

STOP BORROWING TROUBLE:
CLARIFYING THE *SAUDI BASIC* EXCEPTION TO
DELAWARE'S BORROWING STATUTE

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ABSTRACT

Recent decisions in Delaware courts have advanced different interpretations of the exception to the State's Borrowing Statute that was articulated by the Delaware Supreme Court in Saudi Basic Industry Corp. v. Mobil Yanbu Petrochemical Co.¹ Some later decisions read Saudi Basic as creating an exception to the Borrowing Statute whenever Delaware's limitations period is shorter than the limitations period in the state where the cause of action arose. Others read Saudi Basic more narrowly, as creating an exception to the borrowing statute only for parties that have been forced to litigate in Delaware. This Article concludes that the latter interpretation is preferable as a more modest variation from the Borrowing Statute as written that nevertheless achieves the policy goal of preventing forum shopping.

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¹866 A.2d 1, 17-19 (Del. 2005) [hereinafter *Saudi Basic Delaware Appellate Decision*].

TABLE OF CONTENTS

I. INTRODUCTION	30
II. THE BORROWING STATUTE.....	32
A. <i>The Text and Plain Meaning of the Borrowing Statute</i>	32
B. <i>The History and Purpose of the Borrowing Statute</i>	33
III. SAUDI BASIC	34
A. <i>Delaware Trial Court Decision</i>	35
B. <i>Delaware Supreme Court Decision</i>	37
IV. DECISIONS INTERPRETING SAUDI BASIC	38
A. <i>The Broad Interpretation: Only Borrow Shorter</i> <i>Limitations Periods</i>	39
B. <i>The Narrow Interpretation: A Forced-Forum Exception</i>	40
C. <i>The Alternate Textual Interpretation:</i> <i>Only Plaintiffs "Bring Suit"</i>	43
D. <i>Decisions That Did Not Raise Saudi Basic</i>	44
V. EVALUATING POTENTIAL RESOLUTIONS	45
A. <i>The Broad Interpretation: Only Borrow Shorter</i> <i>Limitations Periods</i>	46
B. <i>The Alternate Textual Interpretation:</i> <i>Only Plaintiffs Bring Suit</i>	47
1. <i>The Textual Basis for a Plaintiff-Only Interpretation</i>	48
2. <i>Unresolved Policy Issues</i>	50
3. <i>The Narrow Interpretation: A Forced-Forum Exception</i> ..	51
VI. CONCLUSION	53

I. INTRODUCTION

When a party files a cause of action that arose outside Delaware in a Delaware court, a statutory provision instructs the court to compare the limitations period that would apply under Delaware law with the limitations period that would apply in the jurisdiction where the claim arose.² If the limitations period from the other jurisdiction is shorter, the statute instructs the Delaware court to borrow that shorter limitations period and apply it as the Delaware rule. The statute is therefore colloquially known as the "Borrowing Statute." Although the rule seems simple to apply, the Delaware Supreme Court complicated matters by endorsing an exception to the Borrowing Statute in *Saudi Basic*

²See DEL. CODE ANN. tit. 10, § 8121.

*Industries Corp. v. Mobil Yanbu Petrochemical Co.*³ In that decision, the plaintiff anticipated that the defendant would assert certain counterclaims, so it strategically selected Delaware as a forum because the Borrowing Statute would bar those counterclaims. However, the plaintiff's strategy ran counter to the purpose of the Borrowing Statute, which the Delaware legislature passed with the goal of reducing forum shopping by eliminating the incentive for a plaintiff with a stale claim in its jurisdiction to bring suit in Delaware to take advantage of a longer limitations period. The Delaware Supreme Court therefore declined to apply the plain language of the statute, rejecting a perverse result under which a statute intended to prevent forum shopping actually would encourage forum shopping.

Ever since, trial courts in Delaware have confronted two controlling authorities—the Borrowing Statute and *Saudi Basic*—that point in different directions. Not surprisingly, when trying to follow both authorities faithfully, the trial courts have reached different outcomes. For example, two recent decisions by the Delaware Court of Chancery interpreted the Borrowing Statute and *Saudi Basic* differently. In *Bear Stearns Mortgage Funding Trust 2006-SL1 v. EMC Mortgage LLC*,⁴ the Court followed *Saudi Basic* by applying a foreign statute of limitations that was longer than the statute of limitations in Delaware. The Court felt bound by the language in *Saudi Basic*, stating that the Borrowing Statute did not apply where it "enable[ed] [the plaintiff] to prevail on a limitations defense that would never have been available to it had the [relevant] claims been brought in the jurisdiction where the cause of action arose."⁵ By contrast, in *TrustCo Bank v. Mathews*,⁶ the Court instead reasoned that the Delaware Supreme Court must have intended a narrower exception to the Borrowing Statute that would apply only where the litigant was forced to file claims in Delaware.⁷ Both opinions gave alternate grounds for their respective decisions, so both discussions of *Saudi Basic* were technically dictum. Nevertheless, they illustrate the tension created by having a statute and an exception that point in opposite directions.⁸ Other Delaware state courts and federal courts similarly have diverged when interpreting *Saudi Basic*.

³866 A.2d 1, 17-19 (Del. 2005).

⁴2015 WL 139731 (Del. Ch. Jan. 12, 2015).

⁵*Id.* at *9.

⁶2015 WL 295373 (Del. Ch. Jan. 22, 2015).

⁷*Id.* at *8-9.

⁸Indeed, this is a live and current debate. Following the *TrustCo.* and *Bear Stearns* decisions, other Delaware courts have addressed this exact issue and have been forced to choose sides. See *In re Asbestos Litig.*, 2015 WL 5168121, at *2-3 (Del. Super. Sept. 1, 2015) (rejecting a litigant's attempt to invoke a broad reading of *Saudi Basic* in order to save a time-barred claim); *Lambda Optical Solutions, LLC v. Alcatel-Lucent USA Inc.*, 2015 WL

This Article considers how well different potential interpretations of *Saudi Basic* and the Borrowing Statute address the problem that the *Saudi Basic* Court perceived and sought to address. Section II considers the text of the Borrowing Statute, its history, and its role in a system of horizontal federalism involving co-equal state sovereigns. Section III details the history of the *Saudi Basic* case, including one party's strategic choice to switch forums from New Jersey to Delaware. Section IV categorizes and summarizes the cases that have interpreted *Saudi Basic*. Section V analyzes the competing interpretations. Ultimately, this article concludes that a narrow interpretation of *Saudi Basic* is the best approach to remedying the problem with the Borrowing Statute that *Saudi Basic* sought to address.

II. THE BORROWING STATUTE

A. *The Text and Plain Meaning of the Borrowing Statute*

At common law, a court applies the statute of limitations imposed by the law of the forum state.⁹ Most states, however, have altered that rule by statute.¹⁰ In Delaware, the General Assembly abrogated the common law rule by adopting the Borrowing Statute:

Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action.¹¹

5470210, at *5-6 (D. Del. Aug. 6, 2015) (noting the divergent lines of cases and choosing the *TrustCo* approach), *report adopted*, 2015 WL 5458273, at *1 (D. Del. Sept. 17, 2015).

