the claims . . . of the class." Fed. R. Civ. P. 23(a)(3). In addition, it must assure, also in the distribution any damages awarded, a fair and adequate protection of "the interests of the class." Fed. R. Civ. P. 23(a)(4) & (g)(1)(B). *See, e.g.*, Eisen *et al.* v. Carlisle & Jacquelin, 417 U.S. 156, 165-166 (1974) ("[In] a class action on behalf of . . . odd-lot traders on the New York Stock Exchange, . . . the [trial] court dealt with problems of the computation of damages, the mechanics of administering [the] suit as a class action, and the distribution of any eventual recovery.").

[76] Fed. R. Civ. P. 23.1 advisory committee's note (1966 Amendment).
[77] Fed. R. Civ. P. 23 (d)(1)(A, B).
[78] *Zapata Corp.*, 430 A.2d at 788 ("After an objective and thorough investigation of a derivative suit, an independent committee may cause its corporation to file a pretrial motion to dismiss in the Court of Chancery. The basis of the motion is the best interests of the corporation, as determined by the committee. The motion should include a thorough written record of the investigation and its findings and recommendations.").

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

management throughout the process and beyond in fair and rightful terms. Once again, the configuration of this relationship during the litigation will bear upon how these and other groups interact with each other afterward.

D. Representative Adequacy

Regarding the fourth and last comparative angle, the challenge of adequacy of representation manifests itself differently in the context of these two formal devices. In shareholder class actions, the tribunal must uphold the due process rights of absent class members. In derivative suits, it must not solely shield the entitlements of the represented entity but additionally exert its authority to preserve the autonomy of that collectivity.

As previously noted, the corporation, rather than any of the stockholders, constitutes the genuinely interested party in derivatively prosecuted suits. It participates in the proceedings as a defendant and, therefore, does not ordinarily risk a violation of its adjectival rights or a systematic disregard of its point of view. [79] Nonetheless, this type of litigation may entail the displacement or even the sterilization of the directorial board. Hence, it may undermine the investors' collective effort to govern the corporative concern through that deputized body.

Once again, citizen suits and ordinary class actions present a similar contrast. The former, contrary to the latter, do not call for the protection of the entitlements of the constituents of the collectivity. Instead, they necessitate the prevention of any destabilization of the political branches of government.

In the example evoked earlier, the plaintiff does not endanger the substantive rights of any of her fellow citizens by positing the community's environmental claims against the pharmaceutical conglomerate. Even so, she may hamper the authorities' undertakings on the same front. For instance, the state may have already initiated litigation or may have decided to abstain from doing so in light of the defensive party's voluntary exertions to solve the problem.

Similarly, an investor does not impinge upon the entitlements of her peers when she pursues an assertion against one of the corporation's debtors. Nevertheless, she may frustrate endeavors corporately to address the matter. The directorate may have launched a prior, identical complaint or may have refrained from such a course of action in the expectation of achieving some other benefit, perhaps a concession from the supposed violator.

All too often, the judiciary has approached these complications too narrow-mindedly in corporate controversies. It has assumed that

[79] *See, e.g.*, Cannon v. U. S. Acoustics Corp., 398 F. Supp. 209, 213 (E.D. Ill. 1975) ("A derivative suit is, in legal effect, a suit brought by the corporation, but conducted by the shareholders. The corporation [is] formally aligned as a defendant for historical reasons."); Sohland v. Baker, 141 A. 277, 281 (Del. 1927) ("[A] stockholder may sue in his own name for the purpose of enforcing corporate rights, though the corporation in question is nominally a party defendant.").

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

stockholders, as a group, should exercise their self-determination exclusively through the board.[80] As a result, the case law authorizes derivation suits only when the directors have hopelessly compromised themselves.[81]

Ideally, the law should shift from a representative to a participatory conception of shareholder democracy. It should appreciate, accordingly, that investors participate in the company's decision-making not only through their vote but also through other means, such as stockholder inspections, shareholder proposals, and derivative suits. From this general standpoint, the complaint in these actions would not have to allege with particularity conflict of interest or wrongful denial of prosecution. Moreover, claimants would have the right to minimal process when they initially ask the corporation to assert the contested claim. They could insist on a written response and, upon making a facially meritorious case on paper, a face-to-face meeting with corporative officials.

