THE CONTINUOUS OWNERSHIP REQUIREMENT IN SHAREHOLDER DERIVATIVE LITIGATION: ENDORSING A COMMON SENSE APPLICATION OF STANDING AND CHOICE-OF-LAW PRINCIPLES

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I. INTRODUCTION

In federal court, as well as in most state courts, a shareholder of a corporation can step into the shoes of the corporation and sue in its name. A shareholder typically initiates such a suit when the value of the corporation and its stock is compromised. One common example is if a director purchases an important corporate asset for a fraction of its fair market value. If the same director has control of the corporation or its board, the corporation may "choose" not to file a lawsuit against the director alleging breach of fiduciary duty, self-dealing, or other business transgressions. In the meantime, if the value of the corporation's stock has decreased, shareholders will want to see that loss returned to the company.

When a shareholder decides to file suit in the name of the corporation, the resulting lawsuit is commonly referred to as a "derivative action." Such actions are authorized by Federal Rule of Civil Procedure 23.1 (hereinafter "FRCP 23.1") in federal court and by similar rules and statutes in state courts.[1] Any relief obtained by the shareholder "takes the form of a judgment against [the] defendant that is obtained by the stockholders but runs in

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1. Federal Rule of Civil Procedure 23.1 also covers double derivative actions "in which a stockholder of a parent corporation brings suit to redress a wrong allegedly done to a subsidiary corporation owned by the parent." 7C CHARLES A. WRIGHT, ARTHUR R. MILLER, & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1821, at 6–8 (3d ed. 2007).

favor of the corporation."[2]

Under FRCP 23.1, one requirement is that the "complaint must be verified and must . . . allege that the plaintiff was a shareholder . . . at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law."[3] This requirement is known as the "contemporaneous ownership requirement"[4] and many state statutes contain similar limiting language.[5] The contemporaneous ownership requirement is intended to prevent "strike suits" by parties who could not have been injured by the conduct at issue.[6]

2. *Id.* at 6; Grosset v. Wenaas, 175 P.3d 1184, 1190 (Cal. 2008) ("When a derivative action is successful, the corporation is the only party that benefits from any recovery; the shareholders derive no benefit except the indirect benefit resulting from a realization upon the corporation's assets." (internal quotation marks omitted)).

3. Fed. R. Civ. P. 23.1(b). The full text of Fed. R. Civ. P. 23.1(b) is as follows:

> (b) Pleading Requirements**.**
>
> The complaint must be verified and must:
>
> (1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law;
>
> (2) allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and
>
> (3) state with particularity:
>
> > (A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and
> >
> > (B) the reasons for not obtaining the action or not making the effort.

Fed. R. Civ. P. 23.1(b). "The 'contemporaneous ownership' requirement in shareholder derivative actions was first announced in *Hawes* v. *Oakland*, 104 U.S. 450 (1882), and soon thereafter adopted as Equity Rule 97. This provision was later incorporated in Equity Rule 27 and finally in the present Rule 23.1." Bangor Punta Op., Inc. v. Bangor & Aroostoock R.R. Co., 417 U.S. 703, 708 n.4 (1974).

4. Elgin v. Alfa Corp., 598 So. 2d 807, 811–12 (Ala. 1992).

5. *See, e.g.*, DEL. CODE ANN. tit. 8, § 327 (2010) ("In any derivative suit instituted by a stockholder of the corporation, it shall be averred in the complaint that the plaintiff was a stockholder of the corporation at the time of the transaction of which such stockholder complains or that such stockholder's stock thereafter devolved upon such stockholder by operation of law.").

6. *Grosse*t, 175 P.3d at 1190 (stating that the purpose of the rule is "to prevent so-called strike suits, whereby stock in a corporation is purchased with 'purely litigious motives,' that is, 'for the sole purpose of prosecuting a derivative action to attack transactions' that occurred before the stock purchase") (quoting Alabama By-Products Corp. v. Cede & Co., 657 A.2d 254, 264 n.12 (Del. 1995)); *see also* 7C WRIGHT, *supra* note 1, § 1821, at 15 (stating that "the origin and purpose of the [contemporaneous ownership requirement] are obscure" and that "[i]t simply may reflect equitable principles, or have been an attempt to protect growing but vulnerable corporations from the late nineteenth-century version of strike suits. Conversely, it may have served as a device for preventing corporations from placing shares in the hands of out-of-state third parties to create diversity jurisdiction for suits on behalf of the

The central question addressed by this article is what happens when a shareholder owns stock at the time of the disputed conduct (thus permitting an allegation satisfying the contemporaneous ownership requirement) but thereafter sells or otherwise loses the stock while the ensuing lawsuit is pending. Such a shareholder is arguably injured by the disputed conduct and can therefore file a derivative action under FRCP 23.1 and similar state statutes and rules. However, the shareholder would not benefit from a judgment requiring the director to return the ill-gotten gains to the corporation because the shareholder no longer has any financial stake in the company. Should the law permit such a plaintiff to continue to pursue a derivative lawsuit? If not, what is the legal basis for dismissing the lawsuit—is it grounded in rules and statutes applicable to the court with jurisdiction or derived from an application of common law standing principles?

As discussed in Section II below, the overwhelming majority of jurisdictions (including federal courts) have concluded that a plaintiff who voluntarily or involuntarily ceases to be a shareholder, even momentarily, during the pendency of a derivative action loses standing to pursue the lawsuit. This requirement is known as the "continuous ownership requirement."[7] While the requirement itself is clear, the source of the requirement is not. Numerous federal courts have held that the requirement is animated by the requirement in FRCP 23.1 that the plaintiff in a derivative lawsuit "fairly and adequately represent the interests of the shareholders."[8] Some state courts rest their analysis on explicit statutory language incorporating a continuous ownership requirement.[9] Delaware courts, in contrast, have acknowledged that the operative statute "does not explicitly require continuous stock ownership to maintain a derivative action,"[10] yet Delaware courts have held repeatedly that the continuous ownership requirement is "a bedrock tenet of Delaware law and is adhered to

corporation").

7. *Grosset*, 175 P.3d at 1190.