⁹See *Pack v. Beech Aircraft Corp.*, 132 A.2d 54, 57 (Del. 1957) (noting that Delaware's borrowing statute modified "the common law rule that the matter of limitation of actions is controlled by the law of the forum"). The common law rule had applied since the early days of the Republic. See, e.g., *Lord Proprietary of Md. v. Styer*, 1 Del. Cas. 388, 388 (Ct. C.P. 1795) ("There is no doubt that a contract is to be considered according to the law of the place where it was made. But a suitor who sues in the courts of this state cannot claim a right to proceed according to the rules of practice in that country where the contract was made. The limitation relied on as a defense has nothing to do with the contract, but only with the suit. It is no limitation of the contract, but of the action."). For a discussion of the justification under common law of applying the forum state's statute of limitations because statutes of limitations are procedural, see Ibrahim J. Wani, *Borrowing Statutes, Statutes of Limitations and Modern Choice of Law*, 57 UMKC L. REV. 681, 684 (1989).

¹⁰See Wani, *supra* note 9, at 689.

¹¹DEL. CODE ANN. tit. 10, § 8121.

Most courts construing the Borrowing Statute have agreed that its plain language instructs a court to continue to apply Delaware's statute of limitations to a foreign claim, unless the foreign statute of limitations is shorter, in which case the court "borrows" the foreign statute of limitations and applies it.¹² The text of the statute does not contain any relevant exceptions.¹³ However, one court has suggested that because the statute speaks of "bringing an action," it should apply only to the original plaintiff, not a party asserting a counterclaim.¹⁴ This interpretation is discussed in more detail in Section IV.C as one of the alternative interpretations of *Saudi Basic*.

B. *The History and Purpose of the Borrowing Statute*

Like similar statutes adopted by most other states, Delaware's Borrowing Statute was designed to prevent forum shopping. The General Assembly enacted the Borrowing Statute in 1947.¹⁵ Courts at that time recognized that it was "an act to prevent forum-shopping" and part of a broader trend in other states "toward modification of the common law rule that the matter of limitation of actions is controlled by the law of the forum."¹⁶ That trend has continued: according to a relatively recent count, "[m]ore than two-thirds of the states have borrowing statutes."¹⁷ These statutes generally share the common purpose of "correct[ing] some of the anomalies that resulted from treating statutes of limitations as procedural, including aggravated examples of forum shopping."¹⁸

The type of forum shopping that the Borrowing Statute sought to prevent involves the following scenario: "[A] plaintiff brings a claim in a Delaware court that (i) arises under the law of a jurisdiction other than Delaware and (ii) is barred by that jurisdiction's statute of limitations but would not be time-barred in Delaware, which has a longer statute of limitations."¹⁹ A famous example of this type of forum shopping (though involving a different state) is *Keeton v. Hustler Magazine, Inc.*²⁰ In that case, the plaintiff filed in New Hampshire because it was "the only State

¹²See *infra* Section II.B.

¹³Technically there is an exception for claims involving Delaware residents which states that "[w]here the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply." DEL. CODE ANN. tit. 10, § 8121. This Article does not focus on that limited exception.

¹⁴B. Lewis Prods., Inc. v. Bean, 2005 WL 273298, at *2 (D. Del. Jan. 28, 2005).

¹⁵46 Del. Laws ch. 254, § 1 (1947).

¹⁶Pack v. Beech Aircraft Corp., 132 A.2d 54, 57 (Del. 1957).

¹⁷Wani, *supra* note 9, at 689.

¹⁸RESTATEMENT SECOND OF CONFLICT OF LAWS § 142 (1988 Revisions).

¹⁹*Saudi Basic Delaware Appellate Decision*, 866 A.2d 1, 16 (Del. 2005).

²⁰465 U.S. 770, 773 (1984).

where petitioner's suit would not have been time-barred."²¹ There are many other examples of this strategy.²²

The Borrowing Statute makes this strategy futile in Delaware because "[i]f a non-resident chooses to bring a foreign cause of action into Delaware for enforcement, he must bring the foreign statute of limitations along with him if the foreign statute prescribes a shorter time than the domestic statute."²³ A plaintiff, therefore, will never be able to extend the limitations period on a foreign claim by bringing suit in Delaware. This represents a deliberate policy choice on the part of the General Assembly to close the state's courts to certain claims.²⁴

III. SAUDI BASIC

In *Saudi Basic*, the Delaware courts encountered a different forum-shopping scenario: a plaintiff who appeared to have sued in Delaware specifically because the Borrowing Statute, read literally, would bar certain counterclaims that the plaintiff anticipated that the defendant would assert.

Saudi Basic involved a dispute between a Saudi Arabian corporation, Saudi Basic Industries Corporation ("SABIC"), and its partners in a joint venture, Exxon Chemical Arabia, Inc. ("Exxon") and

²¹465 U.S. 770, 773 (1984).

²²*See, e.g.*, *Ferens v. John Deere Co.*, 494 U.S. 516, 520 (1990) (Plaintiff filed a cause of action in Mississippi because "Mississippi courts . . . would apply Mississippi's 6-year statute of limitations to the tort claim arising under Pennsylvania law and the tort action would not be time barred under the Mississippi statute."); *Heavner v. Uniroyal, Inc.*, 305 A.2d 412, 414 (N.J. 1973) (Plaintiff brought suit in New Jersey to take advantage of the state's longer statute of limitations because "the applicable . . . statute of limitations [in the state where the cause of action arose] had expired and any action was barred in that state."); *Miller v. Stauffer Chem. Co.*, 581 P.2d 345, 348 (Idaho 1978) ("Where an action might be brought in one of several jurisdictions, a plaintiff can choose a forum with a longer statute of limitation. The common law rule thus precludes a uniform limitations period for a particular cause of action and encourages forum shopping."). Commentaries note that practitioners will seek out such forums where available as a matter of vigorous advocacy for their clients. *See, e.g.*, Edward Swartz, *Hazardous Products Litigation* § 3:5 (2d ed.) ("When counsel is faced with a situation where the statute of limitation has run in both plaintiff's and defendant's home states, plaintiff's counsel must forum shop for jurisdictions where the defendant manufacturer does business, and where a lengthier statute of limitations exists. New Hampshire and South Carolina (with six year statutes of limitations and no borrowing statutes) have provided such forums."); Richard Maloy, *Forum Shopping? What's Wrong with That?*, 24 QLR 25, 25 (2005) ("Shopping for the best forum available was simply the first step in achieving that objective [of prevailing for my clients].")

²³*Pack v. Beech Aircraft Corp.*, 132 A.2d 54, 57 (Del. 1957).

²⁴*Dymond v. Nat'l Broad. Co.*, 559 F. Supp. 734, 735 (D. Del. 1983) ("Delaware has made the policy determination in conflict of law decisions that when a cause of action arises outside of Delaware, and that action would be barred in the state in which it arose because of that state's statute of limitations, the cause of action cannot be brought in Delaware.").

Mobil Yanbu Petroleum Company ("Mobil").²⁵ In 1998, SABIC filed suit in federal court in the District of New Jersey alleging patent misappropriation by Mobil and Exxon (the "New Jersey Action").²⁶ In 2000, the joint venture partners learned that SABIC appeared to have been overcharging them for decades, and they asserted an unclean hands defense in the New Jersey Action.²⁷ SABIC initially agreed to conduct discovery on the overcharge issues, but then reversed course and preemptively sued Exxon and Mobil in Delaware Superior Court.²⁸ The Delaware suit sought a declaratory judgment that the joint venture partners' payments to SABIC were not overcharges (the "Delaware Action").²⁹ A few weeks later, Exxon and Mobil filed a second action in New Jersey alleging overcharges.³⁰

A. Delaware Trial Court Decision

In response to SABIC's declaratory judgment action, Exxon and Mobil "interposed counterclaims for damages, based upon SABIC's alleged breaches of the joint venture agreements, breaches of fiduciary duty and upon the implied duty of good faith, and the doctrines of unjust enrichment and promissory estoppel."³¹ Both sides agreed that the counterclaims were governed by Saudi substantive law, but disagreed about which forum's statute of limitations should apply.³² Under Saudi law, the counterclaims were "property rights that could not be barred by the passage of time" and thus eternal in duration.³³ Under Delaware law, the claims would have been subject to a three-year statute of limitations and, therefore, time-barred.³⁴

²⁵*Saudi Basic Delaware Appellate Decision*, 866 A.2d at 6.