In all likelihood, however, tribunals will continue to reject this take out of a somewhat speculative concern with the prospect of a deluge of frivolous filings. They will probably persist in requiring stockholders to demand the board to proceed,[82] in construing the demand as a concession of directorial independence,[83] in allowing the corporation to refuse without any kind of hearing,[84] and in compelling complainants to establish the wrongness of the refusal during the pre-trial phase.[85] Thus, derivation suits will hardly develop, in the near future, their

[80] *See* Levine v. Smith, 591 A.2d 194, 200 (Del. 1991) ("The directors of a corporation and not its shareholders manage the business and affairs of the corporation . . . , and accordingly, the directors are responsible for deciding whether to engage in derivative litigation."); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000) ("The business judgment rule is an acknowledgment of . . . managerial prerogatives . . . . It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company . . . . Absent an abuse of discretion, that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption."); Miller v. American Tel. & Tel. Co., 507 F.2d 759, 762 (9th Cir. 1974) ("The sound business judgment rule . . . expresses the unanimous decision of American courts to eschew intervention in corporate decision-making if the judgment of directors and officers in uninfluenced by personal considerations and is exercised in good faith."). *See generally* James D. Cox, *Searching for the Corporation's Voice in Derivative Suit Litigation: A Critique of* Zapata *and the ALI Project*, 1982 Duke L.J. 959, 972 ("[C]ommercial considerations . . . justify the overwhelming deference courts accord director decisions in normal commercial transactions.").

[81] *See supra* notes 15-18, 79 and accompanying text.

[82] *See supra* note 16 and accompanying text.

[83] *See Levine*, 591 A.2d at 212 ("A shareholder plaintiff, by making demand upon a board before filing suit . . . tacitly concedes lack of self-interest and independence of a majority of the Board.").

[84] *See id*. at 214 ("While a board of directors has a duty to act on an informed basis in responding to a demand . . ., there is obviously no prescribed procedure that a board must follow.").

[85] *See* Beam v. Stewart, 845 A.2d 1040, 1048-1049 (Del. 2008) ("The . . . directors are entitled to a *presumption* that they were faithful to their fiduciary duties. In the context of presuit demand, the burden is upon the plaintiff in a

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

full potential as a vehicle for the empowerment of investors as a collectivity.

Certainly, a derivatively conducted lawsuit may thwart the directorate's work. "By its very nature, the derivative action impinges on the managerial freedom of directors." [86] In other words, it may hinder the shareholders from self-determining through their regular representatives.

The judiciary must keep such danger in mind and at bay. It must painstakingly probe into whether the litigation might undercut the autonomy of stockholders as a collectivity. At the end of the day, while the recommended approach may or may not increase the number of suits, it centers on what matters, namely, the preservation of shareholder self-determination, rather than on intrinsically irrelevant issues, such as whether the pleadings particularize a charge of self-dealing by the directorate.

In any event, judges should acknowledge that investors embark upon an alternative and potentially constructive form of democratic engagement when they sue derivatively. Derivation suits have become, in a formulation by Robert Clark repeatedly quoted by the Delaware Supreme Court, "one of the most interesting and ingenious of accountability mechanisms for large formal organizations." [87] Consequently, judges should reasonably accommodate derivative litigation instead of limiting it to clear cases of directorial partiality.

Part V will revisit these questions. In the end, it will propose that derivatively lodged actions follow the lead of citizen suits and entitle the suitors to file even when the collectivity's legitimate delegates show disinterestedness. Under this proposition, the directors would hold the right to: (1) receive notification of the complaint and of any settlement, (2) stake the assertion themselves, and (3) stop the litigation by demonstrating that it would either harm the corporate business or jeopardize the collective autonomy of the investors.

3. DISTINGUISHING DERIVATIVE AND DIRECT SUITS

The perspective adopted in Part III facilitates understanding derivation suits and shareholder class actions. The former basically entail the vindication of an authentically collective right. The latter involve, by and large, the enforcement of an aggregation of individual entitlements.

From this standpoint, adjudicators would be better able to distinguish one procedure from the other. When tracing this distinction in a concrete controversy, they would focus on the kind of rights that the suitor wants to vindicate. The assessment would start

derivative action to overcome that presumption.").