8. Fed. R. Civ. P. 23.1.

9. *Grosset*, 175 P.3d at 1191–92 (analyzing language of California Corporations Code § 800(b)(1) (1977), which provides that "[n]o action may be instituted *or maintained* . . . ." (emphasis added)).

10. *In re* New Valley Corp. Derivative Litig., C.A. No. 17649, 2004 WL 1700530, at *3 (Del. Ch. June 28, 2004).

closely."[11] A few courts have rejected the continuous ownership requirement, despite the fact that the named plaintiff, who no longer holds any ownership in the corporation, will not benefit by any relief given to the corporation.[12]

As Section III below explains, each court adopting the continuous ownership requirement has used different reasoning to support the rule. These inconsistent rationales regarding the source of the requirement have a profound impact on the court's decision as to whether a plaintiff's ability to pursue a derivative lawsuit in federal court is governed by federal or state law. If the requirement is based on FRCP 23.1, then federal law should govern under *Hanna v. Plummer* and its progeny.[13] But if the continuous ownership requirement is instead a "bedrock tenet" of state substantive law, as it is in Delaware, then state law should apply under *Erie v. Railroad Co. v. Tompkins*.[14] And if the issue is governed by state law (as it would be in state court), which state's laws should apply in a conflict of law analysis? The same choice-of-law principles applicable to the choice between federal and state law are paralleled here: if the requirement is based on the plain language of a state counterpart to FRCP 23.1 and is therefore "procedural" in nature, then the law of the forum would arguably apply, but if the requirement is substantive in nature, then the law of the state of incorporation would apply. Here too, case law is rife with confusion.

The thesis of this article—as set forth in Section IV below—is that courts should adopt and strictly enforce the continuous ownership requirement. Section IV also explains that courts need not look to FRCP 23.1, to its state analogues, or to state statutes regarding derivative lawsuits in order to cobble together a plausible basis for the continuous ownership requirement. Instead, courts need only look to, and apply, traditional standing principles which require that a plaintiff have a "personal stake" in the

11. *Id.*

12. Gaillard v. Natomas Co., 173 Cal. App. 3d 410, 415 (1985).

13. 380 U.S. 460 (1965); Burlington Northern R.R. Co. v. Woods, 480 U.S. 1 (1987); Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988); Affholder, Inc. v. Southern Rock, Inc., 746 F.2d 305 (5th Cir. 1984); Chamberlain v. Giampapa, 210 F.3d 154 (3rd Cir. 2000); Atlantic Richfield Co. v. Monarch Leasing Co., 84 F.3d 204 (6th Cir. 1996); Kohlrautz v. Oilmen Participation Corp., 441 F.3d 827 (9th Cir. 2006); Esfeld v. Costa Crociere, S.P.A., 289 F.3d 1300 (11th Cir. 2002).

14. 304 U.S. 64 (1938).

outcome of the case. This fundamental principle of standing is sufficient to sustain the continuous ownership requirement. Because a court's jurisdiction over an action depends on the standing of the plaintiff to pursue the action, each court would necessarily apply the ordinary principles of standing to determine whether a plaintiff who is no longer a shareholder may nonetheless continue to pursue the action. Applying these principles of standing will not only clarify the source of the continuous ownership requirement but provide consistency and clarity in an otherwise murky area of the law.

II. THE EVOLUTION AND VARYING RATIONALES FOR THE CONTINUOUS OWNERSHIP REQUIREMENT IN FEDERAL AND STATE COURTS

Numerous federal and state courts have adopted the continuous ownership requirement.[15] However, as mentioned above, these courts have relied on varied rationales to explain the source of the continuous ownership requirement. Some courts, even in the absence of a strong textual basis, conclude that the requirement is implicit in the rules and statutes that authorize derivative litigation.[16] Others recognize that the continuous ownership requirement is not required by the text or rationale of the civil rules and analogous state statutes, but nonetheless adopt the continuous ownership requirement on the ground that it is fundamental to a state's substantive law.[17] Some acknowledge that the continuous ownership requirement is related to the named plaintiff's standing to maintain the derivative suit.[18] Still others, although a minority, reject the continuous ownership requirement[19] despite the fact that the named plaintiff in a derivative action is then permitted to proceed with a lawsuit when that plaintiff will not derive a benefit from any relief that is granted to the corporation, which is of course the real party in interest in the lawsuit.[20] Several illustrative cases, demonstrating the evolution

15. *See infra* notes 21–31 and accompanying text.
16. *See infra* notes 36–39 and accompanying text.
17. *See infra* notes 57–64 and accompanying text.
18. *See infra* notes 65–68 and accompanying text.
19. *See infra* notes 76–93 and accompanying text.
20. *See generally*, 7C WRIGHT, *supra* note 1, at § 1822 (stating that "the corporation in

and varying rationales for the continuous ownership requirement, are discussed briefly below.

A. Federal courts

Numerous federal courts have adopted the continuous ownership rule,[21] and one of the seminal opinions on the subject is *Lewis v. Chiles*[22] out of the Ninth Circuit. Although the plaintiff in *Chiles* was a stockholder of Fred Meyer when he filed suit, he sold his stock during the discovery stage of the lawsuit.[23] The defendants responded by filing a motion for summary judgment "on the ground that Lewis no longer had standing to prosecute the suit."[24] The district court granted that motion and the Ninth Circuit affirmed.[25]

The Ninth Circuit based its holding in *Lewis* on both FRCP 23.1 and fundamental notions of standing. Regarding Rule 23.1, the court explained that the rule's provision that a "derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders. . .similarly situated in enforcing the right of the corporation" has served as an anchor for the concept that ownership must extend throughout the life of the litigation.[26] Turning to fundamental notions of standing, the court added:

> As a practical matter, the continuous ownership requirement stems from the equitable nature of derivative litigation which allows a shareholder "to step into the corporation's shoes and to seek in its right the restitution he could not demand on his own." This equitable principle reflects a shareholder's real interest in obtaining a recovery for the corporation which increases the value of his holdings.[27]

In other words, because both the underlying cause of action

effect is the real party in interest" in a derivative suit).

21. *See, e.g.*, Niesz v. Gorsuch, 295 F.2d 909 (9th Cir. 1961); Lewis v. Knutson, 699 F.2d 230, 238 (5th Cir. 1983).

