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Former Chancellor Chandler's Unjust Criticism of Chancellor McCormick and Vice Chancellor Laster: What Does It Signify?

Joel Edan Friedlander*

This article is impelled by Rule 8.2 comment 3 of the Delaware Lawyers' Rules of Professional Conduct: "To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized." On June 20, 2024, former Chancellor William B. Chandler, III testified on the floor of Delaware's House of Representatives in support of Senate Bill 313. This essay explores how Chandler's testimony contained unjust criticism of Chancellor Kathaleen St. Jude McCormick and Vice Chancellor J. Travis Laster. This article further explores the political significance of Chandler's rhetoric and of Senate Bill 313 itself: deal lawyers and defense lawyers are now expressing publicly and in law their hostility to the judicial enforcement of stockholder rights.

> -- The nature of any society therefore is not to be deciphered from its laws alone, but from those understood as an index of its conflicts. What our laws show is the extent and degree to which conflict has to be suppressed.
>
> --Alasdair MacIntyre[1]

* This article is solely my work product, and it is written in my individual capacity. For identification purposes only, I am a partner at Friedlander & Gorris, P.A., in Wilmington, Delaware, and a lecturer at University of Michigan Law School and University of Pennsylvania Carey Law School. My firm has not been involved in *Tornetta v. Musk* or any of the recent or pending cases addressed or impacted by Senate Bill 313. I thank Stephen Bainbridge, Jill Fisch, Joel Fleming, Jesse Fried, and Holger Spamann for their comments. This article is dedicated to the memory of my mother, Claire Friedlander, who always asked me if I had thought through the political implications of what I write, including with respect to an earlier version of this article.

[1] ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 254 (2d ed. 1984).

Introduction

On the evening of June 20, 2024, former Chancellor William B. Chandler, III, a Delaware lawyer in private practice with Wilson Sonsini, a Silicon Valley-based law firm, testified in the Delaware House of Representatives on behalf of Senate Bill 313. Chandler's live-streamed testimony dramatically culminated a legislative response to a series of Court of Chancery decisions that angered leading transactional lawyers and their clients.

One theme of Chandler's testimony was that the House of Representatives should continue to place their trust in the Corporation Law Council of the Delaware State Bar Association, which had submitted the proposed legislation. Chandler praised the Corporation Law Council for its longstanding role vetting and drafting proposed amendments to the Delaware General Corporation Law. That aspect of Chandler's testimony is unremarkable and innocuous, except as a counterpoint to what followed.

A second theme of Chandler's testimony was his effort to discredit the objections to Senate Bill 313 made by numerous law professors and two members of the Court of Chancery, Chancellor Kathaleen St. Jude McCormick and Vice Chancellor J. Travis Laster.

Chandler said very little about the various objections of several dozen law professors to proposed Section 122(18) of the Delaware General Corporation Law, which would enable a corporation to grant broad governance powers to major stockholders by contract, thereby diminishing the authority of a board of directors.[2]

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[2] In reverse chronological order, see, for example, Ann Lipton, *I Write Letters!*, BUS. L. PROF. BLOG (June 16, 2024) ("I believe the proposed amendments will cause Delaware to lose control over its law."); Jill E. Fisch and Anat Alon-Beck, *Does the Moelis Decision Warrant a Quick Legislative Fix?*, CLS BLUE SKY BLOG (June 10, 2024) ("Neither the Proposal nor the synopsis offered by the state bar council addresses the fundamental policy considerations raised in *Moelis* about the appropriate scope of shareholder agreements."), https://clsbluesky.law.columbia.edu/2024/06/10/does-the-moelis-decision-warrant-a-quick-legislative-fix/; *Letter in Opposition to the Proposed Amendment to the DGCL*, HARV. L. SCHOOL FORUM ON CORP. GOV. (June 7, 2024) (signed by 57 professors), https://corpgov.law.harvard.edu/2024/06/07/letter-in-opposition-to-the-proposed-amendment-to-the-dgcl/; Marcel Kahan and Edward Rock, *Section 122(18) DGCL: A proposed compromise*, HARV. L. SCHOOL FORUM ON CORP. GOV. (June 10, 2024) ("We believe that our safe harbor approach provides the greatest legal certainty with the least displacement of existing Delaware law[.]"),

Disingenuously, Chandler stated: "Everyone's voices were heard, [including] lots of voices that weren't even Delaware voices. Now, that gives me some pause and some concern."[3] Chandler did not explain why he had "some pause and some concern" about non-Delaware voices weighing in.