[86] Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

[87] Clark, *supra* note 62, at 639 (cited in Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1264 (Del. 2012); Tooley v Donaldson, Lufkin & Jenrette, Inc., 845 A2d 1031, 1036 (Del. 2004); Kramer v. Western Pacific Industries, Inc., 546 A.2d 348, 351 (1987)).

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

by expressly asking whether the allegations rest on collectively or individually held entitlements. Thereafter, it would proceed to consider who underwent the detriment and who would benefit from the redress.

To be sure, the complainant usually aims to represent herself only, not a sizeable number of investors.[88] In other words, she normally does not institute a stockholder class action. The defending parties, for their part, typically strive to categorize the lawsuit as derivative in order to saddle their adversary with onerous pleading prerequisites.[89]

These more common scenarios present an even starker contrast between the collective and the individual. After all, they turn on a dichotomy between derivatively and individually prosecuted suits, [90] not between derivation suits and shareholder class actions. The judiciary need not expose an aggregative class action as, appearances notwithstanding, individual.

The Delaware Supreme Court has struggled to differentiate derivative and direct suits as clearly and as straightforwardly as possible.[91] In *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, it truly confronted "a purported class action"[92] and went on to discard "some concepts in [its] prior jurisprudence" as "not helpful and... erroneous." [93] The justices thereupon "set forth . . . the law to be applied . . . in determining whether a stockholder's claim is derivative or direct."[94] "That issue," they proclaimed, "must turn *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?"[95]

The tribunal further elaborated on its test:

> *That is, a court should look to the nature of the wrong and to*

[88] *Compare* Feldman v. Cutaia, 951 A.2d 727, 729 (Del. 2008) (Plaintiff "contends that his claim . . . was an individual one and not derivative in nature.") *with Tooley*, 845 A2d at 1033 ("Plaintiff-stockholders brought a purported class action in the Court of Chancery").

[89] *See, e.g.*, *Feldman*, 951 A.2d at 730 ("[T]he defendants moved to dismiss [plaintiff's] complaint . . . . The motion to dismiss asserted that [plaintiff] had lost standing to pursue derivative claims."); *Tooley*, 845 A.2d at 1033 ("The Court of Chancery granted the defendants' motion to dismiss on the sole ground that the claims were . . . claims of the corporation being asserted derivatively. They were, thus, held not to be direct").

[90] *See Ams. Mining Corp.*, 51 A.3d at 1264 ("[A] stockholder who is directly injured retains the right to bring an individual action for those injuries affecting his or her legal rights as a stockholder. Such an individual injury is distinct from an injury to the corporation alone."); *Tooley*, 845 A.2d at 1036 ("A stockholder who is directly injured [has] the right to bring an individual action for injuries affecting his or her legal rights as a stockholder. Such a claim is distinct from an injury caused to the corporation alone. In such individual suits, the recovery or other relief flows directly to the stockholders.").

[91] *See Tooley*, 845 A2d at 1036 ("Therefore, it is necessary that a standard to distinguish such actions be clear, simple and consistently articulated and applied by our courts.").

[92] *Id*. at 1033.

[93] *Id*.

[94] *Id*.

[95] *Id*.

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

> *whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.*[96]

Consequently, a lawsuit qualifies as derivative, as opposed to direct, if the corporate entity, rather than the investors, not merely has endured the loss but additionally would stand to gain from any award issued. In a direct action, claimants must verify a detriment to them separate from any damage to the business itself.

The Delaware's highest tribunal has repeatedly endorsed this 2004 "landmark decision." [97] In *Americas Mining Corp. v. Theriault*, it accordingly distinguished a derivation suit from "a class action [in the name of] minority stockholders only." [98] "Because a derivative suit is brought on behalf of the corporation," the justices underscored, "any recovery must go to the corporation."[99]

The *Tooley* standard zeroes in on two crucial elements for the classification of a particular lawsuit as derivative or direct: the locus of the loss and the beneficiary of any satisfaction.[100] It should have added and should have indeed started with the key factor: the type of right at stake. In this regard, the probe boils down to a determination of whether the claimant is attempting to vindicate collective or individual entitlements.