22. 719 F.2d 1044 (9th Cir. 1983).

23. *Id.* at 1046.

24. *Id.*

25. *Id.* at 1047–48.

26. *Id.* at 1047 n.1 (citing cases).

27. *Id.* at 1047 (quoting Cohen v. Beneficial Loan Corp., 337 U.S. 541, 548 (1949)).

and any resulting recovery belong to the corporation and not to any individual plaintiff, a plaintiff who does not own any stock "could not benefit from any recovery" and therefore lacks standing to pursue the litigation.[28]

B. State courts

Many states have likewise adopted the continuous ownership requirement. Undoubtedly, on matters of corporate law, Delaware is extremely influential in guiding the decisions of other jurisdictions.[29] Accordingly, the discussion below begins with the leading Delaware opinion on the ownership requirement. Next, the discussion highlights California, Florida, and New Mexico among the many jurisdictions[30] that have adopted the continuous ownership requirement, providing a broad overview of each court's reasoning for the rule. Finally, the discussion turns to certain jurisdictions that have not adopted the continuous ownership requirement, particularly North Carolina, Alabama, and Pennsylvania, underscoring the controversy still present among different states.

1. Jurisdictions that Have Adopted the Continuous Ownership Requirement.

The Delaware Supreme Court first addressed the continuous ownership requirement in *Lewis v. Anderson*.[31] The plaintiff in *Anderson* alleged that various officers and directors of Old Conoco

28. *Id.*

29. *See, e.g.*, Dreiling v. Jain, 93 P.3d 861, 864–65, 867–68 (2004) (citing Delaware case law regarding derivative actions).

30. *See, e.g.*, Sound Infiniti, Inc. v. Snyder, 186 P.3d 1107, 1111 (Wash. Ct. App. 2008), *review granted*, 203 P.3d 379 (Wash. 2009) (Washington law); A-Plus Janitorial & Carpet Cleaning v. Employers' Workers' Comp. Ass'n, 936 P.2d 916, 923 (Okla. 1997) (Oklahoma law); Christopher v. Liberty Oil & Gas Corp., 665 So. 2d 410, 411 (La. Ct. App. 1995) (Louisiana law); Bronzaft v. Caporali, 162 Misc. 2d 281, 283, 616 N.Y.S.2d 863 (N.Y. Sup. Ct. 1994) (New York law); Grace Bros., Ltd. v. Farley Indus., Inc., 450 S.E.2d 814, 819 (Ga. 1994) (Georgia law); White v. Banes Co., 866 P.2d 339, 341 (N.M. 1993) (New Mexico law); U.S. Fidelity & Guar. Co. v. Griffin, 541 N.E.2d 553, 555 (Ind. Ct. App. 1989) (Indiana law); Weil v. Northwest Indus., Inc., 168 Ill. App. 3d 1, 5, 118 Ill. Dec. 717, 719, 522 N.E.2d 172, 174, n.1 (1988) (Illinois law); Kramer v. W. Pac. Indus., Inc., 546 A.2d 348, 354 (Del. 1988) (Delaware law); Metal Tech Corp. v. Metal Teckniques Co., 74 Or. App. 297, 302, 703 P.2d 237, 242 (Or. Ct. App. 1985) (Oregon law).

31. 477 A.2d 1040 (Del. 1984).

had wasted corporate assets.[32] While the litigation was pending, Old Conoco merged into another company and ceased to exist.[33] Because the plaintiff was no longer a shareholder of Old Conoco, the trial court dismissed his claims on standing grounds.[34]

The Delaware Supreme Court affirmed, but on state statutory grounds, applying title 8, section 327 of the Delaware Code. Similar to FRCP 23.1, section 327 provides: "In any derivative suit instituted by a stockholder of a corporation, it shall be averred in the complaint that the plaintiff was a stockholder of the corporation at the time of the transaction of which he complains or that his stock thereafter devolved upon him by operation of law." Also similar to the federal rule, this language does not explicitly articulate the continuous ownership requirement, instead referring only to the contemporaneous ownership requirement.[35]

The Delaware Supreme Court glossed over this distinction, concluding that "§ 327 alone addresses standing to commence *and pursue* a derivative suit."[36] It thus held that Delaware law permits "one result which is not only consistent but sound: A plaintiff who ceases to be a shareholder, whether by reason of a merger *or for any other reason*, loses standing to continue a derivative suit."[37] The court also explained that the purpose of the continuous ownership rule "is well established: to eliminate abuses associated with a derivative suit."[38]

The Delaware Court of Chancery similarly ruled in *In re New Valley Corp. Derivative Litigation*.[39] The lead plaintiff there, Richard Goodwin, filed his derivative action in December 1999.[40] Although he owned stock of New Valley Corporation at that time, Goodwin sold the stock in October 2000 and then repurchased

32. *Id.* at 1042.

33. *Id.*

34. *Id.* at 1043.

35. *Compare* 8 Del. C. § 327 ("[I]t shall be averred in the complaint that the plaintiff was a stockholder of the corporation *at the time of the transaction of which he complains* . . . ." (emphasis added)) *with* FRCP 23.1(b)(1) ("must allege . . . that the plaintiff was a shareholder or member *at the time of the transaction complained of* . . . ." (emphasis added)).

36. *Lewis*, 477 A.2d at 1049 (emphasis added).

37. *Id*. (emphasis added).

38. *Id*. at 1046.

39. *In re* New Valley Corp. Derivative Litig., C.A. No. 17649, 2004 WL 1700530, *3 (Del. Ch. June 28, 2004). Although unpublished, *In re New Valley* is a precedential opinion. *See* Del. Sup. Ct. R. 14(g)(ii).