Chandler's expression of concern was disingenuous because transactional lawyers in Silicon Valley and on Wall Street expressed welcomed support for Senate Bill 313. These non-Delaware voices included the National Venture Capital Association[4] and the Committee on Mergers, Acquisitions and Corporate Contests of the New York City Bar Association.[5] Chandler was not referring to those voices. He was endorsing a provincial rhetorical trope of the legislative debate—that the fight over the merits of Section 122(18) was between Delaware lawyers on the Corporation Law Council and law professors from outside of Delaware.[6]

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https://corpgov.law.harvard.edu/2024/06/10/section-12218-dgcl-a-proposed-compromise/; Marcel Kahan and Edward Rock, *Proposed DGCL § 122(18), Long-term Investors, and the Hollowing Out of DGCL § 141(a)*, HARV. L. SCHOOL FORUM ON CORP. GOV. (May 21, 2024), https://corpgov.law.harvard.edu/2024/05/21/proposed-dgcl-%C2%A7-12218-long-term-investors-and-the-hollowing-out-of-dgcl-%C2%A7-141a/; Lucian Bebchuk, *The Perils of Governance by Stockholder Agreements*, HARV. L. SCHOOL FORUM ON CORP. GOV. (May 21, 2024), https://corpgov.law.harvard.edu/2024/05/21/the-perils-of-governance-by-stockholder-agreements/; Sarath Sanga and Gabriel Rauterberg, *Proposed Amendments to DGCL on Stockholder Contracting Would Create More Problems Than They Purportedly Solve*, HARV. L. SCHOOL FORUM ON CORP. GOV. (Apr. 5, 2024), https://corpgov.law.harvard.edu/2024/04/05/proposed-amendments-to-dgcl-on-stockholder-contracting-would-create-more-problems-than-they-purportedly-solve/.

[3] Delaware General Assembly, House of Representatives Legislative Session – Session 2 – 39th Legislative Day (June 20, 2024), https://legis.delaware.gov/WatchAndListen [hereinafter Hearing Video], at 7:30-7:31 p.m.

[4] *See* Delaware General Assembly, Senate Judiciary Committee Meeting (June 11, 2024), https://legis.delaware.gov/WatchAndListen, at 10:19 a.m. ("I think the Senate received a letter from the NVCA, the National Venture Capital Association, that talks about the ubiquitous nature of NVCA forms, and there are provisions in that form whose validity is called into question by the *Moelis* decision.") (testimony of Srinivas Raju).

[5] Let. from Iliana Ongun to Senator Bryan Townsend of 6/10/24, https://www.nycbar.org/wp-content/uploads/2024/06/20221312_LetterDelawareGeneralAssembly.pdf.

[6] Senator Pettyjohn posed the following questions about the 57 professors who signed a letter opposing adoption of Section 122(18): "Are any of them actively practicing attorneys in Delaware? Are they members of the Corporate Law Section in Delaware, that you know of?" Delaware General Assembly, Senate Judiciary Committee Meeting

Chandler's rhetorical swipe at professors nationwide who teach Delaware corporate law was disingenuous for an additional reason. Chandler knows that Delaware judges often look to academic scholarship as a source of law. Upon his retirement from the Court of Chancery, Chandler delivered a speech as part of a symposium at the Columbia University School of Law. The published version of Chandler's remarks expands on how the "academic world provides an extremely relevant and timely voice as an agent of proposed change in the corporate field"[7]:

> The contribution of legal scholars is, to my mind, quite unique, because although it is not uncommon for law professors to comment on issues that come before trial courts, it is unusual, I think, for trial court judges to be able to make practical use of scholarly criticism. But Chancery has been able to do so--in large part due to the fact that there is an abundance of academic commentary on corporate law and M&A and, importantly, because much of it is produced in real-time.[8]

On the House floor, Chandler could have noted his respect as a trial judge for academic commentary and tried to explain why legislators, nonetheless, should ignore academic commentary respecting the proposed legislation. Or Chandler could have engaged on the merits with academic opposition to Section 122(18). Alternatively, Chandler could have explained why certain non-Delaware voices are important, while others give him "some pause and some concern." But speaking to the merits of Senate Bill 313 and treating contrary perspectives respectfully was not how Chandler made his case.

Chandler's criticisms of Chancellor McCormick and Vice Chancellor Laster were pointed. Chandler stated:

> Because right now, the market, the corporate market, is not feeling good about Delaware. It's not feeling good about Delaware. Because of the uncertainty and the unpredictability of a few decisions

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(June 11, 2024), https://legis.delaware.gov/WatchAndListen, at 10:41-10:42 a.m. One retired law professor who resides in Delaware wrote in support of Senate Bill 313. Lawrence Hamermesh, *Letter in support of the proposed amendments to § 122 DGCL*, HARV. L. SCHOOL FORUM ON CORP. GOV. (June 11, 2024), https://corpgov.law.harvard.edu/2024/06/11/letter-in-support-of-the-proposed-amendments-to-%c2%a7-122-dgcl/.

[7] William B. Chandler III, *The Delaware Court of Chancery: An Insider's View of Change and Continuity*, 2012 COLUM. BUS. L. REV. 411, 422 (2012).

[8] *Id.* at 420.

> by just two judges. And remember, that's not a court of two judges. That's a court of seven judges.
>
> But only two judges are telling you that there is some concern about this legislation affecting their decisions. As Chancellor, I will tell you I was taught judges need to stay in their own lane. Judges need to be judging cases in the courtroom applying the law that you give them. Judges don't need to intrude upon the process of making law because if they do, they now have become really powerful. They now have become makers of the law as well as the appliers, the adjudicators of the law. That, to me, is probably even more worrisome, more concerning to me, than whether this legislation passes at all, because that's never happened in our history. Never. Not while I was Chancellor, not while Bill Allen was Chancellor, not while Grover Brown or Bill Marvel, not while Andy Bouchard was Chancellor.[9]

There are at least two distinct arguments in the above passage:

First, Chandler is criticizing Chancellor McCormick and Vice Chancellor Laster for having rendered judicial decisions that purportedly created uncertainty and unpredictability and thereby hurt Delaware's position in the corporate chartering market.

Second, Chandler is criticizing Chancellor McCormick and Vice Chancellor Laster for having spoken out about Senate Bill 313. Chandler accuses them of seeking legislative power as well as judicial power. Chandler states that it is unprecedented for a member of the Court of Chancery "to intrude upon the process of making law."

In this article, I argue that the above criticisms are unjust. Stated simply, in Section I, I explain that the three recent decisions by Chancellor McCormick and Vice Chancellor Laster that were addressed by Senate Bill 313 did not create "uncertainty" or "unpredictability" in any meaningful sense. The three judicial decisions in question were faithful efforts to apply Delaware law to factual scenarios that did not admit of predictable contrary outcomes. In Section II, I explain why Chandler's second criticism is deeply misleading. Chandler himself advocated for new legislation when serving as a judge. So did his unmentioned former colleague and successor, former Vice Chancellor, Chancellor, and Chief Justice Leo Strine.

[9] Hearing Video, *supra* note 3, at 7:32-7:33 p.m.

Chancellor McCormick and Vice Chancellor Laster were merely commenting publicly on legislation proposed by others.