Granted, *Tooley* does allude to this matter. It notes, in its elucidation, that the complainant in a direct action "must demonstrate that the duty breached was owed to the stockholder." [101] And a duty ordinarily correlates with a right. [102] Thus, when defendants shirk an obligation, they typically encroach upon an individually possessed entitlement.

Maybe the Delaware Supreme Court did not include the nature of the right in the analysis because it believed that doing so would amount to circular reasoning. Specifically, it may have thought that it was trying to define the

[96] *Id*. at 1039.
[97] Feldman v. Cutaia, 951 A.2d 727, 729 (Del. 2008); *see, also*, Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1264-1265 (Del. 2012); Brooks-McCollum v. Emerald Ridge Bd. of Dirs., No. 104, 2011, slip op. at 5 (Del. Oct. 5, 2011).
[98] *Ams. Mining Corp.*, 51 A.3d at 1265.
[99] *Id*. at 1264.
[100] *See Tooley*, 845 A.2d at 1033.
[101] *Id*. at 1039.
[102] *See generally* Joseph Raz, *The Nature of Rights* (Ch. 7), The Morality of Freedom 165-192,166 (1986) ("'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty."). *Cf*. Martha Nussbaum, *Capabilities and Human Rights*, 66 Fordham L. Rev. 273-300, 274 (1997) ("Still another unresolved question is whether rights—thought of as justified entitlements—are correlated with duties. If *A* has a right to *S*, then it would appear there must be someone who has a duty to provide *S* to *A*. But it is not always clear who has these duties—especially when we think of rights in the international context. Again, it is also unclear whether all duties are correlated with rights.").

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

entitlement at hand. Had the justices faced such a task, they indeed would have had every logical reason to refuse to list the entitlement's definition as one of the inquiry's prongs.

Nevertheless, the tribunal was attempting to characterize the claim, not the right. It should have perceived the former concept as broader than and as inclusive of the latter. A claim or assertion commonly encompasses a declared entitlement and injury, and prayer for compensation. The complainant must point to the harm experienced and the redress prayed for, in addition to the infringed-upon right.[103] She may not claim anything if she fails to identify the damage imposed and the reasonably requested reparation, even if she, in fact, holds the entitlement invoked.

Ordinary language supports, to some extent, such a divide between the terms "claim" and "right." Parties normally *assert* or *stake* a claim.[104] In contradistinction, they *vindicate* or *enforce* a right.[105] This usage suggests that the underlying objects diverge from each other.

In sum, judges may consistently construe an assertion as derivative or direct based on whether the entitlement, the detriment, and the pursued remedy pertain collectively to the corporative unit or individually to the shareholders. Admittedly, this approach would not necessarily expedite the investigation. Nonetheless, it would lead the bench to zero in on all of the relevant considerations and to deal with hard cases more soundly.

The facts in *Feldman v. Cutaia*[106] help illustrate the point. Feldman directly impugned the validity of certain stock options, which two managing directors and the general counsel of Telx had received in 2004 and exercised upon the corporation's merger into GI Partners in 2006.[107] He evidently contended that the compensation plan took full effect in 2006 and that, at the time, it solely could have injured the investors and called for judgment in favor of them, inasmuch as Telx had ceased to exist.[108]

Under *Tooley*, Feldman should have prevailed on this position. First, he had persuasively averred that the contested measure would exclusively harm the individual shareholders, if

[103] Under the Federal Rules of Civil Procedure a "statement of the claim" must include a "showing that the pleader is entitled to relief" and "a demand for the relief sought." Fed. R. Civ. P. 8(a). The entitlement to relief rides on the existence and the violation of a right.

[104] *See* Webster's Third New International Dictionary of the English Language Unabridged 414 (3d ed. 2002) (defining "claim" as "a calling on another for something due or supposed to be due."). *But cf. id*. (defining "claim" as "a privilege to something: right . . . *specifically*: a title to a debt, privilege, or other thing in the possession of another."); *see also id*. at 131 (defining "assert" as "to demonstrate the existence of.").

[105] *See id*. at 1955 (defining "right" as "something to which one has a just claim" and as "something that one may properly claim as due"); *see also id*. at 2553 (defining "vindicate" as "to protect from attack or encroachment: preserve, defend.").

[106] 951 A.2d 727 (Del. 2008).

[107] *Id*. at 729-730.