²⁶*Saudi Basic Indus. Corp. v. Exxonmobil Corp.*, 194 F. Supp. 2d 378, 411-12 (D.N.J. 2002) [hereinafter *Saudi Basic New Jersey Trial Decision*], *vacated in part sub nom.* *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 364 F.3d 102 (3d Cir. 2004) *rev'd and remanded*, 544 U.S. 280 (2005).

²⁷*Saudi Basic Delaware Appellate Decision*, 866 A.2d at 10.

²⁸*Id.* at 11.

²⁹*Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. at 289.

³⁰*Saudi Basic New Jersey Trial Decision*, 194 F. Supp. 2d at 412.

³¹*Saudi Basic Delaware Appellate Decision*, 866 A.2d at 10.

³²*Id.* at 11.

³³*Id.*

³⁴*Id.* The court also analyzed tolling defenses, but that section of the decision is not relevant to the interpretation of the Borrowing Statute. *Id.* at 15-16 ("We further conclude that, independent of the borrowing statute, the Delaware tolling statute tolled any limitations period until SABIC commenced this action in July 2000, because before that time SABIC was not amenable to suit in Delaware and, therefore, was 'out of the State' for tolling statute purposes.").

SABIC moved for summary judgment, claiming that, under a literal reading of Delaware's Borrowing Statute, the counterclaims were time-barred.³⁵ The trial court denied SABIC's motion in a bench ruling:

The Delaware borrowing statute, the purpose of it, is (a) to prevent forum shopping; and (b) to protect the residents of Delaware.

To apply the borrowing statute and [conclude] that Delaware's statute of limitation[s] would apply would basically turn the borrowing statute on its head for the purpose for which it was enacted. SABIC purposefully chose this forum. And all indications strongly suggest that they chose this forum to obtain a shorter statute of limitations. So it [is] somewhat of a twist; in that, usually these cases involve a plaintiff who chooses this forum, hoping to get a longer statute of limitations So here, it's a twist on the normal set of facts. But the bottom line is: Our legislature intended to prevent people out of state, foreign plaintiffs, from coming into this forum and getting the benefit of a statute of limitations that really ought not to apply given the fact that the substantive law is interwoven with the procedural right.

And here because Saudi law makes it clear and the parties don't dispute that Saudi law makes it clear, that a property right is eternal. And there is no concept in Saudi law that the usurper of the property can rely on the passage of time to extinguish claims.³⁶

The trial court later described its bench ruling as holding as a matter of law that "the Delaware Borrowing Statute does not require application of Delaware's three-year statute of limitations for contract claims to [Exxon and Mobil's counterclaims]."³⁷

The case proceeded to trial, where the jury ultimately awarded \$220 million to Mobil and \$197 million to Exxon.³⁸ After trial, SABIC

³⁵*Saudi Basic Delaware Appellate Decision*, 866 A.2d at 15.

³⁶*Id.* (quoting bench ruling by the trial court; alterations in Delaware Supreme Court opinion).

³⁷*Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 2003 WL 22016813, at *1 (Del. Super. Aug. 26, 2003) [hereinafter *Saudi Basic Delaware Trial Decision*], *aff'd*, 866 A.2d at 15-16 (the *Saudi Basic Delaware Appellate Decision*).

³⁸*Saudi Basic Delaware Appellate Decision*, 866 A.2d at 11.

renewed its argument that the counterclaims were time-barred as a matter of law. The trial court denied SABIC's motion on procedural grounds.³⁹

B. Delaware Supreme Court Decision

On appeal, SABIC challenged several of the trial court's rulings, including the court's decision not to apply Delaware's three-year statute of limitations.⁴⁰ The Delaware Supreme Court reviewed the trial court's determination *de novo* for legal error.⁴¹

The Delaware Supreme Court agreed with SABIC that the Borrowing Statute, "if literally read and applied, would cause the three-year Delaware limitations statute to govern ExxonMobil's overcharge claim," but declined to adopt such a literal reading.⁴² The Delaware Supreme Court reasoned that:

[The] literal construction of the borrowing statute, if adopted, would subvert the statute's underlying purpose. Our case law precedent eschews such a construction. As both this Court and the trial court have recognized, borrowing statutes "are designed to prevent shopping for the most favorable forum" To accomplish that purpose, those statutes are normally designed to "shorten the time limit—not to extend it." Borrowing statutes such as Section 8121 are typically designed to address a specific kind of forum shopping scenario—cases where a plaintiff brings a claim in a Delaware court that (i) arises under the law of a jurisdiction other than Delaware and (ii) is barred by that jurisdiction's statute of limitations but would not be time-barred in Delaware, which has a longer statute of limitations. Under that "standard scenario," the borrowing statute operates to prevent the plaintiff from circumventing the shorter limitations period mandated by the jurisdiction where the cause of action arose.⁴³

The Delaware Supreme Court cited *Pack v. Beech Aircraft Corp.*⁴⁴ as a previous instance where the Court had rejected a literal interpretation of the Borrowing Statute.⁴⁵ The Court explained that, in

³⁹ *Saudi Basic Delaware Trial Decision*, 2003 WL 22016813, at *1.

⁴⁰ *Saudi Basic Delaware Appellate Decision*, 866 A.2d at 15.

⁴¹ *Id.*

⁴² *Id.* at 16.

⁴³ *Id.* at 16-17 (footnotes omitted).

⁴⁴ 132 A.2d at 54, 57.

⁴⁵ *Saudi Basic Delaware Trial Decision*, 866 A.2d at 17.

Pack, a literal interpretation of the second sentence of the Borrowing Statute would have required the Court to extend the built-in two year limitations period on a New Jersey wrongful death action to three years because the suit was brought by a Delaware resident.⁴⁶ The *Pack* Court refused to allow the litigant to use the Borrowing Statute to extend the statute of limitations and instead chose to "enforce the New Jersey law as we find it."⁴⁷

The Delaware Supreme Court concluded that:

[I]t was SABIC who came to Delaware to obtain an adjudication that (*inter alia*) Delaware's three year statute of limitations barred ExxonMobil's claims. Given the nature of SABIC's affirmative claim for declaratory relief, ExxonMobil was entitled to assert its overcharge causes of action as counterclaims for damages. In these circumstances, as the trial judge found, the party that was "shopping for the most favorable forum" was SABIC, not ExxonMobil.

The trial judge recognized that to apply the borrowing statute to ExxonMobil would subvert the statute's fundamental purpose, by enabling SABIC to prevail on a limitations defense that would never have been available to it had the overcharge claims been brought in the jurisdiction where the cause of action arose.⁴⁸

The Delaware Supreme Court accordingly denied SABIC's appeal and affirmed the trial court's holding.