In this article, I also explore the political meaning of Chandler's words on the House Floor. Chandler was not making an oral argument in the Delaware Supreme Court about a claimed error in how the Court of Chancery interpreted the law. He was not giving a lecture in a law school or explicating specific problems in a panel discussion at a conference. Chandler was granted the privilege of the floor of the Delaware House of Representatives to provide testimony in support of proposed legislation. Criticism of a sitting judge in that setting is not only an extraordinary departure from how Delaware markets its judiciary to the outside world,[10] it is necessarily a form of political attack. Delaware judges do not enjoy lifetime tenure. They serve twelve-year terms, and reappointment requires re-nomination by the Governor and re-approval by a majority of the State Senate.[11] Delaware politicians are keen to preserve Delaware's dominance in the market for incorporations, which is a foundation of Delaware's tax base.[12] For Chandler to single out two judges for

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[10] *See, e.g.*, LEWIS S. BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE 1, 5-6, 7 (2007) ("So what is the source of Delaware's prestige—even cachet? Why do corporations choose Delaware? I think the answer is not one thing but a number of things.... It includes the Delaware courts and, in particular, Delaware's highly respected corporations court, the Court of Chancery.... Whether they win or lose, lawyers are impressed by how well-prepared the judges are, the familiarity with complex business transactions and insight into the inner workings or corporations their questions display, and the civility and respect with which both sides are treated.... The history and tradition of the Court of Chancery and the human capital of its excellent judges, cannot be magically transplanted to some other jurisdiction."). This booklet is printed and distributed by the Delaware Department of State, Division of Corporations and it is available on the State of Delaware website, https://corpfiles.delaware.gov/pdfs/whycorporations_english.pdf.

[11] DEL. CONST., art. IV, § 3.

[12] Governor Carney's recommended budget for fiscal year 2025 estimates that incorporation revenue from Delaware entities will constitute 26.9% of Delaware's total sources of funds. https://budget.delaware.gov/budget/fy2025/documents/operating/financial-summary.pdf. The percentage of the tax base attributable to Delaware's preeminence in the incorporation market is significantly higher if one adds escheat attributable to uncollected dividends from Delaware corporations and personal income taxes paid by corporate lawyers and employees of incorporation companies, or other related economic activity. Representative Griffith stated that 45% of Delaware's general fund revenues are attributable to incorporations in Delaware. Hearing Video, *supra* note 3, at 6:36-6:37 p.m.

criticism on the House floor as part of a debate over corporate law legislation necessarily sends a political message to them and to all members of the judiciary. Chandler's political attack on two members of the judiciary was not only unjust, it threatens judicial independence. Additionally, it is potentially damaging to Delaware's authority in the realm of corporate law.

Chandler's words deserve close examination for another reason. Because Chandler was publicly articulating reasons why legislators should vote in favor of Senate Bill 313, interpretation of his words sheds light on the legislation's purpose. Why did Chandler single out Chancellor McCormick and Vice Chancellor Laster? In what way did their decisions leave the "corporate market … not feeling good about Delaware"? Why was legislation the appropriate response, rather than appeals to the Delaware Supreme Court? Why was it galling that they spoke out publicly about the proposed legislation? Why were their objections not addressed on the merits? Why did Chandler castigate them on the House floor? My thesis is that Chandler attacked the decisions and extra-judicial writings of these two judges because Senate Bill 313 was intended to serve a parallel purpose—to rebuke them and the mode of judging they represent. It was an expression of political power by deal lawyers and defense lawyers about how disputes of Delaware corporate law should be resolved, and how these same lawyers can create corporate law through legislation if they are dissatisfied with judicial rulings.

Chandler's words were not uttered in a vacuum. His testimony reflects what others said privately or in other public settings. My method in this article is to place Chandler's words in the context of the larger debate that unfolded over the preceding months respecting various decisions by the Court of Chancery, including decisions not expressly addressed by the legislative history of Senate Bill 313.