[108] The Delaware Supreme Court reports that Feldman alleged "that the defendants breached their fiduciary duties by not reconsidering the validity of the Challenged Stock Options before approving the Merger agreement." *Id*. at 730.

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

anybody. [109] Secondly, he had established that any damages would have to inure to them.[110]

Delaware's highest tribunal just affirmed the Court of Chancery's ruling "that the alleged harm" in 2006 was "the same as the Company would have suffered [in 2004] from the invalidity of the Challenged Stock Options." [111] It concluded, sensibly but inconsistently with *Tooley*, that if the original detriment readily qualified as derivative during Telx's existence, so must have the subsequent, fundamentally identical injury. "In order to state a direct claim," the justices insisted, "the plaintiff [would have had to endure] some individualized harm not suffered by all of the stockholders at large."[112]

This argument, at the very least, begs the question: If the board had a duty to revoke the invalid stock options before approving the 2006 fusion, would a violation not have subsequently inflicted damage upon and demanded reparation for the investors? If so, the corresponding assertion would have come across as direct under *Tooley*.

Certainly, the trier might have ascertained that the directorate actually had no such obligation, that no infringement or impairment had taken place, or that the shareholders deserved no indemnification. He might have even found that Feldman was simply rehashing, in the context of the 2006 merger approval, a prior contention about the 2004 stock-options scheme. These findings would have surely undermined the assertion on the substance; yet they would not have transformed it from direct into derivative.

Moreover, a hypothetical adjudication in which the directors cashed in the stock options ahead of the combination would not essentially differ from the actual dispute. Still, it would have allowed the adjudicator to see the corporate person both as having sustained the loss and as eventually profiting from any relief awarded. *Tooley* would have problematically invited her to concentrate on these two factors and therefore to treat the two factual configurations differently.

In fact, judges should interpret a claim like that in *Feldman* as derivative since it rests on a genuinely collective entitlement possessed by the corporation and by the investors as a whole. Whether this collectivity subsists after the dissolution of the incorporated organization, at least for purposes of litigation, bears on the enforceability, but not on the kind of right. In general, the disappearance of the real party in interest does not render her representative in court the holder of her entitlements, although it may forestall any vindication thereof.

Under the extraordinary circumstances of *Feldman*, (1) the type of right at play runs counter to and ultimately trumps the other criteria, *viz.*, (2) the locus of the injury, and (3) the anticipated recipient of any award. Otherwise, these three parameters usually point in the same direction. In any event, the judiciary may rely on the

[109] *Id.* at 728-30.
[110] *Id.*
[111] *Id.* at 730.
[112] *Id.* at 733.

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

second and third parameters when in doubt with respect to the first one.

If the case law were to embrace the suggestion submitted at the end of Part III and shift away from the burdensome complaint-requirements presently attached to derivation suits, it would reduce the significance of this entire differentiation. Courts would tend to go into the merits straightaway. They would label the lawsuit as derivative or direct chiefly in order to decide how to allocate the satisfaction.

As conceded earlier, the judiciary will probably keep compelling suitors filing derivatively to make much of their case already in the pleadings.[113] In all likelihood, it will also continue insisting that they "maintain stockholder status in the corporate defendant throughout the litigation."[114] Even so, judges might show themselves more open to the proposed benchmark for distinguishing derivative from direct suits because it would not, in any way, lower the bar for investors striving to sue derivatively.

4. CONCEPTUALIZING COLLECTIVE RIGHTS

At the end of the day, grasping the difference between derivation suits and shareholder class actions sheds light on what collective entitlements are all about. Most fundamentally, one perceives that a genuinely collective right differs from an aggregation of discrete entitlements insofar as it belongs to the group, not to the members.

Accordingly, a derivatively driven suit concentrates on the entitlements of the corporate enterprise or of the stockholders as a unit, not on those of individual investors, who retain nothing but an indirect interest.[115] In contrast, a shareholder class action turns on the individually held rights of the shareholders. It combines, for purposes of efficacy in processing, a multiplicity of such entitlements, yet it does not thus become an authentically collective procedure.

The temptation to reduce a collective right to an array of individual entitlements may stem, in part, from the desire to avoid reifying the collectivity. A corporation or a group of investors does not exist in and of itself. Whoever attributes rights to such an entity seems to be treating it, implicitly, as existent.