40. *In re* New Valley Corp., 2004 WL 1700530, at *1.

additional stock in March 2001.[41] Based on this short "lapse in ownership," the defendants filed a summary judgment motion asking the court to dismiss Goodwin's claims on standing grounds.[42] They did so, moreover, even though Goodwin specifically argued in response to the defendants' motion that he "did not realize that [his] sale of New Valley stock . . .might affect [his] standing as a plaintiff in this case."[43]

The court was not persuaded by Goodwin's argument. Citing *Lewis v. Anderson*[44] and its progeny, the court noted that the continuous ownership requirement is "a bedrock tenet of Delaware law and is adhered to closely."[45] The court acknowledged that § 327 "does not explicitly require continuous stock ownership to maintain a derivative action," but nonetheless concluded that the continuous ownership "requirement has been a staple of Delaware law for over two decades."[46] The court then held:

> The continuous ownership requirement. . .has been held applicable even in situations where individuals' stock ownership has been involuntarily terminated in, for example, cash-out mergers. Here, Goodwin voluntarily sold his shares. . .. [O]nce he did so, he lost standing to pursue this derivative litigation.[47]

Thus, under Delaware law, a plaintiff who voluntarily or involuntarily ceases to be a shareholder, even momentarily, loses the ability to pursue a derivative lawsuit.

California is another influential jurisdiction that has recently considered and adopted the continuous ownership requirement, laying to rest a split of authority in the lower courts.[48] Over twenty years ago, in *Gaillard v. Natomas Co.*,[49] the California Court of Appeal concluded that California Corporations Code §800 (b) (1)[50]

41. *Id.* at *2.

42. *Id.* at *1.

43. *Id.* at *4 (bracketed text in original).

44. 477 A.2d 1040.

45. *In re* New Valley Corp., 2004 WL 1700530, at *3.

46. *Id.*

47. *Id.* at *4 (emphasis in original; internal footnotes omitted).

48. Grosset v. Wenaas, 175 P.3d 1184, 1197 (Cal. 2008).

49. 173 Cal. App. 3d 410, 415 (1985).

50. California Corporations Code § 800(b)(1) (1977) states that "[n]o action may be instituted or maintained in right of any domestic or foreign corporation by any holder of shares

requires only contemporaneous ownership, not continuous ownership.[51] More recently, in *Grosset v. Wenaas*,[52] the California Court of Appeal rejected *Gaillard* as "unpersuasive," and it declined to follow those cases from other jurisdictions "embracing the minority view."[53] Instead, the court adopted "the majority rule that continuous stock ownership is necessary for standing to pursue a derivative action."[54] The California Supreme Court granted review to consider the issue and agreed with the appellate court's reasoning, holding "as a matter of California law, that [the plaintiff] lacks standing to continue litigating this derivative action because he no longer owns stock in [the company] as a result of [a] merger."[55]

The Florida state appellate court reached a similar result in *Timko v. Triarsi*.[56] While that derivative lawsuit was pending, the defendant-appellee "purchase[d] all of Appellant's shares."[57] Much like the Ninth Circuit in *Lewis v. Chiles*,[58] the *Timko* court held that a plaintiff in a derivative shareholder lawsuit must have a "*legitimate stake* in the corporation so that its interests are *adequately represented*" and therefore affirmed the trial court's ruling granting the defendant's motion to dismiss.[59] The court added: "In holding as we have today, we align ourselves with the *overwhelming majority* of courts in other jurisdictions that have confronted this issue."[60] The court explicitly rejected the plaintiff's argument that because the applicable statute[61] regarding shareholder derivative actions "does not expressly require present share ownership, one whose shares are disposed of during the

or of voting trust certificates of the corporation unless . . . (1) [t]he plaintiff alleges in the complaint that plaintiff was a shareholder . . . at the time of the transaction or any part thereof of which plaintiff complains. . . ."

51. *Gaillard*, 173 Cal. App. 3d at 415.

52. 35 Cal. Rptr. 3d 58 (Cal. Ct. App. 2006), *rev. granted*, 38 Cal. Rptr. 3d 609 (Jan. 4, 2006), *aff'd*, 72 Cal. Rptr. 3d 129 (Feb. 14, 2008).

53. *Id.* at 70, 72 n.7.

54. *Id*. at 72.

55. *Grosset*, 175 P.3d at1187.

56. 898 So. 2d 89 (Fla. Dist. Ct. App. 2005).

57. *Id.* at 90, n. 1.

58. 719 F.2d 1044 (9th Cir. 1983).

59. *Timko*, 898 So. 2d at 91 (emphasis in original).

60. *Id.* at 91–92 (emphasis added) (citing cases).

61. This statute states that "[a] person may not commence a proceeding in the right of a . . . corporation unless the person was a shareholder of the corporation when the transaction complained of occurred." FLA. STAT. § 607.07401 (2003).

pendency of the suit may nevertheless continue to prosecute a 'shareholder' derivative suit."[62] The court explained the rejection of this argument:

> We think this construction ignores the language of the statute and does violence to the legislative intent underlying the statute. Because section 607.07401 does not, by its express terms, purport to create a right of action, we interpret it to recognize the pre-existence of this common law right. By use of the phrase "may not" and the word "unless" the legislature has simply manifested its intent to place additional limits upon this preexisting right to ensure that a plaintiff's stake in the lawsuit is "legitimate," meaning an ownership interest that is not acquired for predatory purposes.[63]

Thus, as in Delaware and California, a plaintiff in Florida must continuously own a company's stock in order to pursue a derivative lawsuit on behalf of the company.

The New Mexico Supreme Court addressed this issue and reached a similar result in *White v. Banes Co.*[64] The defendant in *White* argued that the court should "interpret [the] contemporaneous ownership requirement to also include a continuous ownership rule."[65] In adopting the continuous ownership requirement, the New Mexico Supreme Court specifically endorsed "the reasons for the continuous ownership rule" and explained that standing to pursue a derivative lawsuit "is justified only by [the] proprietary interest created by the stockholder relationship and the possible indirect benefits the nominal plaintiff may acquire *qua* stockholder of the corporation which is the real party in interest."[66] The court then added: "We do not believe that our legislators would choose to entrust the responsibility of vindicating unenforced corporate rights to someone who is no longer a member of the class which will benefit or suffer from such actions."[67]

62. *Timko*, 898 So. 2d at 91.
63. *Id.* (first emphasis added).
64. 866 P.2d 339 (N.M. 1993).
65. *Id.* at 342.
66. *Id.* (internal quotation marks omitted).
67. *Id.*

