

## Judicial Dissolution: Are the Courts of the State that Brought You In the Only Courts that Can Take You Out?

By Peter B. Ladig and Kyle Evans Gay\*

*In early 2014, the then-managing members of the limited liability company (“LLC”) that owned The Philadelphia Inquirer, the Philadelphia Daily News, and philly.com filed nearly simultaneous petitions for judicial dissolution of the LLC in the Court of Common Pleas in Philadelphia and the Delaware Court of Chancery. The dual petitions created the anomaly that everyone agreed on dissolution, but no one could agree where it should take place. Both courts were asked to address a unique question: could a Pennsylvania court judicially dissolve a Delaware LLC? According to existing precedent, the answer was not so clear. This article proposes that the answer should be clear: a court cannot judicially dissolve an entity formed under the laws of another jurisdiction because dissolution is different than other judicial remedies. This approach gives full faith and credit to the legislative acts of the state of formation, but also permits the forum state to protect its own citizens by granting the remedies it feels necessary, short of dissolution.*

An involuntary judicial dissolution is one of the key tools available to a lawyer advising a client seeking a business divorce. Once the client decides to pursue an involuntary judicial dissolution, an attorney’s first question should be: in which court? It is often the case that even if all of the parties are citizens of the same state, those parties formed their entity under the laws of another state. Under those circumstances, can the parties ask their home state court to judicially dissolve an entity formed pursuant to the laws of a foreign state?

This issue arose recently in the dissolution of Interstate General Media, LLC (“IGM”), the limited liability company that owned *The Philadelphia Inquirer*, the *Philadelphia Daily News*, and the website philly.com. IGM’s two managing members filed near simultaneous actions seeking judicial dissolution in the Commerce Court of the Philadelphia Court of Common Pleas and the Court of Chancery of the State of Delaware, respectively. The simultaneous filings required each court to decide which court should hear the request for dissolution. A principal issue in

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the analysis of this question was whether a Pennsylvania court could dissolve a Delaware limited liability company. The Commerce Court ultimately issued an order declining jurisdiction, which allowed the action in the Court of Chancery to proceed. In the opinion explaining that decision issued a few weeks later, the Commerce Court noted that IGM's operating agreement provided that IGM could be dissolved by entry of a decree of dissolution under the Delaware Limited Liability Company Act (the "LLC Act").<sup>1</sup> The Commerce Court concluded it did not have subject matter jurisdiction to enter a decree of dissolution "under the [LLC] Act" because the LLC Act implies that "exclusive subject matter jurisdiction [to dissolve a limited liability company] lies with the Delaware Court of Chancery."<sup>2</sup>

It makes sense on some level that a Delaware court exclusively should decide whether a Delaware entity should be dissolved. Although courts nationwide have held that they do not have the power to dissolve a foreign entity, that reasoning has not been universally adopted.<sup>3</sup> For instance, in a dissenting statement from the Pennsylvania Supreme Court's decision declining to exercise its discretion to hear an immediate appeal of the decision of the Commerce Court, then-Chief Justice Castille opined that the Commerce Court erred in interpreting the relevant section of the LLC Act to confer "exclusive" subject matter jurisdiction upon the Delaware courts to dissolve a Delaware limited liability company.<sup>4</sup> In addition, in two recent decisions addressing matters other than involuntary judicial dissolution, the Court of Chancery has stated that Delaware statutes that confer exclusive jurisdiction on the Court of Chancery merely allocate jurisdiction within Delaware's unique judicial system that has maintained the separation of law and equity, and not to the exclusion of the ability of any other state to provide the relief necessary.<sup>5</sup>

This article will demonstrate that judicial dissolution can, and should, be reserved for the state of formation while still respecting the sovereignty of the forum state. In practice, the idea runs contrary to convention; state and federal courts regularly police, compel, and enjoin entities properly before them. In that sense, dissolution must somehow be different. This article will demonstrate that

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1. *Intertrust GCN, LP v. Interstate Gen. Media, LLC*, Jan. Term 2014, No. 99, slip op. at 5 (Pa. Ct. Com. Pl. Feb. 11, 2014).

2. *Id.* at 5.

3. *E.g.*, *Holdrum Invs. N.V. v. Edelman*, No. 650950/2011, 2013 WL 435449 (N.Y. Jan. 31, 2013); *In re Dissolution of Hosp. Diagnostic Equip. Corp.*, 613 N.Y.S.2d 884 (App. Div. 1994).

4. *Intertrust GCN, LP v. Interstate Gen. Media, LLC*, 87 A.3d 807, 808 (Pa. 2014). Chief Justice Castille's view is not surprising, as Pennsylvania courts have long taken the position that they could dissolve a foreign entity when all of the relevant parties are Pennsylvania residents. See *Cunliffe v. Consumers' Ass'n of Am.*, 124 A. 501 (Pa. 1924); *Hogeland v. Tec-Crafts, Inc.*, 39 Del. Co. 10 (Pa. Ct. Com. Pl. 1951).

5. *City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229, 236 (Del. Ch. 2014); *IMO Daniel Kloiber Dynasty Trust*, 98 A.3d 924, 939 (Del. Ch. 2014); see *Intertrust*, 87 A.3d at 809 (Castille, C.J., dissenting) ("In my view, . . . the [LLC Act] provision does not purport to vest exclusive jurisdiction in the Delaware courts as against any other proper forum, . . . but instead simply confers upon the Delaware Court of Chancery discretionary authority to decree dissolution of an LLC in appropriate circumstances.").

dissolution is indeed different, and that a state court should be jurisdictionally barred from dissolving an entity formed under the laws of another state. An analysis of common law and statutory law demonstrates that while state courts may have the power to police and regulate foreign entities, the right to dissolve a foreign entity should rest exclusively with the state of formation.

Dissolution is a unique remedy available at common law and pursuant to statute. It is not an ordinary claim that can be brought by anyone, anywhere. Just as a state regulates the birth of an entity under its own laws without the interference or participation of its sister states, so too should judicial dissolution be determined by the laws of the state of birth.<sup>6</sup> The interests of the foreign court can be protected by permitting it to exercise its power over those parties and assets subject to its jurisdiction, and to take whatever action is necessary short of entering an order judicially dissolving the entity. Acknowledging this power provides the foreign jurisdiction with the authority necessary to prevent fraud or other wrongs within its borders and to protect its citizens, while still respecting the rights of its sister state to determine whether an entity created under that sister state's own laws should be dissolved.<sup>7</sup>

## I. HISTORICAL ATTITUDE TOWARD DISSOLUTION

### A. DISSOLUTION OF DOMESTIC ENTITIES

Today, persons seeking to form an entity with some form of limited liability, such as a corporation or limited liability company, do so pursuant to state statutes. This process of entity formation evolved from an earlier system in which the legislature of a state granted charters to individuals to conduct business through an entity for a specific purpose.<sup>8</sup> Under that system, “[t]he very act of incorporation presumed state involvement.”<sup>9</sup> Therefore, for a court to dissolve a corporation, it would have had to undo an act of the state that had been specifically authorized by a separate branch of the state government, namely the legislature. Not surprisingly, at a time when state legislatures granted charters, courts were loath to dissolve corporations, foreign or domestic. As the Delaware Court of Chancery noted in *Lichens Co. v. Standard Commercial Tobacco Co.*,<sup>10</sup> at

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6. For instance, no one would argue that you can go to State A to form an entity pursuant to the laws of State B. How then should State A be able to terminate an entity formed pursuant to the laws of State B?

7. This article focuses only on the ability of state courts, rather than federal courts, to dissolve a foreign entity for two reasons. First, it is well-settled that no state may deprive a federal court of jurisdiction granted by Congress. See *Truck Components Inc. v. Beatrice Co.*, 143 F.3d 1057, 1061 (7th Cir. 1998). In light of this principle, a discussion of the ability of federal courts to dissolve a foreign entity (i.e., an entity formed outside the state in which the federal court sits) would merit its own article. Second, given that the bulk of dissolution cases tend to involve situations in which the partners and the company are citizens of the same state for jurisdictional purposes, obtaining jurisdiction in a federal court would be difficult if not impossible, so a discussion of the ability of state courts to grant this relief would seem to have more applicability.