Still, the statement that derivative suits focus on the entitlements of the corporative unit or of the collection of stockholders does not imply the paradoxical existence of either. It simply means that the incorporated organization subsists as a juridical person and, as such, holds rights that the investors may vindicate derivatively. Such a construct of law can possess no other kind of subsistence.

This insight illuminates collective entitlements more broadly. In particular,

[113] *See supra* notes 81-84 and accompanying text.

[114] *Feldman*, 951 A.2d at 731 (citing Lewis v. Anderson, 477 A.2d 1040, 1046 (Del. 1984)).

[115] *See generally* Joseph Raz, *National Self-Determination* (Chap. 6), Ethics in the Public Domain 125, 120 (1995) ("Group interests are conceptually connected to the interests of their members but such connections are nonreductive and generally indirect.")

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

citizen suits concern the citizenry and its rights along similar lines. Such a civic community boasts not just an equivalent legal existence, recognized at the very least by the statute that authorizes the litigation, but additionally entitlements of its own, which its constituents may exercise on its behalf. [116] In the pharmaceutical air-contamination example invoked in Part III, the society as a whole exists in this sense and a local activist vindicates its environmental entitlements.

Certainly, one need not postulate a metaphysically bizarre communal artifact in order to speak of collective entitlements that pertain to a group rather than to its members. One merely has to acknowledge that people may create an institution that may hold a right that indirectly benefits them but that does not belong to them, *e.g.*, a corporation, club, town, or internationally sovereign regime. Frequently, the process of creation occurs less formally—as with neighborhoods, ethnicities, or nations—and legal recognition may take place *ex post facto*.[117]

Similarly, the enforcement of collective entitlements does not thwart that of individual rights. In fact, the two unfold independently of, even though they may interrelate with and impinge upon, each other. For instance, a derivation suit to prevent, as corporate waste, a massive bonus for the directorate would run separately from a shareholder class action to force the distribution of certain overdue dividends, although it may restrict the amount of money available for such payments. Analogously, a civic suit to stop a chemical plant from polluting the air would proceed apart from, but would most likely bear upon, a class action by the neighbors requesting reparation for the depreciation of their property.

As a final observation, the implementation of group entitlements does not have to operate oppressively *vis-à-vis* the constituents and their rights. As observed in the preceding paragraph, it involves a different and independent set of entitlements, which

[116] For example, section 4911 of the 1972 Noise Control Act expressly authorizes the use of citizen suits in federal court for air noise control violations. *See* Noise Control Act's Citizen Suit Provision, 42 U.S.C. §4911(b) (2006) ("[A]ny person (other than the United States) may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of any noise control requirement . . . . The district courts of the United States shall have jurisdiction, without regard to the amount in controversy, to restrain such person from violating such noise control requirement.").

[117] The communal entity, whether formally or informally created, must simply meet the requirements of numerosity, commonality, typicality, and adequate representation in order to attain recognition as class. *See* Fed. R. Civ. P. 23 (a). If it shows that "the party opposing [it] has acted or refused to act on grounds that apply generally to the class" in violation of its rights, it may request "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23 (b)(2). *See also* Fed. R. Civ. P. 23 advisory committee's note (1966 Amendment) (Subdivision (b)(2)) ("This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate.").

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

do not belong to the members in the first place. All the same, the exercise of such rights by a self-appointed proxy may undermine the collectivity's autonomy and, consequently, calls for special judicial control.

In a derivative suit, the claimant enforces the corporation's entitlements, not her own or those of other investors. [118] Nonetheless, the bench must ensure that she properly represents the incorporated business in a legitimate act of participatory democracy. It must limit her participation in corporative decision-making to matters open to stockholder direct engagement and otherwise keep her from neutralizing the duly designated board.

In a citizen suit, the complainant likewise vindicates the rights of the polity, instead of her own or those of her fellow citizens, [119] as in the previously cited pharmaceutics-example. The tribunal must guarantee, however, that she acts consistently with the principles of participatory and representative democracy. It must rely on its own judgment and on the authorities' input, in order to preclude her from hampering the work of the political branches of government.