IV. DECISIONS INTERPRETING *SAUDI BASIC*

Courts construing the Delaware Supreme Court's decision in *Saudi Basic* have focused on different parts of the decision and reached different conclusions as to the breadth of the ruling. Some courts have interpreted the decision broadly, as holding that the Borrowing Statute does not apply where the relevant statute of limitations in Delaware is shorter than the statute of limitations in the jurisdiction where the claims arose. These decisions typically focus on the discussion of the anti-forum-shopping policy rationale, especially the language in the decision rejecting the notion of allowing a "limitations defense that would never

⁴⁶*Saudi Basic Delaware Appellate Decision*, 866 A.2d at 17.

⁴⁷*Pack*, 132 A.2d at 60.

⁴⁸*Saudi Basic Delaware Appellate Decision*, 866 A.2d at 17–18 (footnotes omitted).

have been available to [a party] had the [relevant] claims been brought in the jurisdiction where the cause of action arose."⁴⁹ Other courts have interpreted the decision narrowly, as applying only where the party asserting the claim that would be barred under a literal interpretation of the Borrowing Statute was forced into a Delaware forum. One case has suggested an alternate textual interpretation of the Borrowing Statute that would apply only to original plaintiffs.

*A. The Broad Interpretation: Only Borrow
Shorter Limitations Periods*

At least two cases have interpreted Saudi Basic broadly: *Furnari v. Wallpang, Inc.*⁵⁰ and *In re Mervyn's Holdings, LLC*.⁵¹

In *Furnari*, a Florida plaintiff brought breach of contract claims in Delaware that arose in Florida.⁵² The plaintiff chose Delaware as a forum to obtain jurisdiction over the defendant after having filed two actions in Florida that were dismissed for lack of jurisdiction.⁵³ The *Furnari* decision first cited *Saudi Basic's* discussion of the Borrowing Statute's anti-forum-shopping policy rationale.⁵⁴ It then quoted *Saudi Basic* in holding as follows:

Importantly, Florida has longer limitations periods than Delaware, making the facts of this case the opposite of what the Borrowing Statute seeks to prevent; Plaintiff is not attempting to circumvent the expiration of his claims by filing in Delaware, he only seeks jurisdiction over the parties. A finding otherwise would "subvert that statute's underlying purpose."⁵⁵

Similarly, *Mervyn's Holdings*, a District of Delaware bankruptcy decision, read *Saudi Basic* as standing for the proposition that the Borrowing Statute does not apply where there is no threat of forum shopping.⁵⁶ The decision first stated that "the Delaware Supreme Court in *Saudi Basic* . . . explained that the rationale of the Delaware borrowing statute is to help prevent forum shopping."⁵⁷ The court then considered

⁴⁹*Saudi Basic Delaware Appellate Decision*, 866 A.2d at 18.

⁵⁰*Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *5 (Del. Super. Apr. 16, 2014).

⁵¹*In re Mervyn's Holdings, LLC*, 426 B.R. 488, 503 (Bankr. D. Del. 2010).

⁵²*Furnari*, 2014 WL 1678419, at *4–6.

⁵³*Id.* at *5.

⁵⁴*Id.*

⁵⁵*Id.* (footnotes omitted) (quoting *Saudi Basic Delaware Appellate Decision*, 866 A.2d at 16).

⁵⁶*In re Mervyn's Holdings, LLC* 426 B.R. 488, 503 (Bankr. D. Del. 2010).

⁵⁷*Id.* at 503.

the facts before it and held that this policy rationale was not implicated:

This is not a case where forum shopping might even remotely be an issue. Debtor, the plaintiff in this adversary proceeding, came to Delaware with a shorter (instead of longer) statute of limitations period and chose Delaware for the Chapter 11 case and not for the adversary proceeding which the [Official Committee of Unsecured Creditors] brought. There is absolutely no threat of forum shopping and the Delaware "borrowing" statute is inapplicable.⁵⁸

Notably, the Court in *Mervyn's Holdings* did not discuss the risk of forum shopping by a different party: the company filing for bankruptcy.⁵⁹ The plaintiff in *Mervyn's Holdings*, the Official Committee of Unsecured Creditors, had been forced into the Delaware forum when the company filed for bankruptcy.⁶⁰ The company could have chosen the forum strategically to avoid allowing the creditors to assert certain claims against the company.⁶¹ The *Mervyn's Holdings* Court could have reached the same conclusion by holding that the Borrowing Statute did not apply because it could encourage forum shopping by the company filing for bankruptcy.⁶²

B. *The Narrow Interpretation: A Forced-Forum Exception*

Two decisions, *Huffington v. T.C. Gp., LLC*,⁶³ and *TL of Florida, Inc. v. Terex Corp.*,⁶⁴ have interpreted *Saudi Basic* narrowly and rejected a broad interpretation.⁶⁵ Another decision, *In re Washington Mutual*,

⁵⁸*In re Mervyn's Holdings, LLC* 426 B.R. at 503.

⁵⁹The company chose Delaware to file its Chapter 11 bankruptcy case, not for any potential adversary proceeding. *See id.*

⁶⁰*See id.* at 503.

⁶¹Creditors join the creditors' committee and retain local counsel where the debtor has voluntarily filed its bankruptcy petition. If this venue is strategically chosen to inconvenience creditors they may be less likely to serve on the creditors' committee or pursue claims. *See* Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11, 24 (1991).

⁶²A debtor strategically choosing a venue to evade creditors could go against the forum-shopping public policy arguments laid out in *Saudi Basic*. *See Saudi Basic Delaware Appellate Decision*, 866 A.2d 1, 16 (Del. 2005).

⁶³*See Huffington v. T.C. Gp., LLC*, 2012 WL 1415930, at *8 (Del. Super. Apr. 18, 2012).

⁶⁴*See TL of Fla., Inc. v. Terex Corp.*, 54 F. Supp. 3d 320, 327 (D. Del. July 3, 2014).

⁶⁵*See id.*; *Huffington*, 2012 WL 1415930, at *8.

Inc.,⁶⁶ followed the narrow interpretation of *Saudi Basic* without rejecting the broad interpretation.⁶⁷

In *Huffington*, an investor elected to bring securities fraud claims under Massachusetts's "blue sky" laws in Massachusetts, where the cause of action arose, rather than in Delaware, as specified by a contractual forum selection clause.⁶⁸ The Massachusetts court dismissed the action, holding that the forum selection clause governed.⁶⁹ By the time the plaintiff re-filed in Delaware, the claim was time-barred under Delaware's statute of limitations, but not under Massachusetts' longer statute of limitations.⁷⁰ The plaintiff argued that the Borrowing Statute did not apply under *Saudi Basic* because Delaware's statute of limitations was shorter, so his case did not fall within the "typical" forum-shopping scenario described in *Saudi Basic*.⁷¹

The *Huffington* court read *Saudi Basic* narrowly and rejected the plaintiff's contention.⁷² The court stated that:

Saudi Basic did not create a broad rule banning the use of the borrowing statute in all situations except for the "typical" scenario. Rather, it demonstrates the Delaware Supreme Court's unwillingness to allow the borrowing statute to be abused by a party shopping for a forum to avoid an adversary's counterclaims. . . . At most, *Saudi Basic* provides a very narrow holding with respect to borrowing statute jurisprudence in that the Supreme Court recognized that applying the borrowing statute in that scenario would "basically turn the borrowing statute on its head for the purpose for which it was enacted."⁷³

The court did hedge slightly in noting that the *Huffington* plaintiff "did forum shop. He tried to avoid the clear and unambiguous forum selection clause by filing in Massachusetts."⁷⁴ There is no indication, however, that the forum shopping or forum selection clause element was necessary to the court's narrow interpretation of *Saudi Basic*.