8. See, e.g., Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1595 (1988).

9. *Id.*

10. 40 A.2d 447 (Del. Ch. 1944).

that time a decree for dissolution of a corporation “was generally within the sole province of the legislative body” so courts would not entertain such requests.<sup>11</sup>

When the process of forming a corporation evolved from legislative charters to charters granted pursuant to state statute, that rationale no longer applied.<sup>12</sup> The majority of courts softened their stance on their inherent power to dissolve entities but remained chary of exercising that power, except under the most extreme circumstances. In *Hall v. John S. Isaacs & Sons Farms, Inc.*,<sup>13</sup> the Delaware Supreme Court held that:

Under some circumstances courts of equity will appoint liquidating receivers for solvent corporations, but the power to do so is always exercised with great restraint and only upon a showing of gross mismanagement, positive misconduct by the corporate officers, breach of trust, or extreme circumstances showing imminent danger of great loss to the corporation which, otherwise, cannot be prevented. Mere dissension among corporate stockholders seldom, if ever, justifies the appointment of a receiver for a solvent corporation. The minority’s remedy is withdrawal from the corporate enterprise by the sale of its stock.<sup>14</sup>

Over time, courts have applied these principles equally to corporations, limited liability companies, and limited partnerships. Although courts had made general pronouncements that they retained the inherent authority to dissolve an alternative entity,<sup>15</sup> in *In re Carlisle Etcetera LLC*,<sup>16</sup> the Court of Chancery concluded, after an exhaustive analysis, that the court’s inherent equitable jurisdiction enables the Court of Chancery to dissolve an entity regardless of statutory authority. There, although the Court of Chancery did not discuss the standard that must be met to dissolve a solvent limited liability company or limited

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11. *Id.* at 452.

12. *Id.*

13. 163 A.2d 288 (Del. 1960). Courts of other states use similar language in articulating the limited instances in which a court will dissolve involuntarily an operating entity. *See, e.g.,* Edison v. Fleckenstein Pump Co., 228 N.W. 705, 705 (Mich. 1930) (“There is no doubt that in certain exceptional cases, such as relieving from fraud, or breach of trust, a court of equity may in its inherent power wind up the affairs of a corporation as incident to adequate relief. But in the absence of all such exceptional circumstances, the equity court, in its inherent power, may not dissolve a corporation, wind up its affairs, and for that purpose alone, sequester corporate property.” (citations omitted)); *see also* Levant v. Kowal, 86 N.W.2d 336, 341 (Mich. 1957) (“This jurisdiction, from an early time, has squarely aligned itself with those jurisdictions holding that a court of equity has inherent power to decree the dissolution of a corporation when a case for equitable relief is made out upon traditional equitable principles.”); *Penn v. Pemberton & Penn, Inc.*, 53 S.E.2d 823, 825 (Va. 1949) (“This statute, in part, is declaratory of the general rule that a court of equity has inherent power, on the request of minority stockholders, to dissolve a solvent corporation when it appears that the directors or a majority of the stockholders have been guilty of fraud or gross mismanagement, or where the principal purpose for which the corporation was formed has become impossible of attainment.”).

14. *Hall*, 163 A.2d at 293 (citations omitted).

15. *Cf. VTB Bank v. Navitron Projects Corp.*, C.A. No. 8514-VCN, 2014 WL 1691250, at \*5 (Del. Ch. Apr. 28, 2014) (“This Court has the inherent equitable power to appoint a receiver for a Delaware limited liability company even where this remedy is not expressly available by statute or under the operative company agreement.” (citing *Ross Holdings & Mgmt. Co. v. Advance Realty Grp., LLC*, C.A. No. 4113-VCN, 2010 WL 3448227, at \*6 (Del. Ch. Sept. 2, 2010))).

16. C.A. No. 10280-VCL, 2015 WL 1947027 (Del. Ch. Apr. 30, 2015).

partnership, the court relied upon two cases that applied the same stringent test traditionally applied to requests to dissolve a solvent corporation on equitable grounds.<sup>17</sup> That is, the court will order equitable dissolution only where there is “gross mismanagement, positive misconduct by corporate officers, breach of trust, or extreme circumstances showing imminent danger of great loss to the corporation which, otherwise, cannot be prevented.”<sup>18</sup>

## B. THE INTERNAL AFFAIRS DOCTRINE AND DISSOLUTION

With respect to foreign corporations, in the nineteenth and early twentieth centuries, state courts, including in Delaware, took the view that an entity could be dissolved only by the courts of the state of its formation.<sup>19</sup> Dissolution was considered one of the so-called “visitorial powers.” Visitorial powers referred generally to “the power to inspect or make decisions about an entity’s operations,”<sup>20</sup> and they were enjoyed only by the incorporating state:

Although it is the duty of the state to provide for the collection of debts from foreign corporations, due to its citizens, and to protect its citizens from fraud, by all the means in its power, whether against domestic or foreign wrongdoers, this does not authorize the courts to regulate the internal affairs of foreign corporations. The courts possess no visitorial power over them.<sup>21</sup>

Visitorial powers included, *inter alia*, the power to dissolve a corporation, to appoint a receiver, to compel or restrain the corporation from declaring a dividend, or to compel a division of its assets.<sup>22</sup>

This concept of visitorial powers developed coextensively with and informed the now widely accepted internal affairs doctrine. The doctrine similarly restricted judicial intervention in the affairs of foreign corporations under the rationale that the internal affairs of a corporation were best regulated by the laws of the corporation’s state of incorporation. Courts “consistently noted the special

17. *Id.* at \*7 (citing *Weir v. JMACK, Inc.*, C.A. No. 3263-CC, 2008 WL 4379592, at \*2 (Del. Ch. Sept. 23, 2008) (dismissing request for equitable dissolution of a solvent corporation because allegations of regulatory misconduct were insufficient to result in the extreme circumstances showing the possibility of imminent loss to the corporation); *Ross Holdings & Mgmt. Co.*, 2010 WL 3448227, at \*6 (recognizing the Court of Chancery’s inherent equitable power to appoint a receiver for an insolvent entity was limited to situations involving fraud or mismanagement causing real danger of imminent loss)).

18. *Weir*, 2008 WL 4379592, at \*2 (quoting *Carlson v. Hallinan*, 925 A.2d 506, 543 (Del. Ch. 2006)).

19. *See, e.g.*, *Swift v. State ex rel. Richardson*, 6 A. 856, 864 (Del. 1886) (“The superior court, and even the state of Delaware itself, cannot forfeit the charter of a foreign corporation.”).

20. A visitorial power is “the power to inspect or make decisions about an entity’s operation.” BLACK’S LAW DICTIONARY 1289 (9th ed. 2009).

21. *Howell v. Chicago & N.W. Ry. Co.*, 51 Barb. 378, 379 (N.Y. Sup. Ct. 1868); *see also* *N. State Copper & Gold Mining Co. v. Field*, 20 A. 1039, 1040 (Md. 1885) (“Our courts possess no visitorial power over [foreign corporations], and can enforce no forfeiture of charter for violation of law, or removal of officers for misconduct, nor can they exercise authority over the corporate functions, . . . arising out of, and depending upon, the law of its creation. These powers belong only to the state which created the corporation.”).

22. *See Babcock v. Farwell*, 91 N.E. 683, 690 (Ill. 1910).

role of the incorporating state, the state under whose laws the corporation was created and on which its existence depended.”<sup>23</sup> They also “recognized the territorial limits of their own authority,” and “wished to avoid adopting decisions that would require enforcement in other states.”<sup>24</sup> Consistent with the idea that shareholders were entitled to equal rights under the law, the internal affairs doctrine prevented different outcomes from similar litigations in different jurisdictions, thereby making litigation more predictable for investors.<sup>25</sup>

During the twentieth century, courts conflated these two separate concepts, one that defines and limits the power of a state to interfere with the sovereignty of another state’s corporate charter, and the other which for policy reasons supports a choice-of-laws analysis in favor of the state of incorporation. In 1894, the Minnesota Supreme Court commented: “courts will not exercise visitorial powers over foreign corporations, or interfere with the management of their internal affairs.”<sup>26</sup> This amalgam of legal theory led to varied approaches and differing precedent, and it caused some courts to lose sight of the common law and statutory and policy reasons supporting the state of incorporation’s exclusive jurisdiction over the dissolution of corporations formed under its laws. Eventually, the modern view of the internal affairs doctrine as solely a discretionary choice-of-law rule would lead to the impermissible conclusion that a state’s power to dissolve a foreign corporation was similarly discretionary.

To be clear, some courts generally accepted that the internal affairs doctrine limited their ability to dissolve foreign corporations.<sup>27</sup> For instance, in *Wilkins v. Thorne*,<sup>28</sup> the plaintiff sought, among other things, an order from a Maryland court dissolving officially a corporation formed under the laws of North Carolina.<sup>29</sup> In reversing the trial court and ordering the case be dismissed, the Maryland Court of Appeals stated that “it would be a strange anomaly in our system of jurisprudence if the courts of one State could be vested with the power to dissolve a corporation created by another, and assume control over its property for the purpose of distributing it among those claiming to be its stockholders.” Similarly, in *Mitchell v. Hancock*,<sup>30</sup> a Texas court noted that it knew “of no authority for the courts of this state to dissolve a foreign corporation on any ground.” The court then cited a statute requiring a request for judicial

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23. Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 66 (2006) (citing *Howell*, 51 Barb. at 378).

24. *Id.* at 67.

25. *Id.* at 39.

26. *Guilford v. W. Union Tel. Co.*, 61 N.W. 324, 339–40 (Minn. 1894).