2. Jurisdictions that Have Rejected the Continuous Ownership Requirement

Other state courts have declined to adopt the continuous ownership requirement. The North Carolina Supreme Court did so, albeit in *dicta*, in *Alford v. Shaw*.[68] The court noted that section 55-55(a) of the North Carolina Code,[69] the statute under which the plaintiffs filed suit, only required contemporaneous ownership and said nothing about continuous ownership.[70] Instead, the court concluded, "[r]eading this statute in a reasonable light and giving it an ordinary meaning, we find there is no requirement of continuing share ownership in order for an individual who is a shareholder at the time of the transaction about which he is complaining and at the time the action is filed, to proceed with a derivative action."[71] In so concluding, the *Alford* court found persuasive the reasoning from the California Court of Appeals opinion in *Gaillard*, that the continuous ownership requirement could create "an anomalous result" in which a plaintiff files a suit, actively pursues it, and is precluded from proceeding years later by a merger.[72]

In *Shelton v. Thompson*,[73] the Alabama Supreme Court likewise declined to apply the continuous ownership requirement as stringently as other courts.[74] In *Shelton*, the plaintiffs lost their shareholder status because the corporation in which they held stocks was merged out of existence.[75] The court recognized that if a stockholder sells her shares in the corporation, she will not be

68. 398 S.E.2d 445 (N.C. 1990). This holding is dicta because, as discussed in the text above, the *Alford* court also held that the suit could proceed under an exception to the continuous ownership requirement because the plaintiff's ownership was terminated as a result of the actions that formed the basis of the suit. *Id*. at 450.

69. That statute provided, in pertinent part:

> (a) An action may be brought in this State in the right of any domestic or foreign corporation by a shareholder or holder of a beneficial interest in shares of such corporation; provided that the plaintiff or plaintiffs must allege, and it must appear, that each plaintiff was a shareholder or holder of a beneficial interest in such shares at the time of the transaction of which he complains or that his shares or beneficial interest in such shares devolved upon him by operation of law from a person who was a shareholder or holder of a beneficial interest in such shares at such time.

N.C. GEN. STAT. § 55-55(a) (1982).

70. 398 S.E.2d at 449.

71. *Id*.

72. *Id*. (quoting Gaillard v. Natomas Co., 219 Cal. Rptr. 74, 76 (1986)).

73. 544 So.2d 845 (Ala. 1989).

74. *See e.g.*, *Lewis*, supra n. 31.

75. *Shelton*, 540 So.2d at 847.

able to claim standing to maintain a derivative action.[76] The court, however, was unwilling to apply the continuous ownership requirement to the plaintiffs, who were involuntarily dispossessed of their shareholder status when their corporation was merged out of existence.[77] Accordingly, while the court was "aware of state and federal precedents to the contrary," it declined to adopt a "blind adherence to the absolutism" of continuous ownership requirement.[78]

Courts in Pennsylvania have similarly ruled. In *Fitzpatrick v. Shay*,[79] the Pennsylvania Superior Court did not specifically mention the continuous ownership requirement or cite any of the cases adopting that requirement. Instead, the court stated in passing that "the individual plaintiff need not own stock in the corporation at the time of the institution of the action," and it noted only that Fitzpatrick had properly pled that he owned stock in Great Oak at the time of the transaction in question.[80] The court then proceeded to affirm the trial court's summary judgment dismissing the action on alternative grounds.[81]

Thirteen years later, in *Drain v. Covenant Life Insurance Company*,[82] a different appellate court in Pennsylvania supplied the missing analysis. The plaintiffs in *Drain* filed a derivative action to challenge their corporation's proposed merger and lost their shareholder status when the merger was consummated. The trial court held that because the plaintiffs lost their shareholder status as a result of the merger, they no longer had standing to pursue the derivative action.[83] The appellate court disagreed, holding that under Pennsylvania law plaintiffs "did not lose standing to maintain their derivative action where the involuntary disposition of their interests" was the result "of the defendants' wrongdoing in the challenged merger."[84] At least one federal court, applying Pennsylvania law, has similarly ruled.[85]

76. *Id*. at 848.
77. *Id*.
78. *Id*. at 849.
79. 461 A.2d 243 (Pa. Super. Ct. 1983).
80. *Id.* at 246–47.
81. *Id.*
82. 685 A.2d 119 (Pa. Super. Ct. 1996).
83. *Id.* at 124–25.
84. *Id*. at 126–27.
85. *See* Warden v. McLelland, 288 F.3d 105 (3d Cir. 2002) (rejecting the continuous

As the foregoing discussion shows, the majority of courts have adopted the requirement for continuous ownership. Nevertheless, some jurisdictions have not adopted the requirement, particularly for involuntary dispositions, leaving the law concerning the continuous ownership requirement unsettled.

III. BECAUSE THE RATIONALE FOR THECONTINUOUS OWNERSHIP REQUIREMENT VARIES, SO TOO DOES THE APPLICATION OF CHOICE-OF-LAW PRINCIPLES TO THAT REQUIREMENT

Courts have reached different—and in some cases conflicting—results in determining what body of law governs whether a plaintiff in a derivative lawsuit must continue to own stock in order to maintain the suit. The most prevalent approach is the "internal affairs doctrine," which holds that the law of the state of incorporation governs the relationships between a company, its officers and directors, and its shareholders.[86] But that is a substantive rule, not a procedural one. If the underlying rationale for the continuous ownership requirement is a rule of civil procedure, such as FRCP 23.1, then that requirement ought to apply even if the state of incorporation does not recognize the continuous ownership requirement.[87] Otherwise, a court would be required to adjudicate a claim despite a plaintiff's apparent lack of standing and the corresponding inability to offer meaningful

ownership requirement because Pennsylvania statute expressly excuses continuous ownership requirement where loss of shares during pendency of derivative lawsuit results from corporate action in which the holder did not acquiesce). In addition, although not addressed in the text above, several courts have also recognized notable exceptions to the continuous ownership rule. One such exception applies if a derivative plaintiff loses his shareholder status as a result of the very transaction being challenged in the derivative suit. In *Alford v. Shaw*, 398 S.E.2d 445 (N.C. 1990), for example, the court held that "if in the course of a shareholder derivative suit defendants' actions terminate the plaintiffs' shareholder status *and these actions are closely related to the grounds for the derivative suit*, the plaintiffs would retain standing to continue prosecution of the suit." *Id*. at 451 (emphasis added). The court permitted the plaintiffs to proceed with their derivative lawsuit because the lawsuit challenged the very same merger that caused the plaintiffs to cease being shareholders of the company. *Id.* In *Elgin v. Alfa Corp.*, 598 So. 2d 807 (Ala. 1992), the court held that continuous ownership might also be excused where there is "evidence presented" establishing that the plaintiff's ownership interest was eliminated specifically in order "to negate [the plaintiff's] standing to pursue a derivative action." *Id.* at 813. These exceptions are beyond the scope of this article.