I also discuss a background debate about the role of stockholder litigation in corporate governance. Chancellor McCormick and Vice Chancellor Laster are representative of a contested approach to stockholder litigation: that, with proper judicial oversight, it is legitimate and necessary for public stockholders to hold deal participants to account. The proponents of Senate Bill 313—largely, deal lawyers and defense lawyers for deal participants—are more inclined to see stockholder litigation as a necessary evil, at best, and to look askance at any judicial opinion that rejects a proffered ground for dismissal, that invalidates a judicially untested but common practice among practitioners, or that casts deal participants in an unflattering light.

For deal lawyers and their clients, it stands to reason that they should exert political pressure respecting judicial selection and the substance of Delaware law so that deal participants are content to remain in Delaware, to incorporate new entities in Delaware, and to litigate and prevail in Delaware. It further stands to reason that any alternative forum to Delaware should be carefully evaluated if judicial application of Delaware law is insufficiently accommodating of their interests. As Martin Lipton stated in a legendary client memorandum in 1988, in response to a decision by Chancellor Allen requiring redemption of a poison pill: "Perhaps it is time to migrate out of Delaware."[13] Relatedly, if amendments to Delaware's General Corporation Law are perceived by deal lawyers as politically expedient, then any objection raised to the amendments—whether procedural or substantive, regardless of the identity of the objector, and notwithstanding the merit of the objection—will be viewed with hostility and disdain.

I conclude that Chandler's rhetoric cannot be justified on its own terms, but it is faithful to the notion that the Corporation Law Council—a province of the deal lawyers—deserves a monopoly over the ultimate content of Delaware corporate law. Alternative voices must be discredited, and individual judges and the Delaware judiciary as a whole must recognize their subordinate status.

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[13] WACHTELL, LIPTON, ROSEN & KATZ, THE INTERCO CASE (Nov. 3, 1988), https://theliptonarchive.org/wp-content/uploads/340-The-Interco-Case-dated-November-3-1988.pdf; *see* WACHTELL, LIPTON, ROSEN & KATZ, YOU CAN'T JUST SAY NO IN DELAWARE NO MORE (Dec. 17, 1988) ("Unless Delaware acts quickly to correct the *Pillsbury* decision, the only avenues open to the half of major American companies incorporated in Delaware will be federal legislation of the type now being considered by the Treasury Department or leaving Delaware for a more hospitable state of incorporation."), https://theliptonarchive.org/wp-content/uploads/340-The-Interco-Case-dated-November-3-1988.pdf. *See also* Lucian Arye Bebchuk and Allen Ferrell, *On Takeover Law and Regulatory Competition*, 57 BUS. LAW. 1047, 1062 (2002) ("When discussing the pressures on Delaware during the late 80's, it has become customary to refer to the now legendary memorandum of Martin Lipton circulated after *City Capital Associates Ltd. Partnership v. Interco Inc.* and before the overruling of *Interco* by *Time*.") (citations omitted).

I. Chandler's Criticism That Chancellor McCormick and Vice Chancellor Laster Harmed Delaware By Creating Unpredictability

A. "Just Two Judges"

Chandler's criticism that the corporate market was dissatisfied with Delaware because of a handful of decisions rendered by "just two judges" on the Court of Chancery is insidious. At a surface level, one can observe that the three decisions expressly addressed by Senate Bill 313—known as *Crispo*,[14] *Moelis*,[15] and *Activision*[16]—were rendered by either Chancellor McCormick or Vice Chancellor Laster. Additionally, as discussed below, one can identify other recent decisions by those same judges that met with controversy. The most notable example is Chancellor McCormick's post-trial opinion issued on January 30, 2024, in *Tornetta v. Musk*, which rescinded Elon Musk's compensation package with Tesla.[17] But Chandler's reference to "just two judges" is insidious because it suggests that these decisions are rogue decisions by rogue judges who are interpreting Delaware law in a manner unfamiliar to other judges or to experienced litigators or other expert observers.