27. See, e.g., *Rogers v. Guar. Trust Co. of New York*, 288 U.S. 123, 130 (1933) (“It has long been settled doctrine that a court—state or federal—sitting in one State will as a general rule decline to interfere with . . . the management of the internal affairs of a corporation organized under the laws of another state but will leave controversies as to such matters to the courts of the state of domicile.”).

28. 60 Md. 253, 258 (Ct. App. 1883).

29. *Id.* at 257.

30. 196 S.W. 694 (Tex. Civ. App. 1917).

dissolution to be brought in the county or state in which it was formed and noted that “[t]his announcement of the law seems well established by the authorities.”<sup>31</sup>

But at the same time, the strict view that the internal affairs doctrine prohibited a court from *at all* regulating a foreign corporation began to erode. Courts developed certain exceptions to the internal affairs doctrine under which they allowed some regulation of foreign corporations, but still stopped short of condoning dissolution by a foreign court.

In *Babcock v. Farwell*,<sup>32</sup> one of two relevant decisions released by the Illinois Supreme Court on the same day in 1910, the plaintiff challenged certain contracts between the corporation, organized under the laws of Great Britain, and its directors.<sup>33</sup> The matter was dismissed, and on appeal, the defendants argued that the court should not take jurisdiction of the action, citing the general rule against interference with the internal management of a foreign corporation.<sup>34</sup> The Illinois Supreme Court, however, noted that this doctrine had limitations, and except in cases involving judicial dissolution, the question was not one of jurisdiction but rather *discretion* in exercising jurisdiction.<sup>35</sup> The court noted that “[t]he rule rests more on grounds of policy and expediency than on jurisdictional grounds; more on want of power to enforce a decree than on jurisdiction to make it.”<sup>36</sup> At the same time, however, the court also stated that there was no exercise of discretion under certain circumstances:

Where the wrongs complained of are merely against the sovereignty by which the corporation was created or the law of its existence, or are such as require for their redress *the exercise of the visitorial powers of the sovereign*, or where full jurisdiction of the corporation and of its stockholders is necessary to such redress, the courts will decline jurisdiction. Examples of such cases are *suits to dissolve a corporation; to appoint a receiver . . .*<sup>37</sup>

The court concluded that under the facts of the case, i.e., a contract dispute, it was appropriate to take jurisdiction of the case.<sup>38</sup>

The companion case released the same day, *Edwards v. Schillinger*,<sup>39</sup> reached a similar conclusion. In *Edwards*, the plaintiff challenged declaration of a dividend by a Missouri corporation and sought to hold the stockholders liable for unpaid

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31. *Id.* at 698 (citing *Republican Mountain Silver Mines v. Brown*, 58 F. 644 (8th Cir. 1893); *State v. Curtis*, 35 Conn. 374 (1868); *Swift v. State ex rel. Richardson*, 6 A. 856 (Del. 1886); *Hietkamp v. Am. Pigment Co.*, 158 Ill. App. 587 (1910); *Miller v. Hawkeye Gold Dredging Co.*, 137 N.W. 507 (Iowa 1912); *Tex. & Pac. Ry. Co. v. Gay*, 26 S.W. 599 (Tex. 1894), *aff'd*, 167 U.S. 745 (1897)).

32. 91 N.E. 683 (Ill. 1910).

33. *Id.* at 684.

34. *Id.* at 690.

35. *Id.*

36. *Id.*

37. *Id.* (emphasis added).

38. The court in *Babcock* affirmed the dismissal on the grounds that the plaintiff was barred from seeking relief because the plaintiff ratified the challenged transactions. *Id.* at 693.

39. 91 N.E. 1048, 1051 (Ill. 1910).

subscription amounts.<sup>40</sup> Here, the defendants made the same core argument as in *Babcock*, that the courts of Illinois had no jurisdiction over a Missouri corporation, as well as a broad range of additional arguments against Illinois taking jurisdiction.<sup>41</sup> Given the holding in *Babcock*, it is not surprising that the Illinois Supreme Court rejected these arguments. The court again discussed the distinction between matters that fell within the exercise-of-discretion rule and cases for which there was no jurisdiction.<sup>42</sup> The Illinois Supreme Court plainly stated that Illinois courts had no power to grant a request for judicial dissolution. The Supreme Court held:

The courts of one state have no power to dissolve a foreign corporation and wind up its affairs; but [the foreign corporation] will retain its legal existence until dissolved by a proceeding in the state which created it; but even in that case assets which are a trust fund for shareholders and creditors will be administered by the domestic courts where they are found.<sup>43</sup>

These two rulings demonstrate a key point. While there may be instances in which a court can or may exercise jurisdiction in its discretion, there are certain types of cases in which there is no discretion involved—those in which the court has no power to grant the relief sought. In cases involving visitatorial powers, such as seeking dissolution of a foreign entity, the court has no power to enter the relief sought, so there is no question of jurisdiction.

At the same time, however, other courts had and have appropriated similar theories to justify *expanding* their jurisdiction. These courts ignore the distinction between visitatorial powers and discretionary action and view the internal affairs doctrine as a choice-of-law question, rather than one of inherent power. In *Starr v. Bankers' Union of the World*,<sup>44</sup> the trial court appointed the plaintiff as the receiver of the Order of the Iron Chain, a fraternal organization formed under the laws of Minnesota and operated in Minnesota which, among other things, paid death benefits to survivors of its members.<sup>45</sup> The Order had financial problems and it sought to consolidate with the Bankers' Union of the World, a Nebraska corporation operating in Nebraska.<sup>46</sup> After negotiating, the Order and the Bankers' Union entered into a contract pursuant to which the books, records, and assets of the Order would be transferred to the Bankers' Union to be spent consistently with the regulations of the Order.<sup>47</sup> A member of the Bankers' Union became the Supreme Chancellor of the Order and collected money pursuant to notices of assessment from the Order.<sup>48</sup>

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40. *Id.* at 1049–50.

41. *Id.* at 1050.

42. *Id.* at 1051.

43. *Id.*

44. 116 N.W. 61 (Neb. 1908).

45. *Id.*

46. *Id.* at 62.

47. *Id.* at 61.

48. *Id.*



After failing to receive payments due from the Order, a beneficiary of the death benefits filed suit and the trial court appointed him as receiver of the Order.<sup>49</sup> The receiver commenced an action against the Bankers' Union and its officers for conversion of the funds received from the Order pursuant to the contract and collected from its members in response to the assessment.<sup>50</sup> The defendants admitted the existence of the contract between the Order and the Bankers' Union, but argued that the trial court lacked the power to appoint a receiver for a foreign corporation.<sup>51</sup>

The Nebraska Supreme Court disagreed. The court based its holding on the same argument as in *Babcock* and *Edwards*, but here noted that “[t]he power to appoint a receiver of the assets of a foreign corporation is *constantly* exercised.”<sup>52</sup> The court held that courts did not normally appoint a receiver for a foreign corporation because usually the court could not obtain control of all of the books, records, and assets of a foreign corporation so “as to do full justice between all the parties interested.”<sup>53</sup> The court went to state, however, that:

[T]he operation of this rule ceases when the reason for it no longer exists, and whatever might be the objection to appointing a receiver for the property of a foreign corporation found in this state, where such property is only part of its assets, and where the books and records and officers of such corporation are beyond the process of the court, they do not apply in this case. Here all the assets, books, and records were brought into this jurisdiction. Here the defendants assumed to exercise the power and authority of the foreign corporation. No assets, no books, no person assuming to act as its officer remained in the state of its creation. Clearly the courts of this state in which all that remained of the Order of the Iron Chain had been brought by these defendants would be better able to take jurisdiction of an action by its beneficiaries and members than would the courts from the state from which it was abducted. There nothing remained for the jurisdiction of that state to act upon, no funds, no records, and no officers, but those who had abdicated their authority and ceased to act for the order.<sup>54</sup>

This reasoning seems entirely consistent with the “exception” noted in *Babcock* and *Edwards*—that a court without jurisdiction to exercise visitatorial powers over a foreign corporation can still take jurisdiction over assets in the forum state. But the Nebraska Supreme Court then took the argument one step further holding that:

None of the ordinary reasons why the courts of this state should not take jurisdiction of these assets remained, but whether the suit in which the receiver was appointed is considered as one to subject the assets of the foreign corporation found in this state to the payment of its debts, or *whether it be considered as a suit*

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49. *Id.*

50. *Id.* at 62.

51. *Id.*

52. *Id.* at 63 (emphasis added).

53. *Id.*

54. *Id.*

to administer and wind up the affairs of such corporation, every reason exists why the courts of this state should take jurisdiction.<sup>55</sup>

Thus, in one fell swoop, the Nebraska Supreme Court expanded its own power from simply taking control of assets in the forum state to “administering and winding up the affairs” of a foreign corporation with all of its assets in the forum state. Still, there is no language in the opinion indicating that the Nebraska Supreme Court granted the receiver the power to administer and wind up.