⁶⁶See *In re Washington Mutual, Inc.*, 2010 WL 3238903, at *5 (Bankr. D. Del. Aug. 13, 2010).

⁶⁷See *id.*

⁶⁸*Huffington*, 2012 WL 1415930, at *2.

⁶⁹*Id.*

⁷⁰Massachusetts's Blue Sky statute has a four-year statute of limitations but Delaware's statute of limitations is three years. See *id.* at *4.

⁷¹*Id.* at *8.

⁷²*Id.* at *8-9.

⁷³*Huffington*, 2012 WL 1415930, at *8-9.

⁷⁴*Id.* at *9.

Similarly, in *TL of Florida*, a construction equipment dealer located in Florida brought suit against a construction equipment manufacturer located in Delaware.⁷⁵ The plaintiff filed in the District of Delaware, asserting claims relating to a distributorship contract between the two companies.⁷⁶ By the time the plaintiff brought suit, several of the claims were time-barred under Delaware's statute of limitations, but would not have been time-barred under Florida's statute of limitations.⁷⁷ The plaintiff argued that the Borrowing Statute "only applies to prevent litigants from 'attempting to file in [Delaware] to take advantage of a longer limitations period,'" and because "Delaware's statute of limitations is not longer than Florida's limitations period, the [B]orrowing [S]tatute does not apply."⁷⁸ The court disagreed, stating that:

[U]nlike in *Saudi Basic*, a literal construction of the borrowing statute would not subvert the statute's underlying purpose. Unlike in *Saudi Basic*, application of the borrowing statute here does not unfairly prejudice a party other than the party that chose to file suit here in Delaware. While the situation here may not present the circumstances with which Delaware was most concerned when it adopted its borrowing statute—as the Court is not confronted with a party that has brought its case to Delaware for the purpose of benefitting from Delaware's longer statute of limitations—it remains the fact that the literal language of Delaware's borrowing statute makes it applicable to the circumstances presented here.⁷⁹

Another case, *Washington Mutual*, also focused on *Saudi Basic* as preventing the party selecting the forum from using the Borrowing Statute to gain an advantage.⁸⁰ *Washington Mutual* resembled *Mervyn's Holdings* in that it involved a company that filed for bankruptcy in Delaware, so the plaintiff could bring suit only in Delaware.⁸¹ By the time the plaintiff filed, the Delaware statute of limitations had run, but the claim would not have been barred in the state in which the claim

⁷⁵*TL of Fla.*, 54 F. Supp. 3d at 323.

⁷⁶*Id.* at 324.

⁷⁷*Id.* at 326-27.

⁷⁸*Id.* at 327.

⁷⁹*TL of Fla.*, 54 F. Supp. 3d at 327.

⁸⁰*Washington Mut.*, 2010 WL 3238903, at *5.

⁸¹*Id.* at *5.

arose.⁸² The company moved to dismiss, arguing that the plaintiff's claims were time-barred under Delaware's shorter statute of limitations.⁸³

The court granted the motion to dismiss.⁸⁴ It cited the Delaware Supreme Court's quotation of the trial court bench ruling in *Saudi Basic* for the proposition that the Borrowing Statute "will not be applied to permit a party to take advantage of Delaware's shorter limitations period, as this 'would basically turn the borrowing statute on its head for the purpose for which it was enacted.'"⁸⁵ Relying on the Borrowing Statute's anti-forum-shopping rationale, the Court held:

A debtor's filing for bankruptcy in Delaware sets Delaware as the forum and requires that a creditor pursue all its claims here. Allowing Delaware's borrowing statute to determine the applicable statute of limitations in such a scenario would "subvert the fundamental purpose of the statute and encourage forum-shopping by debtors seeking statute of limitations protection."

When WMI filed for bankruptcy in Delaware, it chose Delaware as the forum in which creditors must bring all of their claims. To allow WMI to use the benefit of Delaware's shorter limitations period would subvert the anti-forum-shopping purpose of the borrowing statute. Therefore, the Court will not apply Delaware's borrowing statute.⁸⁶

The Court did not reject a broad reading of *Saudi Basic*, but its reasoning endorsed the narrower reading.⁸⁷

C. The Alternate Textual Interpretation: Only Plaintiffs "Bring Suit"

One case from the District of Delaware, *B. Lewis Products, Inc. v. Bean*, has suggested that the text of the Borrowing Statute can be construed to apply only to the original plaintiff.⁸⁸ The decision recognized that "[c]ounterclaims are 'actions' for statute of limitations purposes," but observed that "that does not necessarily mean that they are

⁸²*Washington Mut.*, 2010 WL 3238903, *4, *6.

⁸³*Id.* at *3.

⁸⁴*Id.* at *16.

⁸⁵*Id.* at *5 (quoting *Saudi Basic Delaware Appellate Decision*, 866 A.2d at 15).

⁸⁶*Washington Mut.*, 2010 WL 3238903, at *5 (citations omitted) (quoting *In re W.R. Grace & Co.*, 418 B.R. 511, 518 n.4 (D. Del. 2009)).

⁸⁷*Id.*

⁸⁸2005 WL 273298, at *1-2 (D. Del. Jan. 28, 2005).

'actions' for purposes of the borrowing statute."⁸⁹ However, the *Bean* decision also quoted portions of *Saudi Basic*, holding that the statute applies to counterclaims.⁹⁰ The *Bean* court concluded that:

[T]he same kinds of considerations that operated to make the literal application of Delaware's borrowing statute inappropriate in *Saudi Basic* appear to be applicable here. Allowing [the plaintiff] to bring suit here and have the advantage of the shorter statute of limitations would effectively encourage the forum shopping denounced by the Delaware Supreme Court, and it would unfairly deprive Bean of rights to which he may otherwise be entitled. Consequently, I hold that Delaware's borrowing statute does not apply and, therefore, neither does Delaware's three year statute of limitations.⁹¹

Thus, the *Bean* court ultimately relied on *Saudi Basic* as creating an exception to the Borrowing Statute.⁹² While the *Bean* court did not fully embrace the alternate construction of the Borrowing Statute that it initially suggested, courts in other jurisdictions have interpreted borrowing statutes in their own states to apply only to the original plaintiff, as discussed in Section V.B of this Article.

D. Decisions That Did Not Raise *Saudi Basic*

Before the Delaware Supreme Court's decision in *Saudi Basic*, the Delaware Court of Chancery had declined to follow the Borrowing Statute on equitable grounds on one occasion. In *Juran v. Bron*, the Court held that the facts of the case presented "one of those 'unusual' or 'special' circumstances where the Court, as a Court of Equity, should not look to the applicable statute of limitations at law for guidance."⁹³ The Court held that "it would be inequitable to rigidly apply a Delaware statute of limitations to this action" because

[t]his is a California case. The parties were California residents at all relevant times to this action. The Employment Agreement was executed in California and the performance of the contract was to be in California. The

⁸⁹*Bean*, 2005 WL 273298, at *2.

⁹⁰*Id.*

⁹¹*Id.* at *3 (footnote omitted).