In both cases, the judiciary should steer clear of granting the democratically elected representatives a prerogative to speak for the collectivity. It should appreciate the value and the legality of alternative modes of representation, whether within the corporation or society in its entirety. Litigation should go forward so long as the suitor meets the basic statutory or regulatory prerequisites, even if she cannot prove a clear conflict of interest or a manifest incapacity on the part of the official decision-makers.

On this front, citizen suits might lead derivation suits toward more openness. The former, as opposed to the latter, do not compel the claimant to establish in the complaint, or at trial, that office holders have compromised themselves. [120] Ideally, derivative suits might follow civic suits down this road and end up embracing a comparable approach.

If so, a litigant lodging a suit derivatively would not have to prove that the directors lacked independence. She would solely have to confirm that she offered them the opportunity to institute the action themselves. Such a confirmation would function to some extent like a verification of exhaustion of administrative remedies in a citizen suit against a governmental agency. [121]

Subsequently, the trier would pass on the appropriateness of the

[118] *See* Fed. R. Civ. P. 23.1(a); *see also* Tooley v Donaldson, Lufkin & Jenrette, Inc., 845 A2d 1031, 1036 (Del. 2004) ("[The derivative suit] enables a stockholder to bring suit on behalf of the corporation for harm done to the corporation. Because a derivative suit is being brought on behalf of the corporation, the recovery, if any, must go to the corporation."); Levine v. Smith, 591 A.2d 194, 200 (Del. 1991) ("A shareholder derivative suit is a uniquely equitable remedy in which a shareholder asserts on behalf of a corporation a claim belonging not to the shareholder, but to the corporation.").

[119] *See supra* note 114 and accompanying text.

[120] *See supra* notes 19, 22-23, 112 and accompanying text.

[121] *See* Hawes v. Oakland, 104 U.S. 450, 460 (1881) ("[B]efore the shareholder is permitted in

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

board's refusal. It would thereby consider whether further litigation would serve the company's well-being. Lastly, the judicial focus would turn to the merits of the derivative assertion.

In civic suits, the state profits not only from its usually superior financial resources and expertise in the defense of the public interest but also from a number of adjectival advantages. It must normally receive notice ahead of the litigation,[122] in addition to a copy of any eventually proposed consent decree.[123] The authorities may then object to the latter, as well as intervene.[124] Moreover, they may file for dismissal if they are already "diligently prosecuting an action" on the matter.[125]

In the context of derivation suits, the board currently enjoys many of these procedural benefits, along with others. It ordinarily has a right to notification in the form of a demand on it by the person intending to sue. [126] Besides, the corporation appears as a defendant,[127] as do the directors if the complainant stakes a claim against them. The concern's leadership therefore participates in the proceedings, as well as in any settlement negotiations. Furthermore, it may move to dismiss the complaint by invoking its own ongoing diligent prosecution, [128] which would justify the rejection of an additional identical lawsuit and, by the same token, the extinction of the suitor's "legal ability to initiate a derivative action."[129] Finally, at any point prior to the trial, "an independent committee possesses the

his own name, to institute and conduct a litigation which usually belongs to the corporation, he should show . . . that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes."); *see also* Aronson v. Lewis, 473 A.2d 805, 811-812 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000) ("Hence, the demand requirement of Chancery Rule 23.1 exists at the threshold, first to insure that a stockholder exhausts his intracorporate remedies, and then to provide a safeguard against strike suits. Thus, by promoting this form of alternate dispute resolution, rather than immediate recourse to litigation, the demand requirement is a recognition of the fundamental precept that directors manage the business and affairs of corporations.").

[122] *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act (1980) (CERCLA), 42 U.S.C. § 9659(d)(1), (e) (2006).

[123] *See, e.g.*, Clear Air Act, 42 U.S.C. § 7604(c)(3) (2006) ("No consent judgment shall be entered in an action brought under this section in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator . . . ."); Clean Water Act, 33 U.S.C. § 1365(c)(3) (2006) ("No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.").

[124] *See, e.g.*, CERCLA, 42 U.S.C. § 9659(g).

[125] *See, e.g.*, *id.*, § 9659(d)(2).

[126] *See supra* note 16 and accompanying text.

[127] *See supra* note 78 and accompanying text.