Other courts, including Pennsylvania’s Supreme Court, relied on *Starr’s* reasoning to justify appointing a receiver for the purpose of dissolving and winding up a foreign corporation. In *Cunliffe v. Consumers’ Ass’n of America*,<sup>56</sup> the plaintiffs sought the appointment of a receiver for the defendant, Consumers’ Association of America (“CAA”), for the purpose of liquidating CAA’s assets and winding up its affairs.<sup>57</sup> CAA was a Delaware corporation but conducted all of its business in Pennsylvania, and all of its stockholders resided in Pennsylvania except for one who had moved to Delaware only recently.<sup>58</sup> Echoing the generally accepted view that a court has the inherent equitable authority to dissolve a domestic entity in cases of fraud or gross mismanagement, the Pennsylvania trial court found that the corporation was used as a “cloak to cover fraudulent conduct on the part of the officers.”<sup>59</sup> Thus, the trial court ordered that receivers should be appointed to liquidate CAA’s assets and wind up its affairs.<sup>60</sup>

The officer-defendants argued that a Pennsylvania court did not have jurisdiction to appoint a receiver of a Delaware corporation for this purpose.<sup>61</sup> The Pennsylvania Supreme Court disagreed. Quoting a federal decision that cited *Babcock*, the court held that the question was “not strictly one of discretion, but rather of discretion in the exercise of jurisdiction.”<sup>62</sup> Then, after discussing *Starr* at length, the Pennsylvania Supreme Court held that:

[I]n the case at bar, under the facts disclosed, we have come to the emergent situation, where our courts, to protect our own citizens, and to preserve property within our jurisdiction for those of them whose money has gone into it, must lay hands on a fraudulent enterprise, and not permit it to hide behind the screen of corporate organization by another state and inveigle further victims. It would be strange to say that the courts of Pennsylvania have no jurisdiction to appoint a receiver for a corporation where all of the assets, all of the business, all of the officers and directors, and all of the books and records of the corporation are in this state, merely because the promoters of the corporation for some purpose went to another state to have the company incorporated.<sup>63</sup>

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55. *Id.* (emphasis added).

56. 124 A. 501 (Pa. 1924).

57. *Id.* at 502.

58. *Id.* at 501.

59. *Id.*

60. *Id.*

61. *Id.* at 504.

62. *Id.* at 502 (quoting *Chi. Title & Trust Co. v. Newman* 187 F. 573, 576 (7th Cir. 1911)).

63. *Id.* at 504.

In *Starr* and *Cunliffe*, the courts relied exclusively on the theory that courts could take jurisdiction of disputes involving foreign corporations as an exercise of discretion provided that all parties were before the forum court. In each case, however, the courts failed to appreciate the important distinction drawn by the Illinois Supreme Court in *Babcock* and *Edwards* that there is no discretionary jurisdiction where a plaintiff requests that the forum court exercise visitatorial powers over a foreign corporation.<sup>64</sup>

In *Rogers v. Guaranty Trust Co.*,<sup>65</sup> the United States Supreme Court contributed to the evolution of the internal affairs doctrine from a doctrine grounded in visitatorial powers to a discretionary basis for a court to refuse to consider a case. In *Rogers*, the plaintiff, a stockholder of the American Tobacco Company, a New Jersey corporation, filed actions in New York state court challenging the sale of stock by the company.<sup>66</sup> The defendants removed the cases to federal court in New York where they were consolidated.<sup>67</sup> The district court dismissed the actions in the exercise of the court's discretion since the claims alleged in the complaint raised complex questions under New Jersey law "peculiarly a matter for determination in the first instance by the New Jersey courts."<sup>68</sup> The Second Circuit affirmed the dismissal for the reasons given by the district court.<sup>69</sup>

The Supreme Court affirmed the dismissal as well. The Supreme Court started its analysis by articulating its understanding of the internal affairs doctrine:

[A] court—state or federal—sitting in one State will as a general rule decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another state but will leave controversies as to such matters to the courts of the state of the domicile.<sup>70</sup>

The Supreme Court explained that the rule meant that a court has discretion to refuse a case under the appropriate circumstances:

Obviously, no definite rule of general application can be formulated by which it may be determined under what circumstances a court will assume jurisdiction of stockholders' suits relating to the conduct of internal affairs of foreign corporations. But it safely may be said that *jurisdiction will be declined whenever considerations of convenience, efficiency, and justice point to the courts of the state of the domicile as appropriate tribunals for the determination of the particular case.*<sup>71</sup>

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64. See *N. State Copper & Gold Mining Co. v. Field*, 20 A. 1039, 1040 (Md. 1885); *Howell v. Chicago & N.W. Ry. Co.*, 51 Barb. 378, 379 (N.Y. Sup. Ct. 1868).

65. 288 U.S. 123 (1933).

66. *Id.* at 124.

67. *Id.*

68. *Id.* at 128.

69. *Id.* at 129. For some reason, the Second Circuit also decided the merits of the plaintiff's claims. The Supreme Court reversed that determination.

70. *Id.* at 130.

71. *Id.* at 131; see also *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947) (relying, in part, on *Rogers* to affirm dismissal on *forum non conveniens* grounds a derivative action brought in New York on behalf of Illinois mutual society where all witnesses and directors were in Illinois).

Thus, the general concept of the internal affairs doctrine continued its evolution into a discretionary doctrine.

Other courts built on the concept of the internal affairs doctrine as a discretionary matter as articulated in *Rogers*. For instance, in *Hogeland v. Tec-Crafts, Inc.*,<sup>72</sup> the Pennsylvania Court of Common Pleas, relying on *Cunliffe* and the Second Circuit's opinion in *Rogers*,<sup>73</sup> held that whether the court could hear a claim for dissolution of a Delaware corporation was a matter of discretion, not jurisdiction.<sup>74</sup> Under this theory, courts began to view the question within the lens of a *forum non conveniens* analysis, rather than for review of their power to render the relief sought. Similarly, in *State ex. rel. Weede v. Iowa Southern Utilities Co.*, the Supreme Court of Iowa supported its decision under Iowa corporation law to reverse the trial court's grant of a motion to dismiss the plaintiff's claim against a Delaware corporation by citing a number of cases in which courts had agreed to hear matters that would arguably interfere with the internal affairs of foreign corporations.<sup>75</sup> The courts in *Hogeland* and *Weede* relied on *Cunliffe* as well as other cases in which courts merely agreed to take jurisdiction of cases involving breaches of fiduciary duties or other relief less drastic than termination of corporation existence.<sup>76</sup>

### C. CONTEMPORARY APPLICATION

Although the issue of dissolution of foreign entities arose fairly often in the early to mid-1900s, there is very little case law after that until the early 2000s. The courts that have considered the issue can be divided into two camps. In the first camp are courts that merely paid lip service to the issue, if they gave it any treatment at all, and concluded that the court had the power to dissolve a foreign corporation. Two decisions of the First Department in New York followed this approach. In *In re Dissolution of Hospital Diagnostic Equipment Corp.*,<sup>77</sup> the Appellate Division affirmed the trial court's exercise of

72. 39 Del. Co. 10 (Pa. Ct. Com. Pl. 1952).

73. *Rogers v. Guar. Trust Co. of New York*, 60 F.2d 114 (2d Cir. 1932).

74. *Hogeland*, 39 Del. Co. at 13; see also *Tanzer v. Warner Co.*, 9 Pa. D. & C. 3d 534, 540 (Pa. Ct. Com. Pl. 1978) (citing *Cunliffe* for proposition that an action to appoint a receiver to wind up a foreign corporation is an exception to the rule against interfering in the internal affairs of a corporation), *aff'd*, 263 Pa. Super. 600 (1978).

75. *State ex rel. Weede v. Iowa S. Utilities Co.*, 2 N.W.2d 372, 392–93 (Iowa 1942), *modified on denial of hearing* by 4 N.W.2d 869 (Iowa 1942).

76. E.g., *Conerty v. Butler Cnty. Oil Refining Co.*, 152 A. 672 (Pa. 1930) (holding that Pennsylvania court had jurisdiction to order production of books and records of Arizona corporation); *Wetengel v. Robinson*, 136 A. 673, 675 (Pa. 1927) (holding that Pennsylvania court could hear claims brought against former directors of dissolved West Virginia corporation); see also *Weede*, 2 N.W.2d at 392–93 (listing cases in which courts find jurisdiction to hear claims involving breach of fiduciary duty, rescission, and other claims). To be clear, these decisions appear to be motivated a bit by parochialism and are not reflective of the modern economy. As an example, in *Weede*, the court referred to the defendant corporation there—originally formed in Maine, then reincorporated in Delaware, but always doing business in Iowa, as a “tramp or migratory corporation.” *Id.* at 385. Many of the other decisions of this time period imply or expressly state some level of offense and skepticism at entrepreneurs who would choose to incorporate in one state but do business in another.