⁹²*Id.*

⁹³*Juran v. Bron*, 2000 WL 1521478, at *11 (Del. Ch. Oct. 6, 2000).

contract specifies that it is subject to California law. Finally, the alleged breach of this agreement occurred in California. The cause of action accrued in, and has the most significant ties to, California.⁹⁴

The Court also looked to the policy rationale for the Borrowing Statute.⁹⁵ The Court noted that:

[this ruling] falls squarely within the policy behind [the Borrowing Statute] . . . [which] was designed to protect Delaware's courts from having to adjudicate stale out-of-state claims. The typical problem this statute addresses is where a plaintiff's action is barred in its "home state" because the limitations period has run, but the Delaware courts may have jurisdiction over the parties and the action would not yet be barred under Delaware law. By forcing the Delaware courts to apply the shorter of the two periods, the General Assembly sought to prevent forum shopping to take advantage of a longer limitations period. Here, we do not have that situation. The plaintiffs have come to a jurisdiction with a *shorter*, rather than a longer, limitations period. Thus, there is no danger of forum shopping here.⁹⁶

The *Juran* decision thus cited the same arguments that *Furnari* and *Mervyn's Holdings* advanced when interpreting *Saudi Basic* broadly.⁹⁷

V. EVALUATING POTENTIAL RESOLUTIONS

As the foregoing discussion shows, the precise scope of *Saudi Basic* remains unclear. This section evaluates the three interpretations suggested by the decisions interpreting *Saudi Basic*: (i) applying the Borrowing Statute only when the Delaware statute of limitations is longer; (ii) applying the Borrowing Statute only to plaintiffs; or (iii) a compulsory forum exception to the Borrowing Statute.

⁹⁴ *Juran*, 2000 WL 1521478, at *11.

⁹⁵ *Id.* at *12.

⁹⁶ *Id.*

⁹⁷ See Part IV.A.

A. *The Broad Interpretation: Only Borrow
Shorter Limitations Periods*

The reason that the broad interpretation of *Saudi Basic* prevents forum shopping is that, under that regime, Delaware courts will always apply the foreign state's limitations period to causes of action arising outside Delaware. Consider both scenarios: either the other forum's limitations period is shorter or it is longer. If the other forum's limitations period is shorter, it applies under either interpretation of the Borrowing Statute. If the other forum's limitations period is longer, then, under a broad interpretation of *Saudi Basic*, it applies as an exception to the Borrowing Statute. Either way, the other forum's limitations period applies.

The broad interpretation of *Saudi Basic* is therefore equivalent to revising the Borrowing Statute to read: "[w]here a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of . . . the time limited by the law of the state or country where the cause of action arose." The phrase "whichever is shorter, the time limited by the law of this State, or" effectively is read out of the statute. This interpretation obviously removes any incentive for forum shopping entirely, but at the cost of a significant adjustment to the policy balance struck by the legislature regarding statutes of limitations. Indeed, the addition of the words "whichever is shorter" seemingly would imply a policy determination by the legislature against importation of another state's lengthier statute of limitations. The broad interpretation, therefore, conflicts not only with the literal language of the statute, but also with what implicitly seems to be the underlying policy determination of the legislature.

While Delaware courts have recognized that there can be exceptions even to clear and unambiguous statutes, such as when absurdity otherwise would result, the principle is relatively narrow. Normally, "[t]he goal of statutory construction is to determine and give effect to legislative intent. If a statute is unambiguous, there is no need for judicial interpretation, and the plain meaning of the statutory language controls."⁹⁸ As Blackstone's *Commentaries on the Laws of England* suggests, in a passage cited by the Delaware Supreme Court, the absurdity canon should be applied to avoid "absurd consequences, manifestly contradictory to common reason."⁹⁹

⁹⁸Eliason v. Englehart, 733 A.2d 944, 946 (Del. 1999).

⁹⁹Reddy v. PMA Ins. Co., 20 A.3d 1281, 1287 (Del. 2011) (quoting 1 William Blackstone, *Commentaries on the Laws of England*, *61 (1st ed. 1765)).

Here, it is difficult to fit such a significant revision to the Borrowing Statute within the narrow confines of the absurdity canon, even though the revision would further the generally accepted policy goal of removing incentives for forum shopping. The legislature certainly would have been aware that adopting the limitations period of the forum where the cause of action arose would deter forum shopping, but the General Assembly struck a different balance between competing policy goals.¹⁰⁰

Nevertheless, if a lower court reads the broad language in *Saudi Basic* as a holding of the Supreme Court, it is bound to follow that interpretation.¹⁰¹ The analysis of the Borrowing Statute in *Saudi Basic* ends with this sentence:

The trial judge recognized that to apply the borrowing statute to ExxonMobil would subvert the statute's fundamental purpose, by enabling [the plaintiff] to prevail on a limitations defense that would never have been available to it had the overcharge claims been brought in the jurisdiction where the cause of action arose, i.e., Saudi Arabia.¹⁰²

A lower court reasonably could interpret this sentence as holding that the Borrowing Statute does not apply when the limitations period on the foreign claim is longer than the limitations period in Delaware. Clarification by the Delaware Supreme Court as to the scope of its holding in *Saudi Basic* or legislative action reiterating or revisiting the policy choices underlying the Borrowing Statute would help eliminate any ambiguity.

*B. The Alternate Textual Interpretation:
Only Plaintiffs Bring Suit*

The *Bean* court's suggestion that the Borrowing Statute could be read to apply only to the original plaintiff has a stronger textual basis than either the broad or narrow interpretation, but that interpretation would eliminate only one of the two scenarios where the Borrowing

¹⁰⁰See *Dymond v. Nat'l Broad. Co.*, 559 F. Supp. 734, 735 (D. Del. 1983) (discussing how the Borrowing Statute represents a policy choice by the Delaware legislature).

¹⁰¹*In re MFW S'holders Litig.*, 67 A.3d 496, 502 (Del. Ch. 2013) ("[T]he [lower] court has to satisfy itself that our Supreme Court has not already answered the question. If our Supreme Court has done so, this court is bound by that answer, which may only be altered by the Supreme Court itself or by legislative action."), *aff'd sub nom. Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

¹⁰²*Saudi Basic Delaware Appellate Decision*, 866 A.2d 1, 17-18 (Del. 2005).

Statute creates incentives for forum shopping. Such an interpretation would eliminate the incentive for a party that knows it is about to be sued to bring a declaratory judgment action, as occurred in *Saudi Basic*. However, for purposes of forum shopping by bankruptcy filers, as illustrated in *Washington Mutual* and *Mervyn's Holdings*, the plaintiff is not the party that picks the forum. Interpreting the Borrowing Statute to apply only to plaintiffs therefore does not eliminate the incentives for forum shopping.

1. The Textual Basis for a Plaintiff-Only Interpretation

The text of the Borrowing Statute speaks of application to a party using the active phrases "bringing an action" and "brought an action."¹⁰³ This could indicate that the Borrowing Statute applies only to plaintiffs. The phrase "bring an action" is the modern version of the phrase "bring suit."¹⁰⁴ Versions of Black's Law Dictionary published shortly after the Borrowing Statute was passed explain that "[t]o 'bring' an action or suit has a settled customary meaning at law, and refers to the initiation of legal proceedings in a suit. . . . A suit is 'brought' at the time it is commenced."¹⁰⁵ The most recent version of Black's Law Dictionary similarly defines "bring an action" as "[t]o sue; institute legal proceedings."¹⁰⁶

It is settled law that references to "actions" in statutes of limitations also apply to counterclaims,¹⁰⁷ but this principle does not necessarily apply when interpreting other types of statutes, including the Borrowing Statute. The statute of limitations applies to counterclaims "by analogy" rather than under a strict textual interpretation.¹⁰⁸ As Chancellor Seitz explained:

¹⁰³See DEL. CODE ANN. tit. 10, § 8121.