[128] *See* Maldonado v. Flynn, 413 A.2d 1251, 1263 (Del. Ch. 1980) ("The stockholder's right to litigate is secondary to the corporate right to bring suit only for so long as the corporation has not decided to refuse to bring suit.").

[129] Zapata Corp. v. Maldonado, 430 A.2d 779, 784 (Del. 1981) ("A demand, when required and refused (if not wrongful), terminates a stockholder's legal ability to initiate a derivative action.").

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

corporate power to seek the termination of a derivative suit."[130]

Conversely, citizen suits could themselves evolve by drawing on derivatively conducted actions. For instance, they might take a page from the latter with respect to standing. This issue has generated considerable controversy in the literature.[131]

A civic suit presently necessitates an "'injury in fact,'" demanding that "the party seeking review be himself among the injured." [132] In *Arizona Christian School Tuition Organization v. Winn*, [133] the federal Supreme Court explained that "requiring a particular injury" entails "'that the injury must affect the plaintiff in a personal and individual way.'"[134] In *Bond v. United States*, [135] the justices proclaimed that: "It is not enough that a litigant 'suffers in some indefinite way in common with people generally.'"[136]

Derivation suits, in contradistinction and more appropriately, rest on the assumption that the claimant does not have a subjective stake of her own in the underlying group-assertion. If she did, she would be positing an individualized claim, or, at most, a cluster thereof. As a result, she would need to launch a direct action, or perhaps a shareholder class action.

In a thoroughly collective lawsuit, the complainant does not and cannot have an individual stake. Hence, judges should not insist that she show the opposite. They should exclusively ask her to persuade them that the collectivity has a cognizable claim to which she will do full justice.

In sum, the study of derivative and citizen suits may contribute to clarifying the nature and the inner workings of group entitlements. It may ultimately help in the transformation and improvement of these actions by virtue of such clarification. Of course, other types of collective litigation might change and improve on the same basis.

REFERENCES

[130] *Id*. at 785; *see also id*. at 788 ("After an objective and thorough investigation of a derivative suit, an independent committee may cause its corporation to file a pretrial motion to dismiss in the Court of Chancery.").

[131] *See generally, e.g.*, Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. Rev. 1505 (2008); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. Rev. 962 (2002); William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 223, 229 (1988); Myriam E. Gilles, *Representational Standing: U.S.* ex rel. *Stevens and the Future of Public Law Litigation*, 89 Cal. L. Rev. 315 (2001); Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 Mich. L. Rev. 2239 (1999); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. Pa. L. Rev. 613 (1999); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 Colum. L. Rev. 1432, 1434 (1988); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163 (1992); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371, 1395 (1988).

[132] Sierra Club v. Morton, 405 U.S. 727, 734-735 (1972).

[133] 131 S. Ct. 1436 (2011).

[134] *Id*. at 1442 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n.1 (1992)).

[135] 131 S. Ct. 2355 (2011).

[136] *Id*. at 2366 (quoting Frothingham v. Mellon, 262 U.S. 447, 488 (1923) (decided with Massachusetts v. Mellon)).

Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

CHAYES, Abram. *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1976.

CLARK, Robert Charles, *Corporate Law*. 639-40, 1986.

ERICKSON, Jessica. *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 Wm. & Mary L. Rev. 1749, 1754, 2010.

FISS, Owen M. *The Political Theory of the Class Action*, 53 Wash. & Lee L. Rev. 21, 1996.

FISS, Owen M. *The Social and Political Foundations of Adjudication*. 6 L. & Hum. Behav. 121, 1982.

GARTH, Bryant G.; *et al.*, *Empirical Research and the Shareholder Derivative Suit: Toward a Better-Informed Debate*, 48 Law & Contemp. Probs. 137, 158, 1985.

GRUNDFEST, Joseph A; PERINO, Michael A. *The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litigation*, 38 Ariz. L. Rev. 559, 564 n. 22, 1996.

NUSSBAUM, Martha. *Capabilities and Human Rights*, 66 Fordham L. Rev. 273-300, 274, 1997.

OQUENDO, Ángel R. *The Comparative and the Critical Perspective in International Agreements*. 15 UCLA Pac. Basin L.J. 205, 208, 1997.

RAZ, Joseph. *The Nature of Rights* (Ch. 7), The Morality of Freedom 165-192,166, 1986.