86. *See infra* notes 98–100 and accompanying text.

87. *See infra* notes 123 and accompanying text.

redress. As discussed below, courts have reached varied results when addressing such issues.

Starting with state courts, the Delaware Supreme Court's recent opinion in *VantagePoint Venture Partners 1996 v. Examen, Inc.*[88] provides a thorough and cogent discussion of the choice-of-law principles that Delaware has applied to these problems. Drawing on a wide range of applicable legal principles—including bedrock corporate law principles, traditional choice-of-law principles, and both the Due Process Clause and the Commerce Clause of the United States Constitution—the court concluded that the "conflicts practice of both state and federal courts has consistently been to apply the law of state of incorporation to the entire gamut of internal corporate affairs."[89] This is the internal affairs doctrine.[90]

Numerous state courts have applied the internal affairs doctrine with similar results. In *Olympia Mining & Milling Company v. Kerns*,[91] for example, the Washington Supreme Court held that whether the plaintiffs could "compel the defendant to respect their rights. . .is a question of Missouri law touching the internal affairs of a Missouri corporation."[92] In *Grosset v. Wenaas*,[93] the California Court of Appeal likewise concluded that the continuous ownership requirement is controlled by the law of the state of incorporation.[94] A leading treatise regarding corporate law similarly concludes that "[t]he law of the state of incorporation determines a plaintiff's standing to bring a derivative proceeding."[95] According to these courts and legal authorities, the internal affairs doctrine is mandated by both the Due Process Clause and the Commerce Clause of the United States

88. 871 A.2d 1108 (Del. 2005).

89. *Id.* at 1113 (internal quotation marks and citation omitted).

90. *Id.* In *Rales v. Blasband*, 634 A.2d 927 (Del. 1993), the Delaware Supreme Court likewise concluded that the shareholder demand requirement, which is a similar prerequisite to a derivative action, is a question concerning the internal affairs of a corporation and is therefore controlled by the law of the state of incorporation. *Id.* at 932 n.7.

91. 64 Wash. 545, 117 P. 260 (1911).

92. *Id.* at 549.

93. 35 Cal. Rptr. 3d 58 (Cal. Ct. App. 2006), *rev. granted*, 38 Cal. Rptr. 3d 609 (Cal. 2006), *aff'd*, 72 Cal. Rptr. 3d 129 (Cal. 2008).

94. *Id.* at 66–69.

95. 13 JENNIFER L. BERGER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5972.50, at 127 (perm. ed., rev. vol. 2004).

Constitution.[96]

To further justify applying the law of the state of incorporation, courts have reasoned that the various rules and statutes that set forth the contemporaneous ownership requirement are only adopting procedural requirements that must be met before a derivative action may be commenced. These rules and statutes are not meant to alter or abrogate other substantive requirements dictated by the laws of the state of incorporation. For example, as the court noted in *Timko*, Florida's statute setting forth the contemporaneous ownership requirement does not create a cause of action.[97] Instead, it sets forth *procedural* requirements that must be met before a derivative action can be commenced in the state and does not abrogate other—*substantive*—requirements that are dictated by the laws of the state of incorporation.

The California Court of Appeal reached a similar result in *Grosset*.[98] The plaintiff in *Grosset* argued that California law governed the continuous ownership requirement as a substantive matter because the California legislature had enacted a statute that includes the phrase "domestic or foreign corporation."[99] The court rejected that argument on three separate grounds:

- First, the court stated that "[S]ection 800(b)(1) is merely a *procedural* pleading requirement, stating that a plaintiff must at a minimum allege that he or she was a shareholder at the time of the transaction, not a statement of California law on the standing requirement of continuous ownership of stock."[100]

- Second, the court stated that "Federal courts and other states applying pleading statutes similar to Section 800(b)(1) have

96. *See, e.g.*, VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1113–16 (Del. 2005) ("The internal affairs doctrine is not only a conflicts of law principle. Pursuant to the Fourteenth Amendment Due Process Clause, directors and officers of corporations have a significant right to know what law will be applied to their actions and stockholders have a right to know by what standards of accountability they may hold those managing the corporation's business and affairs.") (internal citations and quotes omitted); *Grosset*, 35 Cal. Rptr. 3d at 68.

97. Timko v. Triarsi, 898 So. 2d 89, 91 (Fla. Dist. Ct. App. 2005).

98. 35 Cal. Rptr. 3d at 67.

99. *Id.* (quoting CAL. CORP. CODE § 800(b)(1)).

100. *Id*. (emphasis added).

also held that such statutes do not trump the *substantive* continuous ownership rule."[101]

- Third, the court noted that "even if Section 800(b)(1) were a substantive statute that controlled the issue whether a plaintiff must own stock throughout the derivative litigation to have standing, to the extent that statute conflicts with Delaware law, Delaware law prevails, based upon both choice of law and constitutional principles."[102]

Based on this analysis, the court concluded that "Delaware law controls the issue of whether a plaintiff in a derivative action must own stock in the relevant corporation throughout the litigation."[103] The court then added: "Because it is not subject to dispute that Delaware requires such ownership, [plaintiff] lacks standing to pursue this matter and his appeal must be dismissed."[104] Other state courts have reached similar results.[105]

While this substantive/procedural distinction works in state court—and leads to application of the law of the state of incorporation under the internal affairs doctrine—it leads to conflicting results in federal court. In *Kona Enterprises, Inc. v. Estate of Bishop*,[106] for example, the Ninth Circuit addressed whether, under the *Erie* doctrine, the continuous ownership requirement in FRCP 23.1 is applicable in diversity cases.[107] The court ultimately concluded that "Rule 23.1's continuous share ownership requirement is procedural in nature and thus applicable in diversity actions."[108] Thus, Rule 23.1 can bar a former stockholder's lawsuit in federal court even though that former stockholder would have no such obstacle in state court. The court's analysis in *Kona* was predicated on *Erie* principles; the court did not discuss state choice-of-law issues or mention the

101. *Id.* at 68 (emphasis added).