¹⁰⁴Version of Black's Law Dictionary from the period when the Borrowing Statute was enacted did not define "bring an action." Instead, they defined "bring suit" and noted in the definition of "bring suit" that under the Federal Rules of Civil Procedure, the "term 'suit' has been replaced by 'action.'" See, e.g., BLACK'S LAW DICTIONARY 240 (4th ed. 1968); BLACK'S LAW DICTIONARY 174 (5th ed. 1979).

¹⁰⁵BLACK'S LAW DICTIONARY 240 (4th ed. 1968); BLACK'S LAW DICTIONARY 174 (5th ed. 1979) (same). The phrase "bring suit" was replaced by "bring an action," which the current edition of Black's Law Dictionary defines similarly as "[t]o sue; institute legal proceedings." BLACK'S LAW DICTIONARY 218 (9th ed. 2009).

¹⁰⁶BLACK'S LAW DICTIONARY 218 (9th ed. 2009).

¹⁰⁷See, e.g., *Wilson v. Kirlin*, 2011 WL 1465576, at *2 (Del. Super. Apr. 15, 2011); *Am. Home Prods. Corp. v. Norden Labs., Inc.*, 1992 WL 368604, at *3 (Del. Ch. Dec. 11, 1992); *Gracelawn v. E. Mem'l*, 1975 WL 507, at *2 (Del. Ch. Aug. 15, 1975).

¹⁰⁸*Del. Chems., Inc. v. Reichhold Chems., Inc.*, 121 A.2d 913, 917-18 (Del. Ch. 1956) (internal quotation marks omitted).

The question then is whether the Court will by analogy apply the statute of limitations to a counterclaim seeking affirmative relief in connection with the same transaction or occurrence which forms the basis of plaintiff's claim. It is generally agreed that [t]he purpose of statutes of limitation is to bar actions and not to suppress or deny matters of defense, whether legal or equitable; and it is a general rule that such statutes are not applicable to defenses, but apply only where affirmative relief is sought. . . .

The three year statute of limitations relied upon by plaintiff, 10 *Del. C.* § 8106, applies to any "action" enumerated therein. I believe a counterclaim seeking affirmative relief is an "action" within the meaning of the statute. The fact that it appears in a counterclaim cannot obscure the fact that it has all the characteristics of an independent action. . . . This conclusion is strengthened by the fact that these counterclaims would, as independent actions, have been filed at law and would have been barred by the statute.¹⁰⁹

Other courts have held that the analogy between claims and counterclaims does not hold in other statutory contexts.¹¹⁰ They have reverted to the definition of "bring suit" as the commencement of a legal proceeding, and therefore something that only the plaintiff does.¹¹¹ For example, the Third Circuit recently interpreted a federal statute that spoke of when a party may "bring a civil action" as a time-bar that applied only to a plaintiff.¹¹² The statute stated that "[a]ny party aggrieved by the findings and decision made" by the relevant agency "shall have the right to bring a civil action with respect to the complaint presented."¹¹³ The Court reasoned that, while

[t]he word "action," without more, is arguably broad enough to encompass any type of judicial proceeding, including counterclaims . . . [t]he phrase "bring an action" is defined as "to sue; institute legal proceedings." Therefore, an action is "brought" when a plaintiff files a complaint, which is the

¹⁰⁹*Del. Chems, Inc.*, 121 A.2d at 917-18. The Chancellor reinforced the fact that he was reasoning by analogy by stating: "I therefore conclude that these counterclaims seeking as they do affirmative relief of a legal nature are by analogy subject to the defense of the statute of limitations." *Id.* at 918.

¹¹⁰*See, e.g., infra* notes 111-15.

¹¹¹*Jonathan H. v. The Souderton Area Sch. Dist.*, 562 F.3d 527, 530 (3d Cir. 2009).

¹¹²*Id.* at 529.

¹¹³20 U.S.C. § 1415.

first step that invokes the judicial process. . . . Unlike the proactive nature of a complaint, a counterclaim is reactive because it is filed only after the plaintiff has initiated the case by bringing a civil action. Indeed, a counterclaim is a "claim for relief asserted against an opposing party after an original claim has been made." . . . In light of the foregoing, a defendant does not "bring an action" by asserting a counterclaim; only a plaintiff may "bring an action" for purposes of the [statute].¹¹⁴

Other courts have reached similar conclusions.¹¹⁵

2. Unresolved Policy Issues

The decisions in *Washington Mutual* and *Mervyn's Holdings* illustrate two different scenarios where a party, other than the original plaintiff, may engage in forum shopping to take advantage of the Borrowing Statute. In *Washington Mutual*, the debtors filing for bankruptcy in Delaware established Delaware as the forum and forced creditors to pursue their claims there.¹¹⁶ A creditor, as the plaintiff, still would be subject to the Borrowing Statute under the *Bean* interpretation.¹¹⁷ Debtors, therefore, still would have an incentive to file for bankruptcy in Delaware in order to shelter themselves from claims arising in other jurisdictions that would be subject to a shorter limitations period in Delaware.

Similarly, in *Mervyn's Holdings*, the Official Committee of Unsecured Creditors caused the company to bring suit against a third party.¹¹⁸ Although the creditors caused the suit to be initiated and primarily would benefit from a favorable outcome, the company technically was the plaintiff.¹¹⁹ Thus, the Borrowing Statute still would apply, even though the company, not the creditors, selected the forum.¹²⁰ A company could have an incentive to file for bankruptcy in Delaware in order to ensure that the company would not be able to later pursue

¹¹⁴*Jonathan H.*, 562 F.3d at 529-30 (citations omitted).

¹¹⁵*See, e.g.*, *UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia*, 720 F. Supp. 2d 800, 804 (W.D. Tex. 2010) ("The Court finds that, as a general rule, 'bringing an action' means initiating a lawsuit, not filing a counterclaim."); *Soileau v. Smith True Value & Rental*, 144 So. 3d 771, 778 (La. 2013) ("[W]e conclude that, in the [relevant statute], the legislature used the word 'brought' as in 'initially filed' or 'commenced.'").

¹¹⁶*Washington Mut.*, 2010 WL 3238903, at *5.

¹¹⁷*See supra* notes 88-91 and accompanying text (suggesting the Borrowing Statute may only be applied to the original plaintiff).

¹¹⁸*See In re Mervyn's Hldgs.*, 426 B.R. 488, 492 n.2 (Bankr. D. Del. 2010).

¹¹⁹*Id.*

¹²⁰*Id.* at 493.

certain claims on behalf of the creditors, such as claims against former management. The *Bean* rule would risk letting conflicted fiduciaries engage in forum shopping if they did not want the company to be able to pursue certain claims. Creditors might argue that the company deliberately harmed itself, and indirectly harmed them, by choosing a bankruptcy forum that made it impossible to pursue the claims, but it is unclear to what degree such an argument would be successful.

Undoubtedly, creative legal minds could identify additional methods to take advantage of the Borrowing Statute. While the *Bean* interpretation solves the problem of a defendant facing a preemptive declaratory judgment action for non-breach and being forced to assert compulsory counterclaims under a different limitations period, the *Bean* interpretation does not answer the question of the Borrowing Statute's application in bankruptcy or other as-yet unseen procedural situations where a different party picks the forum. In sum, the rule is not likely to be effective.