77. 613 N.Y.S.2d 884 (App. Div. 1994).

discretion to dismiss the petitioner's claim to dissolve a Delaware corporation.<sup>78</sup> Yet, in *dicta*, the Appellate Division stated that it had "considered the litigants' remaining arguments, including the Attorney General's that the courts of New York lack[ed] subject matter jurisdiction to dissolve a foreign corporation, and [found] them to be without merit."<sup>79</sup> In *Holdrum Investments N.V. v. Edelman*,<sup>80</sup> the New York Supreme Court concluded without meaningful discussion that it was bound by the *dicta* in *Hospital Diagnostics* and held that it had the ability to dissolve a foreign entity.<sup>81</sup>

Other states' courts have similarly glossed over the distinction between discretion and jurisdiction. In *ARC LifeMed, Inc. v. AMC-Tennessee, Inc.*,<sup>82</sup> the Tennessee Court of Appeals merely affirmed the trial court's decision to dissolve the entity without any meaningful discussion regarding the basis for which the Delaware limited liability company was dissolved or whether there was any challenge to the court's jurisdiction.<sup>83</sup> Moreover, the dissolution at issue was ordered pursuant to a Tennessee statute, not the Delaware LLC Act.<sup>84</sup>

In the other camp are courts that have expressly considered the issue at any length. Those courts uniformly have held that they had no power to order dissolution of a foreign entity. Here, the Second and Third Departments in New York depart from *Hospital Diagnostics* and *Holdrum* and that line of First Department cases. In 2007, the Third Department held in *Rimawi v. Atkins*<sup>85</sup> that "unlike the derivative claim involving the internal affairs of a foreign corporation, the plaintiffs' claim for dissolution and an ancillary accounting [was] one over which the New York courts lack subject matter jurisdiction."<sup>86</sup> Two years later, in *MHS Venture Management Corp. v. Utilisave, LLC*<sup>87</sup> the Second Department, citing *Rimawi*, held that "[a] claim for dissolution of a foreign limited liability company is one over which the New York courts lack subject matter jurisdiction."<sup>88</sup>

This second group of New York decisions was consistent with other state court decisions that have considered the issue at length. All such cases have concluded uniformly that courts of one state lack the power or authority to dissolve an entity formed under the laws of another state. West Virginia's highest court, the Supreme Court of Appeals, addressed the issue directly in

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78. *Id.* at 884.

79. *Id.*

80. No. 650950/2011, 2013 WL 435449 (N.Y. Sup. Ct. Jan. 31, 2013).

81. *Id.* at \*3.

82. 183 S.W.3d 1 (Tenn. Ct. App. 2005).

83. *Id.* at 29.

84. *Id.*

85. 42 A.D.3d 799 (N.Y. App. Div. 2007).

86. *Id.* at 801.

87. 63 A.D.3d 840 (N.Y. App. Div. 2009).

88. *Id.* at 841; see also *Bonavita v. Savenergy Holdings, Inc.*, No. 603891-13, slip op. at 12, 16 (N.Y. Sup. Ct. Dec. 8, 2014); *In re Warde-McCann v. Commex, Ltd.*, 135 A.D.2d 541, 542 (N.Y. App. Div. 1987).

*Young v. JCR Petroleum, Inc.*<sup>89</sup> In *Young*, the Supreme Court of Appeals heard a certified question from a West Virginia circuit court asking whether a West Virginia court could dissolve an Ohio corporation. After concluding that there was no statutory power granted to West Virginia courts to dissolve a foreign corporation, the supreme court concluded that the Full Faith and Credit Clause of the United States Constitution required each state to respect the sovereign acts of the other states, and the creation and dissolution of a corporation was one such act.<sup>90</sup> To support this argument, the West Virginia court quoted *Am. Jur. 2d*,<sup>91</sup> which stated:

Since a corporation is a creature of the state by which it is chartered, the right to dissolve the corporation without its consent belongs exclusively to the state. The existence of a corporation cannot be terminated except by some act of the sovereign power by which it was created. Accordingly, the courts of one state do not have the power to dissolve a corporation created by the laws of another state.<sup>92</sup>

With the advent of alternative entities, when faced with requests to dissolve limited partnerships and limited liability companies, state courts adopted similar rationales. In 2010, the Circuit Court of Virginia cited *Young* in its opinion granting a motion to dismiss a claim for dissolution of a foreign limited partnership. In *Valone v. Valone*,<sup>93</sup> the plaintiff sought an order dissolving a limited partnership formed in Georgia.<sup>94</sup> The defendants argued that Virginia courts had no subject matter jurisdiction to dissolve a foreign entity.<sup>95</sup> The *Valone* court first discussed the Virginia Supreme Court's opinion in *Taylor v. Mutual Reserve Fund Life Ass'n*,<sup>96</sup> in which the court held that a Virginia court could not "interfere with the internal management of a foreign corporation."<sup>97</sup> Rather, "[s]uch questions are to be settled by the tribunals of the state which created the corporation."<sup>98</sup> In *Valone*, the circuit court held that although the question before the Virginia Supreme Court in *Taylor* did not address whether a Virginia court could dissolve a foreign entity, the holding was "broad enough to address such a request":

Courts other than those of the State creating it, and in which it has its habitat, have no visitatorial powers over such corporation, have no authority to remove its officers,

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89. 423 S.E.2d 889 (W. Va. 1992).

90. *Id.* at 892.

91. The *Young* opinion incorrectly cites to 19 *Am. Jur. 2d Corporations* § 2734 (1986). The quoted text is found at 19 *Am. Jur. 2d Corporations* § 2349 (1986).

92. *Young*, 423 S.E.2d at 892 (quoting 19 *Am. Jur. 2d Corporations* § 2734 (1986)); accord *Spurlock v. Santa Fe Pac. R.R. Co.*, 694 P.2d 299, 312 (Ariz. Ct. App. 1984) ("[N]o court can declare a forfeiture of a franchise or a dissolution of a corporation except the courts of the jurisdiction which created it." (internal quotations omitted)).

93. No. CL08-5249, 2010 WL 7373698 (Va. Cir. Ct. Jan. 20, 2010).

94. *Id.* at \*1.

95. *Id.* at \*2.

96. 33 S.E. 385 (Va. 1899).

97. *Id.* at 388.

98. *Id.*

or to punish them for misconduct committed in the State which created it, *nor to enforce a forfeiture of its charter*.<sup>99</sup>

Although *Taylor* only had been followed in one prior Virginia decision, that decision stood for the same principles:

The existence of a corporation cannot be involuntarily dissolved except by the act of a sovereign power by which it was created. Accordingly, the courts of one state do not have the power to dissolve a corporation created by the laws of another state.<sup>100</sup>

The circuit court then noted that numerous decisions, including *Young*, had reached the same conclusion.<sup>101</sup> The Virginia court found that no difference between a limited partnership and a corporation could justify departing from *Taylor*. Thus, the court declined to apply a contrary rule to a claim for dissolution of a foreign limited partnership as had been applied to claims for dissolution of a foreign corporation.

The Superior Court of Vermont reached the same conclusion in *Casella Waste Systems, Inc. v. GR Technology, Inc.*,<sup>102</sup> but for a slightly different reason. There, the parties' limited liability company agreement required that a decree of dissolution be entered "pursuant to" the Delaware LLC Act.<sup>103</sup> The defendant moved to dismiss on the grounds that only the Court of Chancery could enter a decree of dissolution "pursuant to" the LLC Act.<sup>104</sup> The plaintiff argued that the language of section 18-802 of the LLC Act merely allocated power among Delaware's various courts.<sup>105</sup> The Vermont court rejected the plaintiff's argument and held that it was without jurisdiction to hear a dissolution claim pursuant to section 18-802 because it was not authorized to do so by section 18-802:

In this case, dissolution under § 18-802 is a purely statutory remedy, and the power to dissolve limited liability companies is conferred entirely by the enabling statute, rather than by any source of authority deriving from the common law, or by traditional equitable relief. In other words, jurisdiction under § 18-802 is conferred completely by the Delaware LLC Act, and not by any other source. The

99. *Valone*, 2010 WL 7373698, at \*2 (quoting *Taylor*, 33 S.E. at 388).

100. *Id.* at \*2 (quoting *Lucker v. Rel Tech Grp., Inc.*, 24 Va. Cir. 197, 200 (1991)). Not surprisingly, it is well settled in Delaware that Delaware courts cannot dissolve a foreign entity. *Swift v. State ex rel. Richardson*, 6 A. 856, 864 (Del. 1886) ("The superior court, and even the state of Delaware itself, cannot forfeit the charter of a foreign corporation.").

101. *Id.* at \*2–3 (citing *Mills v. Anderson*, 214 N.W. 221, 223 (Mich. 1927) ("It is text book law that the courts of one state cannot dissolve a corporation created by another state."); *Rimawi v. Atkins*, 42 A.D.3d 799, 801 (N.Y. App. Div. 2007) ("[W]e conclude that plaintiffs' cause of action seeking dissolution [of a Delaware limited liability company] must also be dismissed. A limited liability company is a hybrid entity and is, in all respects pertinent here, most like a corporation . . . . Thus, . . . plaintiffs' claim for dissolution and an ancillary accounting is one over which the New York courts lack subject matter jurisdiction."); *State of Texas v. Dyer*, 200 S.W.2d 813, 815–16 (Tex. 1947) ("Since a corporation is a creature of the state by which it is chartered, the right to dissolve the corporation without its consent belongs exclusively to the state. . . . One state has no power to dissolve a corporation created by the laws of another state.").