Chandler's phraseology creates a false impression about Court of Chancery adjudication and practice. A common body of precedent is applied by all members of the Court of Chancery. It is rare for one member of the Court of Chancery to expressly disagree with a decision rendered by another. The lack of an intermediate court of appeals means that all final judgments are appealable directly to the Delaware Supreme Court, which typically hears corporate law cases *en banc*. There is no Delaware equivalent to unresolved circuit splits. Nor are there opposing ideological wings of the Court of Chancery in some manner similar to the United States Supreme Court. All members of the Court of Chancery work conscientiously to distinguish good cases from bad cases, and good arguments from bad arguments.[18]

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[14] Crispo v. Musk, 304 A.3d 567 (Del. Ch. 2023).

[15] West Palm Beach Firefighters' Pension Fund v. Moelis & Company, 311 A.3d 809 (Del. Ch 2024).

[16] Sjunde AP-fonden v. Activision Blizzard, Inc., C.A. No. 2022-1001-KSJM, 2024 WL 863290 (Del. Ch. Feb. 29, 2024, corrected, Mar. 19, 2024).

[17] 310 A.3d 430 (Del. Ch. 2024).

[18] A recent decision by Vice Chancellor Will invalidating certain advance notice bylaws met with similar criticism from the defense bar that it created uncertainty. *See infra* notes 74 and 132 and accompanying text. Vice Chancellor Will and Chandler are former partners in the Delaware office of Wilson Sonsini, which may help explain why Chandler stated on the House floor that "just two judges," rather than three judges, had rendered

In short, the opinions of the Court of Chancery are grounded in law, and they are subject to appeal and reversal.

There is, however, a sense in which Chancellor McCormick and Vice Chancellor Laster both proclaim a contested outlook about stockholder litigation and the judicial role. In an opinion issued soon after joining the Court of Chancery, Vice Chancellor Laster took the highly unusual step of replacing class counsel.[19] In explaining his reasoning, Vice Chancellor Laster spoke about alternative perspectives toward stockholder litigation:

> ***Were I generally cynical about the motives and capabilities of the plaintiffs' bar, I might well dismiss what happened here as simply another example of business as usual. But I share our law's premise that representative litigation serves as a valuable check on managerial conflicts of interest.*** Stockholder plaintiffs can and do achieve meaningful results. But it requires effort, something absent from the litigation to date.
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> * * *
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> Entrepreneurial litigators create case-specific benefits by obtaining monetary recoveries and inducing beneficial corporate changes. Perhaps more importantly, entrepreneurial litigators produce a public good by deterring corporate wrongdoing. Balanced against these positive effects are problems of opportunism, over-deterrence, over-enforcement, and agency costs. Whether the traditional plaintiffs' bar generates net social benefits depends on the former exceeding the latter.
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> * * *
>
> ***By contrast, a policymaker who believed that representative actions impose a net social cost might regard rote quasi-litigation as the next best alternative to eliminating representative litigation entirely.*** Delaware does not endorse the negative assessment of representative litigation that would undergird such a view.[20]

Vice Chancellor Laster's perspective is generally representative of the Delaware judiciary as a whole. Perhaps the best evidence of the current judicial attitude toward the "motives and capabilities of the plaintiffs' bar" is the Delaware

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decisions creating "uncertainty" and "unpredictability." Hearing Video, *supra* note 3, at 7:32.

[19] *In re* Revlon, Inc. S'holders Litig., 990 A.2d 940 (Del. Ch. 2010).

[20] *Id.* at 959-60 & n.7 (citations omitted) (emphasis added).

Supreme Court's recent affirmance of a $266.7 million fee award in a case presided over by Vice Chancellor Laster that settled for $1 billion shortly before trial.[21] The Supreme Court stated: "As lawyers and judges, we understand that representative litigation performs a valuable service to stockholders who individually might not have the resources or the will to pursue fiduciaries for breach of their duties. The potential for large fees incentivizes counsel to accept challenging cases."[22]

A contrary perspective would seek to eliminate representative litigation entirely, severely restrict it, or tolerate what Vice Chancellor Laster described above as "rote quasi-litigation as the next best alternative." This defense-bar perspective was articulated as follows by a New York lawyer nearly a century ago: "To the large corporation law offices in the neighborhood of Wall Street or State Street or LaSalle Street, every stockholders' suit is ipso facto a strike suit."[23]

Events in 2015 highlighted the stakes between Vice Chancellor Laster's perspective toward stockholder litigation and the defense-bar perspective. These events serve as a prelude to the legislative debate in 2024.