3. The Narrow Interpretation: A Forced-Forum Exception

The narrow interpretation of *Saudi Basic* takes the view that the Borrowing Statute does not apply to claims that parties are forced to bring in Delaware. It better fits within the absurdity canon and better targets incentives for forum shopping. This interpretation, however, is harder to define with precision and could create a line-drawing problem when applied to various scenarios. In sum, it lacks the bright-line quality of the broad interpretation and the *Bean* interpretation.

Parties can be forced into a forum in a number of different ways. Most obviously, the defendant frequently has no say in forum selection.¹²¹ A defendant asserting a compulsory counterclaim, as in *Saudi Basic* itself, is forced into the forum.¹²² As the Delaware Supreme Court discussed in *Saudi Basic*, forcing the defendant to oppose the plaintiff's claims without allowing the defendant to bring counterclaims that would have been available in the forum where the cause of action

¹²¹A defendant may potentially influence the choice of forum where there is a preexisting relationship between the parties. See, e.g., Richard A. Gantner, *Contracts—Forum Selection—Absent Bad Faith, Fraud or Overreaching, A Reasonable Forum Selection Clause in A Commercial Cruise Form Contract Is Enforceable—Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991), 22 SETON HALL L. REV. 505, 505 (1992) (stating that a forum selection clause is a contract whereby parties agree to a “particular court of justice or tribunal for litigation.”).

¹²²*Saudi Basic Delaware Appellate Decision*, 866 A.2d 1, 37 (Del. 2005).

arose unfairly burdens the defendant and encourages forum shopping.¹²³ It is also an inefficient use of judicial resources.¹²⁴

The problem is magnified when the plaintiff strategically brings a preemptive declaratory action for the purposes of the choosing the forum, as also occurred in *Saudi Basic*. Delaware courts have taken issue with the way that parties use declaratory judgments as strategic forum selection tools in other contexts.¹²⁵ In several cases, courts have refused to give deference to an action as first-filed when it is a transparent attempt by a party that knows they are likely to be sued to pick the forum.¹²⁶ As the Delaware Superior Court recently reiterated, "Delaware courts take a 'rather dim view of declaratory judgment claims of non-breach made for purposes of forum shopping.'"¹²⁷ Delaware courts similarly have expressed disapproval with "[t]he anticipatory use of a declaratory judgment action 'for the purpose of gaining an affirmative judgment in a favorable forum.'"¹²⁸ Parties' use of declaratory actions to gain the protection of the Borrowing Statute against anticipated counterclaims implicates the same policy concerns. The rationale for refusing to apply the Borrowing Statute in the context of counterclaims to forum-shopping declaratory judgment actions is thus particularly strong.

The plaintiff, rather than the defendant, also may be the party forced into the forum, such as in the bankruptcy context, as illustrated by *Mervyn's Holdings* and *Washington Mutual*.¹²⁹ This scenario presents the opportunity for another party to use the Borrowing Statute offensively and to forum-shop for the jurisdiction that offers the most

¹²³*Id.* at 17-18.

¹²⁴Fragmentation of claims arising from the same transaction or occurrence results in duplicative litigation and waste of judicial resources. The policy considerations are similar to those underlying the adoption of Rule 13 of the Federal Rules of Civil Procedure regarding compulsory counterclaims. *See, e.g., Adam v. Jacobs*, 950 F.2d 89, 93 (2d Cir. 1991) ("[Rule 13] plays a unique role in conserving judicial resources.").

¹²⁵*See infra* note 126.

¹²⁶*See, e.g., Williams Gas Supply Co. v. Apache Corp.*, 594 A.2d 34, 36, 38 (Del. 1991) (affirming dismissal of first-filed declaratory judgment action in favor of Colorado litigation); *In re Delta & Pine Land Co. S'holders Litig.*, 2000 WL 1010584, at *5 (Del. Ch. July 17, 2000) (original instance of statement that "Delaware law's rather dim view of declaratory judgment claims of non-breach made for purposes of forum shopping"); *Playtex, Inc. v. Columbia Cas. Co.*, 1989 WL 40913, at *4 (Del. Super. Apr. 25, 1989) (refusing to stay later-filed Delaware action in favor of first-filed declaratory judgment action in Illinois and stating "the use of a declaratory judgment action to anticipate and soften the impact of an imminent suit elsewhere for the purpose of gaining an affirmative judgment in a favorable forum requires a closer look at the deference historically accorded a prior filed action").

¹²⁷*Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Turner Constr. Co.*, 2014 WL 703808, at *3 (Del. Super. Feb. 17, 2014) (quoting *E-Birchtree, LLC v. Enter. Prods. Operating L.P.*, 2007 WL 914644, at *3 (Del. Super. Jan. 18, 2007)).

¹²⁸*Id.* (quoting *Playtex, Inc.*, 1989 WL 40913, at *4).

¹²⁹*See supra* notes 116-120 and accompanying text.

protection from claims. In this scenario, a narrow interpretation of the Borrow Statute also should apply.

Other scenarios can be envisioned, however, where plaintiffs claim that they have been "forced" into the forum, but a narrow interpretation of *Saudi Basic* would not make sense. For example, the plaintiff may have agreed to a forum selection clause specifying the forum. A plaintiff who must file in Delaware because of a forum selection clause deliberately chose Delaware as a forum at an earlier stage, so they have not been forced into the forum. Delaware law recognizes that forum selection clauses represent a choice by contracting parties, and both the General Assembly and the courts take great pains to uphold such voluntary contractual agreements.¹³⁰ Furthermore, the implications of the Borrowing Statute may even have been within the parties' contemplation when they mutually agreed on the forum. The effect of the Borrowing Statute would then be an explicit element of the agreement between the parties. As a related point, the Delaware legislature recently altered the state's statute of limitations to give effect to parties' contractual selection of statute of limitations periods.¹³¹ The parties' intent similarly should be given effect by applying the Borrowing Statute without exception when the parties have agreed to a forum selection clause.

The numerous factual scenarios in which a party may be forced into Delaware as a forum show why the narrow interpretation requires a carefully crafted definition of when a party is "forced" into Delaware. Current precedent would require the party asserting a claim to be forced to assert claims in Delaware in the strong sense of that term, such as a compulsory counterclaim or a bankruptcy filing that forecloses all other forums. This principle may be stated as: "The Borrowing Statute does not apply to a claim if a party is required to file the claim only in Delaware by statute or rule and the party did not trigger that mandate by its own actions."

VI. CONCLUSION

As the discussion above shows, courts have adopted divergent interpretations of *Saudi Basic*, under a variety of factual situations. The cases applying *Saudi Basic* touch on different policy concerns and different aspects of forum shopping. The resulting divergence on the proper interpretation of *Saudi Basic* presents the Delaware Supreme Court with an opportunity to clarify its intent.

¹³⁰See, e.g., Nat'l Indus. Gp. (Hldg.) v. Carlyle Inv. Mgmt. L.L.C., 67 A.3d 373, 385-86 (Del. 2013); Ingres Corp. v. CA, Inc., 8 A.3d 1143, 1147 (Del. 2010).

¹³¹See DEL. CODE ANN. tit. 10, § 8106(c).

Achieving the anti-forum-shopping purpose of the Borrowing Statute is difficult because both plaintiffs and defendants can engage in forum shopping in wide variety of contexts. Holding that the Borrowing Statute does not apply to plaintiffs would not resolve many of these issues. Re-writing the Borrowing Statute to always apply the other forum's statute of limitations is a broader remedy than required to avoid forum shopping and is not consistent with the text of the statute. A narrow interpretation, while also inconsistent with the text of the statute, effects a more moderate change to achieve the same result. It is therefore the preferable result.