102. No. 409-6-07, 2009 WL 6551408 (Vt. Super. Ct. 2009).

103. *Id.* at \*2.

104. *Id.* at \*1.

105. *Id.* at \*5.

presumption of general jurisdiction does not allow this court to exercise jurisdiction over a statutory cause of action where the enabling statute does not grant it authority to do so.<sup>106</sup>

Finally, as discussed in the introduction, the court in *Intertrust GCN, LP v. Interstate General Media, LLC* took a position very similar to the court in *Casella*, holding that the plain language of section 18-802 of the LLC Act “implies that exclusive subject matter jurisdiction lies with the Delaware Court of Chancery.”<sup>107</sup> The statutory authority to dissolve alternative entities is discussed more fully below.

## II. THE DIFFERENCE WITH DISSOLUTION

As discussed above, the courts that find they have jurisdiction to dissolve a foreign entity tend to view the issue in the context of the internal affairs doctrine, which would make the decision whether to resolve a claim for judicial dissolution of a foreign entity discretionary, not mandatory. To reach that conclusion, these courts must necessarily presume a claim for judicial dissolution is like any other claim—one that can adjudicated by the court provided that it has jurisdiction over the parties, subject to the ordinary choice-of-law rules, like a tort or breach of contract claim. But a claim for judicial dissolution is no ordinary claim.

As explained in *In re Carlisle Etcetera, LLC*, the sovereign has an interest in the formation and dissolution of an entity created under its laws:

Of particular relevance to dissolution, the purely contractarian view discounts core attributes of the LLC that only the sovereign can authorize, such as its separate legal existence, potentially perpetual life and limited liability for its members. To my mind, when a sovereign makes available an entity with attributes that contracting parties cannot grant themselves by agreement, the entity is not purely contractual. Because the entity has taken advantage of benefits that the sovereign has provided, the sovereign retains an interest in that entity. That interest in turn calls for preserving the ability of the sovereign’s courts to oversee and, if necessary, dissolve the entity. Put more directly, an LLC agreement is not an exclusively private contract among its members precisely because the LLC has powers that only the State of Delaware can confer. . . . Just as LLCs are not purely private entities, dissolution is not a purely private affair. It involves third party claims, which have priority in the dissolution process. Because an LLC takes advantage of the benefits that the State of Delaware provides, and because dissolution is not an exclusively private matter, the State of Delaware retains an interest in having the Court of Chancery available, when equity demands, to hear a petition to dissolve an LLC.<sup>108</sup>

Similarly, the West Virginia Supreme Court of Appeals held in *Young* that the creation and dissolution of entities are the types of “public acts” that require

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106. *Id.* (citations omitted).

107. *Intertrust GCN, LP v. Interstate Gen. Media, LLC*, Jan. Term 2014, No. 99, slip op. at 5 (Pa. Ct. Com. Pl. Feb. 11, 2014).

108. C.A. No. 10280-VCL, 2015 WL 1947027, at \*5 (Del. Ch. Apr. 30, 2015).



Full Faith and Credit from sister states.<sup>109</sup> The Full Faith and Credit Clause requires that other states respect the continuing interest that a state has in entities formed under its laws.

A claim for judicial dissolution brought outside of the state of incorporation, however, seeks to undo that interest and the privileges and rights granted by the state of formation that entitle the entity to continue to operate in the state of its formation, regardless of its ability to operate in any other state. For instance, most states today maintain a regulatory system that permits its citizens, corporate and corporal, to engage in economic activities sanctioned by the state, often times by license. Thus, a citizen of State A may obtain a license from State A to sell alcohol,<sup>110</sup> deadly weapons,<sup>111</sup> or operate a security business.<sup>112</sup> To engage in the same economic activity in State B, the citizen of State A usually must obtain the same licenses or permission from State B. But if the citizen of State A has his license revoked by State B, the citizen of State A may continue to do business in State A.<sup>113</sup>

Likewise, most states today require a foreign corporation to obtain some form of permission to do business in a state other than the one of its formation. While there may be good and sound reasons why a court of State B may wish to have the power to preclude what it perceives to be a rogue entity formed under the laws of State A from operating within the borders of State B, an order of judicial dissolution does far more than that. Judicial dissolution terminates the existence of the entity entirely, precluding the entity from operating within any state, including its state of formation. Just as we would not expect a court of State B to be able to revoke a license granted by State A, thereby terminating the economic activity of the citizen beyond the borders of State B, we also should not expect a court of State B to terminate the ability of an entity formed under the laws of State A to continue to do business in State A.

Moreover, for an order of judicial dissolution to be effective, an official act must be performed in the state of formation. In Delaware, if a corporation is dissolved by order of the Court of Chancery, the Register in Chancery must file the judgment with the Secretary of State.<sup>114</sup> Limited liability companies and limited partnerships require a different procedure, but under the relevant statutes, upon dissolution and completion of the winding up, they will continue to exist until an individual files a certificate of cancellation.<sup>115</sup> This unique aspect of judicial dissolution is far more than “want of power [of a foreign court] to enforce a decree rather than jurisdiction to make it”<sup>116</sup> but rather the unique requirement of an act in another sovereign state to ensure its effectiveness.

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109. *Young v. JCR Petroleum, Inc.*, 423 S.E.2d 889, 892 (W. Va. 1992).

110. *E.g.*, DEL. CODE ANN. tit. 4, § 501(a) (2011).

111. *E.g.*, DEL. CODE ANN. tit. 24, § 901 (2011).

112. *E.g.*, *id.* § 1202(a).

113. Even if revocation of a license in State B has collateral effect in State A due to reciprocity provisions or agreements, State A must still act independently to take any action affecting the license it issued.

114. DEL. CODE ANN. tit. 8, § 285 (2011).

115. DEL. CODE ANN. tit. 6, § 17-203 (2013); *id.* § 18-203.

116. *Cunliffe v. Consumers' Ass'n of Am.*, 124 A. 501, 502 (Pa. 1924).

As discussed above, courts originally recognized the fundamental difference between an ordinary claim arising from the governance of an entity and a claim seeking its termination. Courts would not dissolve charters granted by express act of the legislature. As the process for forming corporations evolved into general chartering provided by statute, the reluctance of the judicial branch to interfere with a charter waned but formation and dissolution remained distinct acts of the sovereign. As explained in *In re Carlisle Etcetera, LLC*, even under contemporary formation schemes, an entity has powers that *only* the state can provide.<sup>117</sup>

This concept is implemented in two ways in the statutes that address dissolution. First, the provisions of the General Corporation Law of the State of Delaware (the “DGCL”) addressing dissolution do not materially enhance the inherent equitable authority of the Court of Chancery to dissolve a corporation through statutory authorization. Only one provision of the current version of the DGCL expressly empowers the Court of Chancery to dissolve a Delaware corporation, 8 *Del. C.* § 273, but that statute is limited only to corporations equally owned by two stockholders conducting a joint venture.<sup>118</sup> Courts have interpreted section 291 of the DGCL to permit a court to dissolve a corporation, but that statute requires (i) the entity to be insolvent, (ii) “special circumstances of great exigency,” and (iii) a benefit to creditors by the appointment of a receiver.<sup>119</sup> Finally, section 226 empowers the Court of Chancery to appoint a custodian in cases of stockholder or director deadlock or abandonment of the business.<sup>120</sup> In cases of stockholder or director deadlock, the custodian has all of the powers of a receiver under section 291, except that she is to continue the business unless otherwise ordered by the court.<sup>121</sup> A custodian appointed under section 226 due to the abandonment of the business, however, is empowered by the statute to dissolve the business.<sup>122</sup>

Second, the language used by the Delaware General Assembly in sections 226, 273, and 291 empowers only the Court of Chancery to exercise these powers; it does not simply allocate jurisdiction to the Court of Chancery to hear these statutory claims. In general, there are three “types” of language used in the DGCL to allocate certain types of claims to the Court of Chancery: “exclusive jurisdiction” language, conferring jurisdiction language, and empowering language. The “exclusive jurisdiction” language does exactly what it says: it provides in clear language that the Court of Chancery shall have exclusive jurisdiction to hear and decide cases brought pursuant to the relevant statutory provision. The “conferring jurisdiction” provisions give specific authorization to the Court of Chancery to decide those cases when it otherwise would have no power to

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117. C.A. No. 10280-VCL, 2015 WL 1947027, at \*5 (Del. Ch. Apr. 30, 2015).