In June 2015, critics of stockholder litigation lost a legislative battle. New legislation prohibited Delaware corporations from adopting bylaws or charter provisions that would shift the cost of stockholder litigation to stockholder plaintiffs if they did not prevail on the merits.[24] The Corporation Law Council took a firm position about the need to forbid fee-shifting provisions for stock corporations:

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[21] *In re* Dell Techs. Inc. Class V S'holders Litig., 300 A.3d 679 (Del. Ch. 2023), *aff'd*, --- A.3d ---, 2024 WL 3811075 (Del. Aug. 14, 2024). It is notable that the lead counsel group included Quinn Emanuel Urquhart & Sullivan, LLP, which markets itself as "one of the few top-tier firms without a corporate practice" and as follows: "unlike our peer firms, we regularly represent both plaintiffs *and* defendants in derivative and class action corporate governance matters." Quinn Emanuel Urquhart & Sullivan, LLP, Corporate Governance Litigation (2024), https://www.quinnemanuel.com/practice-areas/corporate-governance-litigation/#overview.

[22] 2024 WL 3811075, at *11.

[23] Harris Berlack, *Stockholders' Suits: A Possible Substitute*, 35 U. MICH. L. REV. 597, 605 (1937).

[24] Delaware Senate Bill 75, 148th General Assembly, (passed June 24, 2015), https://legiscan.com/DE/text/SB75/id/1218368 (adding 8 *Del. C.* § 102(f) and amending 8 *Del. C.* § 109(b)).

> "The purpose and effect of these provisions is to significantly, if not completely, deter the enforcement of stockholder protections."[25]
>
> "A jurisprudence has developed in Delaware over the last hundred years, which has been very successful in regulating this critical relationship. If the ability of stockholders to bring lawsuits were seriously curtailed by fee-shifting provisions, a regulator is quite likely to fill the void--perhaps the federal government."[26]

In August 2015, *The Wall Street Journal* published an article entitled "Dole and Other Companies Sour on Delaware as Corporate Haven,"[27] which discussed then-pending litigation arising out of the 2013 buyout of Dole Food Company, Inc. by its CEO, David Murdock, as well as Dole's efforts to lobby for statutory restrictions on appraisal litigation. Professor Bainbridge wrote a blog post about how the newspaper article validated his criticism of Delaware's new anti-fee-shifting legislation.[28]

Later that same month, Vice Chancellor Laster issued a post-trial opinion awarding significant damages based on findings that Murdock and Dole President C. Michael Carter had engaged in a pervasive fraud.[29] Vice Chancellor Laster's decision in *Dole* met with approval from commentators,[30] and the defendants chose

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[25] CORPORATION LAW COUNCIL, FEE-SHIFTING FAQS 2 (2015), https://www.law.upenn.edu/live/files/6894-fee-shifting-faqspdf.

[26] *Id.* at 3.

[27] Liz Hoffman, *Dole and Other Companies Sour on Delaware as Corporate Haven*, WALL ST. J. (Aug. 2, 2015, 10:38 PM), https://www.wsj.com/articles/dole-and-other-companies-sour-on-delaware-as-corporate-haven-1438569507.

[28] Stephen M. Bainbridge, *The Fallout Begins: WSJ Reports Fee Shifting is Rumbling Delaware Corporations* (Aug. 3, 2015), https://www.professorbainbridge.com/professorbainbridgecom/2015/08/the-fallout-begins-wsj-reports-fee-shifting-is-rumbling-delaware-corporations.html.