102. *Id.* (citing VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1113–16 (Del. 2005)).

103. *Id.* at 69.

104. *Id.*

105. Katz v. Emmett, 641 N.Y.S.2d 131, 132 (N.Y. App. Div. 1996) (holding that "[f]or choice of law purposes, Delaware, the state of incorporation, determines the applicable law").

106. 179 F.3d 767 (9th Cir. 1999).

107. *Id.* at 769.

108. *Id.*

internal affairs doctrine.[109]

The Ninth Circuit squarely addressed the application of the internal affairs doctrine in federal courts one year before deciding *Kona Enterprises*. In *Batchelder v. Kawamoto*,[110] the court explained:

> Under the 'internal affairs' doctrine, the rights of shareholders in a foreign company, including the right to sue derivatively, are determined by the law of the place where the company is incorporated . . . . Consequently, Batchelder's prerogative to step into the shoes of the parent corporation as derivative plaintiff. . .must be determined by the law of the place of incorporation of the company in which he holds an interest.[111]

On this occasion, the Ninth Circuit confronted the internal affairs doctrine and reached a different result: the law of the state of incorporation applies under *Batchelder* (applying the internal affairs doctrine) whereas FRCP 23.1 is controlling under *Kona Enterprises* (applying the *Erie* doctrine).

The Supreme Court of the United States addressed these same issues in *Cohen v. Beneficial Industrial Loan Corp.*,[112] when it considered whether a New Jersey statute that would require a plaintiff suing derivatively to post security should apply to an action removed to federal court on diversity grounds. The Supreme Court held that the statute was not merely procedural and that a federal court sitting in diversity must therefore apply the requirement to removed actions, thus requiring the plaintiff to post a bond for the action to proceed in federal court.[113] The Court then touched on the question of whether the requirements of FRCP 23.1

109. Other federal courts have similarly held, without much discussion, that the issue of standing is a procedural matter. 13 BERGER, *supra* note 95, at § 5972.50; St. Paul Fire and Marine Ins. Co. v. Universal Builders Supply, 409 F.3d 73, 80 (2d Cir. 2005) (acknowledging that defendant's claim that plaintiffs lack standing is a procedural matter); Corrections USA v. Dawe, 504 F. Supp. 2d 924, 931 (E.D. Cal. 2007) (explaining that under *Erie*, "[d]erivative suits are subject to the procedural requirements of Fed. R. Civ. P 23.1"); Earth Island Inst. v. Pengilly, 376 F. Supp. 2d 994, 999 (E.D. Cal. 2005) (acknowledging that procedural matters include whether plaintiffs have standing); Mroz v. Hoaloha Na Eha, Inc., 360 F. Supp. 2d 1122, 1135–36 (D. Haw. 2005) ("[d]erivative claims are subject to the standing requirements of Federal Rule of Civil Procedure 23.1.").

110. 147 F.3d 915 (9th Cir. 1998).

111. *Id.* at 920 (emphasis added).

112. 337 U.S. 541 (1949).

113. *Id*. at 555.

were substantive or procedural.

> Rule 23 requires the stockholder's complaint to be verified by oath and to show that the plaintiff was a stockholder at the time of the transaction of which he complains or that his share thereafter devolved upon him by operation of law. In other words, the federal court will not permit itself to be used to litigate a purchased grievance or become a party to speculation in wrongs done to corporations. . .. These provisions neither create nor exempt from liabilities, but require complete disclosure to the court and notice to the parties in interest. None conflict with the statute in question and all may be observed by a federal court, even if not applicable in state court.[114]

Although the Supreme Court implied that the provisions of Rule 23.1 should be considered "procedural" in nature under the *Erie* doctrine and thus applicable in federal courts sitting in diversity, it also recognized that the continuous ownership requirement is necessary to prevent the federal courts from being used to vindicate "purchased grievance[s]."[115]

Finally, the Sixth Circuit's approach to these legal principles is also noteworthy. In *McCall v. Scott*,[116] the Sixth Circuit explained that FRCP 23.1 is "the procedural embodiment of the substantive principle" of the stockholder's right to sue on behalf of the corporation.[117] Although the Sixth Circuit has succeeded in combining both procedural and substantive aspects of the continuous ownership requirement, its approach perpetuates a notable inconsistency created by application of federal law. If federal courts are to respect the internal affairs doctrine, then states are responsible for governing the relationship between a corporation and its stockholders—including the ability of former stockholders to pursue a derivative action. But while federal courts acknowledge that doctrine, they do not permit former stockholders to pursue such actions in federal court based on both the *Erie* doctrine and constitutional (and prudential) standing principles. Simply put, in federal court, *Erie* trumps inconsistent state law.

114. *Id*. at 556 (emphasis added).

115. *Id.*

116. 239 F.3d 808 (6th Cir. 2001).

117. *Id.* at 816.