118. DEL. CODE ANN. tit. 8, § 273(b) (2011).

119. *In re Townsend Acres, Inc.*, C.A. No. 561, 1977 WL 2571, at \*1 (Del. Ch. May 3, 1977). The express language of section 291 does not mention dissolution and appointment of a receiver does not necessarily require dissolution of the entity. *In re Int'l Reinsurance Corp.*, 48 A.2d 529, 539 (Del. Ch. 1946).

120. DEL. CODE ANN. tit. 8, § 226(a) (2011).

121. In theory the Court of Chancery could order dissolution under the deadlock provisions of section 226, but to date no court has done so.

122. *Id.* § 226(a)(3), (b).

decide them because they fall outside of the court's traditional equitable jurisdiction. The empowering statutes, like sections 226, 273 and 291, do one of two things, and sometimes both: empower the Court of Chancery to take certain actions *or* create a substantive right that a stockholder, member, or limited partner can enforce. Because the General Assembly used different language for each of these types of statutory provisions, we can presume that the General Assembly meant the provisions to mean different things.<sup>123</sup> A closer examination of the different statutes reveals that the General Assembly used the empowering language when it was conferring its vistorial powers on the court to address claims relating to the unique powers granted by the state itself.

### A. EXCLUSIVE JURISDICTION STATUTES

Although many lawyers simply assume that the Court of Chancery has exclusive jurisdiction over many causes of action, in fact the number of "exclusive jurisdiction" provisions is low. Only sections 145, 203, and 220 of the DGCL contain "exclusive jurisdiction" language.<sup>124</sup> The provision conferring exclusive jurisdiction in the Court of Chancery in section 145 was adopted to alter the prior practice in which advancement cases not only could be brought, but often had to be brought, in the Delaware Superior Court.<sup>125</sup> Simply authorizing the Court of Chancery to hear those cases would not have necessarily changed the practice, because such cases could still have been brought in the Delaware Superior Court. To ensure that the practice changed, the General Assembly had to ensure that *all* advancement cases were brought in the Court of Chancery. To accomplish this goal, the General Assembly used the following language:

The Court of Chancery is hereby *vested with exclusive jurisdiction* to hear and determine all actions for advancement of expenses or indemnification brought under this section or under any bylaw, agreement, vote of stockholders, or disinterested directors, or otherwise. The Court of Chancery may summarily determine a corporation's obligation to advance expenses (including attorneys' fees).<sup>126</sup>

Sections 203 and 220 contain similar language.

123. See *Ins. Comm'r of State of Delaware v. Sun Life Assurance Co. of Canada (US)*, 31 A.3d 15, 22 (Del. 2011) (citing 2A NORMAN J. SINGER & J.O. SHAMBLE SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 46:6 (7th ed. 2010) ("The use of different terms within similar statutes generally implies that different meanings were intended.")).

124. DEL. CODE ANN. tit. 8, § 145(k) (2011) ("The Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all actions for advancement of expenses or indemnification brought under this section or under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise."); *id.* § 203(e) ("The Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all matters with respect to this section."); *id.* § 220(c) ("The Court of Chancery is hereby vested with exclusive jurisdiction to determine whether or not the person seeking inspection is entitled to the inspection sought.").

125. See *IMO Daniel Kloiber Dynasty Trust*, 98 A.3d 924, 939 (Del. Ch. 2014) (noting that until 1994, "suits seeking advancement and indemnification were heard in the Superior Court because they involved monetary, rather than equitable relief" but the General Assembly reassigned those matters to the Court of Chancery through adoption of 8 *Del. C.* § 145(k)).

126. DEL. CODE ANN. tit. 8, § 145(k).

## B. CONFERRING JURISDICTION STATUTES

The next category of provision simply grants the Court of Chancery jurisdiction—on a non-exclusive basis—where there otherwise would be none. The General Assembly uses two forms of language to achieve this result: “may” and “shall.” Section 111 of the DGCL is a classic example of the “may” type of provision. In section 111, the language confers jurisdiction by stating that many claims that would not otherwise be within the Court of Chancery’s jurisdiction, such as a claim to determine the validity of a provision of a certificate of incorporation or a company’s bylaws, or to interpret an agreement or certificate of merger, “may” be brought in the Court of Chancery.<sup>127</sup> Prior to adoption of this section, the Court of Chancery would have had no subject matter jurisdiction to issue a declaratory judgment regarding the validity or interpretation of any of these documents without an additional equitable basis for jurisdiction.<sup>128</sup> Section 284 provides an example of the “shall” type of provision. There, the statute begins with the words “[t]he Court of Chancery shall have jurisdiction” and then describes the type of cause of action.<sup>129</sup>

## C. THE EMPOWERING STATUTES

Finally, the largest of the three categories is the empowering provisions. An empowering provision is one that creates a substantive right (for a company, director, or stockholder) or confers authority on the Court of Chancery to take certain action. The categories are not mutually exclusive: an empowering statute can also be an exclusive jurisdiction statute, or the statute may empower both a stockholder and the court. An example of an empowering provision is section 220 of the DGCL, which creates a statutory right of a stockholder to obtain books and records of a company provided the stockholder meets the statutory prerequisite.<sup>130</sup> That right exists independent of where the claim should be brought.

In addition to sections 226, 273, and 291, the other provisions that empower the Court of Chancery to take some action, as opposed to creating a substantive right, all share one trait: they permit the Court of Chancery to exercise the visitorial powers reserved for the state of incorporation. Under section 205, the Court of Chancery may validate a corporate act, such as the issuance of shares or approval of a corporate transaction, that did not receive approval as required

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127. DEL. CODE ANN. tit. 8, § 111(a) (2011) (“may be brought in the Court of Chancery”).

128. See Darby Emerging Mkts. Fund, L.P. v. Ryan, Consol. C.A. No. 8381-VCP, 2013 WL 6401131, at \*6–7 (Del. Ch. Nov. 27, 2013) (noting that the synopsis of the legislative bill proposing section 111 states that “[t]his amendment expands the jurisdiction of the Court of Chancery with respect to a variety of matters pertaining to Delaware corporations”).

129. DEL. CODE ANN. tit. 8, § 284(a) (2011) (“The Court of Chancery shall have jurisdiction to revoke or forfeit the charter of any corporation for abuse, misuse or nonuse of its corporate powers, privileges or franchises.”).

130. *Id.* § 220.

by the DGCL.<sup>131</sup> In sections 211 and 215, the Court of Chancery may order a stockholder vote for the election of directors to be held.<sup>132</sup> In sections 223, 225, 226, and 227, the court can enter orders determining who the directors of a corporation are, break deadlocks among the stockholders or directors, displace the board by appointing a custodian, and determine who has the right to vote in an election of directors.<sup>133</sup> In sections 278 and 279, the Court of Chancery has the authority to appoint receivers for dissolved corporations or even extend the very existence of the corporation past its statutory life.<sup>134</sup> These powers permit the Court of Chancery to interfere with the management and, indeed, very existence of the corporation itself.

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131. DEL. CODE ANN. tit. 8, § 205(a) (2011) (“upon application . . . the Court of Chancery may”).

132. *Id.* § 211(c) (“If there be a failure to hold the annual meeting or to take action by written consent to elect directors in lieu of an annual meeting for a period of 30 days after the date designated for the annual meeting, or if no date has been designated, for a period of 13 months after the latest to occur of the organization of the corporation, its last annual meeting or the last action by written consent to elect directors in lieu of an annual meeting, the Court of Chancery may summarily order a meeting to be held upon the application of any stockholder or director.”); *id.* § 215(d) (“If the election of the governing body of any nonstock corporation shall not be held on the day designated by the bylaws, the governing body shall cause the election to be held as soon thereafter as convenient. The failure to hold such an election shall not work any forfeiture or dissolution of the corporation, but the Court of Chancery may summarily order such an election to be held upon the application of any member of the corporation.”).

133. *Id.* § 223(c) (“If, at the time of filling any vacancy or any newly created directorship, the directors then in office shall constitute less than a majority of the whole board (as constituted immediately prior to any such increase), the Court of Chancery may, upon application of any stockholder or stockholders holding at least 10 percent of the voting stock at the time outstanding having the right to vote for such directors, summarily order an election to be held to fill any such vacancies or newly created directorships, or to replace the directors chosen by the directors then in office as aforesaid, which election shall be governed by § 211 or § 215 of this title as far as applicable.”); *id.* § 225(a) (“Upon application of any stockholder or director, or any officer whose title to office is contested, the Court of Chancery may hear and determine the validity of any election, appointment, removal or resignation of any director or officer of any corporation, and the right of any person to hold or continue to hold such office, and, in case any such office is claimed by more than 1 person, may determine the person entitled thereto.”); *id.* § 226(a) (“The Court of Chancery, upon application of any stockholder, may appoint 1 or more persons to be custodians, and, if the corporation is insolvent, to be receivers, of and for any corporation when . . . .”); *id.* § 227(a) (“The Court of Chancery, in any proceeding instituted under § 211, § 215 or § 225 of this title may determine the right and power of persons claiming to own stock to vote at any meeting of the stockholders.”).

134. *Id.* § 278 (“All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution or for such longer period as the Court of Chancery shall in its discretion direct.”); *id.* § 279 (“When any corporation organized under this chapter shall be dissolved in any manner whatever, the Court of Chancery, on application of any creditor, stockholder or director of the corporation, or any other person who shows good cause therefor, at any time, may either appoint 1 or more of the directors of the corporation to be trustees, or appoint 1 or more persons to be receivers, of and for the corporation, to take charge of the corporation’s property and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation.”).

## D. EMPOWERING STATUTES AND DISSOLUTION

So, under common law, the right to dissolve equitably a corporation should be reserved for the state of incorporation because only that state can exercise visitorial powers over the entity. Similarly, the statutes that do permit judicial dissolution fall into a category of statutes that do not merely allocate jurisdiction among the Delaware courts, but permit the Court of Chancery to exercise the visitorial powers reserved for the sovereign. Thus, even if a person seeks to bring a statutory claim for dissolution, the power being exercised pursuant to the statute is a visitorial power that should be exercised only by the state of formation.

That theory has been applied in recent cases seeking dissolution of alternative entities. The dissolution sections of the Delaware Revised Uniform Limited Partnership Act and the Delaware Limited Liability Company Act (the “LLC Act”) empower a particular person—member, manager, or partner—to make an application to the Court of Chancery.<sup>135</sup> The Court of Chancery is then empowered, in its discretion, to dissolve the entity if it meets the statutory prerequisite; i.e., that it is no longer reasonably practicable to carry on the business of the entity in conformity with its agreement.<sup>136</sup> The courts in *Casella* and *Intertrust* both reached the conclusion that this statutory language reserved for the Court of Chancery the right to dissolve a Delaware limited liability company.

The Court of Chancery, however, has issued opinions recently disclaiming the notion that foreign courts cannot adjudicate claims allocated to the Court of Chancery. In *IMO Daniel Kloiber Dynasty Trust*,<sup>137</sup> the Court of Chancery held that statutes that confer exclusive jurisdiction to a Delaware court do not make “a claim against the world that no court outside of Delaware can exercise jurisdiction over that type of case.”<sup>138</sup> The court explained that “as a matter of power within our federal republic,” the State of Delaware could not “arrogate that authority to itself.”<sup>139</sup> The court reasoned that Delaware could not preclude a sister state from hearing a claim under its laws because doing so

would not be giving constitutional respect to the judicial proceedings of the sister state. In the converse scenario, the United States Supreme Court has interpreted the Full Faith [and] Credit Clause as requiring that state courts not only respect the laws of their sister states but also entertain claims under their laws.<sup>140</sup>

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135. DEL. CODE ANN. tit. 6, § 17-802 (2013) (“On application by or for a partner the Court of Chancery may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement.”); *id.* § 18-802 (“On application by or for a member or manager the Court of Chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement.”).

136. *See supra* note 135.

137. 98 A.3d 924 (Del. Ch. 2014).

138. *Id.* at 939.

139. *Id.*

140. *Id.* at 939–40.

It is not, however, inconsistent with these principles to find that only the state of formation can dissolve an entity, or, more pointedly, that only the Court of Chancery can dissolve a Delaware entity.

As an initial matter, the only way to give Full Faith and Credit to the state's laws respecting dissolution is to read and interpret them as written, with due deference to the General Assembly's choice of language. All of the dissolution statutes in the State of Delaware expressly confer power (as opposed to merely allocating jurisdiction) only to the Court of Chancery to judicially dissolve an entity formed under Delaware law. As the courts in *Intertrust* and *Casella* noted, the statutory language used in the LLC Act dissolution provision meant that only the Court of Chancery had the power to grant the relief of judicial dissolution.<sup>141</sup> The provisions in the DGCL, which use the same type of empowering language as the LLC Act, should yield the same result.

Second, dissolution statutes should be narrowly construed. As the *Casella* court noted, the power to dissolve a limited liability company "is conferred entirely by the enabling statute, rather than by any source of authority deriving from the common law or traditional equitable relief."<sup>142</sup> As well under Delaware law, this statutory grant of authority is a narrow one to be used sparingly, and not to be enlarged beyond the specific reach authorized by the General Assembly.<sup>143</sup> To read Delaware's dissolution statutes to permit the courts of another state to grant relief the General Assembly specifically authorized only the Court of Chancery to confer would read the statute beyond the reach of its plain language.

To say that only courts of the state of formation have the ability to exercise visitatorial powers, such as dissolution, does not do harm to a sister state's right to protect its own citizens from harm or to affect assets or entities within its own borders. Foreign courts may appoint a receiver for property owned by a foreign corporation within the forum state's borders or issue an injunction preventing the corporation or its agents from conducting business in the state. The forum state's court may even enter orders that have the effect of causing the

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141. *Intertrust GCN, LP v. Interstate Gen. Media, LLC*, Jan. Term 2014, No. 99, slip op. at 5 (Pa. Ct. Com. Pl. Feb. 11, 2014).

142. *Casella Waste Sys., Inc. v. GR Tech., Inc.*, No. 409-6-07, 2009 WL 6551408, at \*4 (Vt. Super. Ct. 2009).

143. See *In re Arrow Invs. Advisors, LLC*, No. 4091, 2009 WL 1101682, at \*2 (Del. Ch. Apr. 23, 2009) ("Given its extreme nature, judicial dissolution is a limited remedy that this court grants sparingly."); *In re Seneca Invs., LLC*, 970 A.2d 259, 263-64 (Del. Ch. 2008) (declining to dissolve limited liability company based on alleged failure to comply with operating agreement because "[t]he role of this Court in ordering dissolution under § 18-802 is limited, and the Court of Chancery will not attempt to police violations of operating agreements by dissolving LLCs"); *Active Asset Recovery, Inc. v. Real Estate Asset Recovery Servs., Inc.*, No. 15478, 1999 WL 743479, at \*6 (Del. Ch. Sept. 10, 1999) ("As a general matter, this court's power to dissolve a partnership . . . is a limited one and should be exercised with corresponding care." (internal quotation omitted)); *Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv. of Cincinnati, Inc.*, No. 13389, 1996 WL 506906, at \*11 (Del. Ch. Sept. 3, 1996) ("The Court of Chancery's power to order dissolution and sale, in my opinion, is a narrow and limited power. The Court should not enlarge the dissolution power beyond the reach intended by the Legislature when it enacted § 17-802."), *aff'd*, 692 A.2d 411 (Del. 1997) (TABLE).

dissolution of the entity under the terms of its agreement,<sup>144</sup> or leave the entity with no assets. But what the forum state cannot and should not do is enter a decree of dissolution dissolving the entity judicially.

This is not a distinction without a difference. While a court may effectively strip a foreign entity of its assets and deprive it of the ability to conduct business in the forum state, whether that entity continues to exist, and under the terms and conditions it exists, should, and indeed must, be determined solely by the state of formation. Otherwise, the judicial branch of the foreign state would be making a determination that the legislature vested exclusively with the state of formation. Entities exist because of the powers bestowed on them by state statute, such that only the state that brings them into existence can take them back out.

### III. CONCLUSION

Though the concept of judicial dissolution as a visitatorial power exercisable solely by the state of incorporation may appear as something of an ancient legal theory, it is no less important today, when entities are formed pursuant to state statutes. At the same time, it is understandable how courts conflated visitatorial powers with the internal affairs doctrine, resulting in the unfortunate conclusion that a court's ability to exercise visitatorial powers over a foreign entity was discretionary. One cannot necessarily blame a court, like the one in *Hogeland*, for taking jurisdiction over a foreign entity in order to protect the citizens of its state from a fraud perpetrated by use of a foreign corporation. Yet, a court can protect its citizens without dissolving the foreign entity; the *Hogeland* court did not need to take the final step and terminate the existence of the entity itself. Dissolution, if necessary, should be left to the state of formation. And while it may have been the case long ago that obtaining relief in the state of formation would work a hardship on the injured parties, the modern legal, communication, and transportation systems eliminate much, if not all, of the hardship of filing a petition for relief in another state, even a faraway one.

But even placing aside the elimination of practical impediments, the act of dissolution is essentially different than other statutory claims. Dissolution severs the tie between the parties and the state of formation. It terminates the special powers given to the entity that only the state of formation can give. It also ends the life of the entity in not just the forum state, but in any other state. Foreign courts must appreciate that even without the power to dissolve a foreign entity, they remain fully empowered to protect their citizens from fraud and any other wrongdoing perpetrated by a foreign entity. To do so without dissolving the foreign entity would be to respect all states involved.

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144. See, e.g., *Citrin Holdings LLC v. Cullen 130 LLC*, C.A. No. 2791-VCN, 2008 WL 241615 (Del. Ch. Jan. 17, 2008) (staying a Delaware proceeding in favor of a prior-filed action in Texas because the Texas court was capable of determining whether the actions of the plaintiff in the Delaware action caused dissolution under the terms of the limited liability agreement).