IV. COURTS SHOULD ADOPT AND STRICTLY ENFORCE THE CONTINUOUS OWNERSHIP REQUIREMENT BASED ON A COMMON SENSE APPLICATION OF STANDING AND CHOICE-OF-LAW PRINCIPLES

There are very sound reasons to adopt the continuous ownership requirement. As explained above, the requirement is another way of ensuring that the nominal plaintiff has an actual injury to redress: in other words, it is one aspect of a plaintiff's standing. Thus, plaintiffs who have purchased their shares after the wrongdoing from those who either participated or acquiesced in the wrongful transaction "have purchased all or substantially all of the shares of a corporation at a fair price, [and] they have personally sustained no injury from wrongs which occurred prior to their purchase, and consequently, any recovery on their part for such prior wrongs would constitute a windfall."[118] Similarly, if a plaintiff owns his or her shares at the time of the wrongdoing but sells those shares before a derivative shareholder action is finally adjudicated, the plaintiff does not stand to benefit from the court's ruling and therefore lacks standing.[119] By adopting the continuous ownership requirement, courts are able to ensure that any relief granted will be meaningful to the litigants. Such a requirement is especially important in state courts that lack robust standing requirements similar to the case or controversy requirement in Article III of the United States Constitution, which generally requires the presence of adverse parties who have some genuine interest at stake in the case.[120]

118. Courtland Manor, Inc. v. Leeds, 347 A.2d 144, 147 (Del. Ch. 1975). At least some courts recognize an exception when the alleged misdeeds were concealed and "the effects of the mismanagement continued to the stockholder's injury." Davis v. Harrison, 167 P.2d 1015, 1019 (Wash. 1946).

119. *See supra* notes 27–28 and accompanying text.

120. *See, e.g.*, Alvarez v. Smith, 130 S. Ct. 576 (2009); the Court in *Horne v. Flores*, 129 S. Ct. 2579 (2009) stated:

> Before addressing the merits of petitioners' Rule 60(b)(5) motion, we consider the threshold issue of standing — an essential and unchanging part of the case-or-controversy requirement of Article III. To establish standing, a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged action; and redressable by a favorable ruling. Here, as in all standing inquiries, the critical question is whether at least one petitioner has alleged such a personal stake in the outcome

Courts have correctly noted that the continuous ownership requirement makes practical sense. If a plaintiff prevails in a derivative lawsuit, then the corporation may recover damages while the shareholder receives nothing. Although it is theoretically possible that the company's stock will increase in value as a result of such a recovery and thereby "benefit" the current shareholders, allowing a plaintiff who does not own stock to pursue a derivative lawsuit would lead to "the anomalous result that a plaintiff with absolutely no 'dog in the hunt' is permitted to pursue a right of action that belongs solely to the corporation."[121] As the *Timko* court aptly noted, such a holding would "drastically expand this historic right of action in the face of a clear legislative trend in this and other jurisdictions to do just the opposite."[122]

In addition, if courts do not uniformly adopt the continuous ownership requirement, choice-of-law issues may ensue. Commentators have expressed such concern, noting that for actions filed in state court but subject to removal in federal court, there may be situations in which imposing the continuous ownership requirement would result in dismissal in the federal court but not in the state court.[123] In other words, if a state does not require continuous ownership, but federal courts do, and the action is subject to removal, dismissal at the federal level after removal "would have the effect either of completely frustrating the shareholder or imposing the federal requirement on the state court," raising "serious questions in diversity cases under the [*Erie*] doctrine."[124] In order to resolve this problem, these commentators suggest that FRCP 23.1's requirements should be viewed as a matter of substantive law such that they would yield to contrary state practice in diversity cases or that these cases, rather than being dismissed, should be remanded to state court.[125]

These solutions merely highlight the problem with viewing the continuous ownership requirement as anything other than part of traditional notions of standing. Thus, following either of these

> of the controversy as to warrant *his* invocation of federal-court jurisdiction. (internal quotation marks and citations omitted).

Horne, 129 S. Ct. at 2592 (2009).

121. *Timko v. Triarsi*, 898 So. 2d 89, 91 (Fla. Dist. Ct. App. 2005).

122. *Id.*

123. 7C WRIGHT, *supra* note 1, § 1824, at 32.

124. *Id.*

125. *Id.*

approaches will merely perpetuate the confusion and differing results depending upon a plaintiff's choice of forum. The benefit of classifying the continuous ownership requirement as part of the bedrock requirement of standing to sue is that, in either federal court or state court, the result would be same. A plaintiff must—to use the *Timko* court's phrase—continue to have "a dog in the hunt" in order to sue derivatively on behalf of the corporation and maintain that suit.[126] This requirement should apply equally in state or federal court, thus avoiding the situation in which an action subject to removal on diversity grounds could have proceeded in the state court but would be subject to dismissal in the federal court.

V. CONCLUSION

For a derivative shareholder action, the overwhelming majority of jurisdictions have imposed the continuous ownership requirement. While the requirement itself is clear, the source of the requirement is not. Some courts have based the continuous ownership requirement on the requirement in FRCP 23.1 that the plaintiff in a derivative lawsuit "fairly and adequately represent the interests of the shareholders."[127] Some courts rest their analysis on more explicit statutory language incorporating a continuous ownership requirement.[128]

The inconsistent rationales regarding the source of the continuous ownership requirement have created confusion regarding whether a plaintiff's ability to pursue a derivative action should be decided on the basis of state or federal law. Rather than looking to FRCP 23.1, its state analogues, or state statutes regarding derivative lawsuits, courts need only look to, and apply, traditional standing principles, which require that a plaintiff have a "personal stake" in the outcome of the case.

This fundamental principle of standing is sufficient to sustain the continuous ownership requirement. Because a court's jurisdiction over an action depends on the standing of the plaintiff to pursue the action, each court would necessarily apply the

126. *Timko*, 898 So. 2d at 91.

127. Fed. R. Civ. P. 23.1.

128. Grosset v. Wenaas, 175 P.3d 1184, 1191–92 (Cal. 2008) (analyzing language of California Civil Code § 800(b)(1), which provides that "[n]o action may be instituted *or maintained*" (emphasis added)).

ordinary principles of standing to determine whether a plaintiff who is no longer a shareholder may nonetheless continue to pursue the action If the plaintiff is no longer a shareholder because of the defendant's alleged wrongdoing, then the plaintiff should have standing. But if the plaintiff is no longer a shareholder for reasons unrelated to the defendant's alleged wrongdoing, then the plaintiff most likely lacks standing to pursue the claims.

As can be seen, proper application of the continuous ownership requirement is necessarily fact-specific and may vary from case to case. But the important point is that the answer will be (or at least should be) the same in both state and federal court. Thus, the ordinary application of fundamental principles of standing will not only clarify the source of the continuous ownership requirement but provide consistency and clarity in an otherwise murky area of the law.