[29] *In re* Dole Food Co., Inc. S'holder Litig., Cons. C.A. No. 8703-VCL, 2015 WL 5052214 (Del. Ch. Aug. 27, 2015).

[30] Daniel Fisher, *Dole Foods Case Shows the Good Side of Shareholder Litigation*, FORBES (Aug. 28, 2015, 10:46 a.m.) (quoting Professor Hamermesh as follows: "If there's anything Delaware corporate law is supposed to accomplish, it's to prevent those in control from using their position to profit at the expense of public shareholders."), https://www.forbes.com/sites/danielfisher/2015/08/28/dole-foods-shows-good-side-of-litigation/?sh=1ac1c61b4782; Kevin LaCroix, *A Closer Look at the Massive $148 Million Damages Award Against Dole's CEO and General Counsel*, D&O DIARY (Aug. 30,

to settle the case for the same amount as the judgment.[31] In short, a prominent critic of Delaware stockholder litigation who had been leveraging his significant political power in Delaware while defending Delaware litigation against him[32] was exposed as a fraudster through stockholder litigation.

That revelation did not dampen the defense bar's criticisms of Vice Chancellor Laster. Several months later, then-Governor Jack Markell told me, "I only hear complaints about one of the judges." An oft-heard refrain was that the defense bar did not want "another Laster" appointed to the bench.

2015) ("Laster's post-trial conclusions about the transaction provides a vivid reminder that while merger objection litigation as a general phenomenon has gotten out of hand, there are from time to time merger objections that are legitimate."), https://www.dandodiary.com/2015/08/articles/director-and-officer-liability/a-closer-look-at-the-massive-148-million-damages-award-against-dole-s-ceo-and-general-counsel/.

[31] *See In re* Dole Food Co., Inc. S'holder Litig., C.A. No. 8703-VCL, 2016 WL 541917 (Del.Ch. Feb. 10, 2016); *In re* Dole Food Co., Inc. S'holder Litig., C.A. No. 8703-VCL, 2017 WL 624843 (Del. Ch. Feb. 15, 2017).

[32] Upon the closing of the Dole buyout, Murdock and Dole negotiated a major lease agreement with the administration of Delaware Governor Jack Markell respecting the Port of Wilmington, assuring steady revenues for Delaware and some 850 jobs in the state. *Dole Signs 15-year Lease To Remain at Port of Wilmington* (Dec. 10, 2013), https://news.delaware.gov/2013/12/10/dole-signs-15-year-lease-to-remain-at-port-of-wilmington/. Hours later, the governor's general counsel sent Dole's general counsel a list of Delaware legal experts who had proposed changes to Delaware corporate law and stated: "Happy to discuss next steps at your convenience." Tom Hals, *America's Oldest CEO Puts His Dole Buyout To a High-stakes Test*, REUTERS (Aug. 15, 2015, 1:51 p.m.), https://www.reuters.com/article/usa-dole-litigation/americas-oldest-ceo-puts-his-dole-buyout-to-a-high-stakes-test-idUSL1N10P1S320150814. Dole's Carter wrote to legislators that the appraisal litigation against Dole was expensive and "abusive" and attached draft legislation. *Id. See* also Charles Korsmo & Minor Myers, *Reforming Modern Appraisal Litigation*, 41 DEL. J. CORP. L. 279, 284 (2017) ("Dole management had gone further, lobbying the Delaware legislature and the Governor's office to eliminate appraisal altogether for any stockholder who did not own its shares at the time a merger is announced."). One Delaware legislator stated: "Dole is a big, big deal to Delaware and to middle class jobs. It's something we need to pay attention to." Jonathan Starkey, *Dole Pressures Delaware on Corporate Law Changes*, NEWS. J. (Mar. 11, 2015 6:45 p.m. ET, updated Mar. 12, 2015 8:48 a.m. ET), https://www.delawareonline.com/story/news/local/2015/03/11/dole-pressures-delaware-corporate-law-changes/70175384/. Throughout the litigation, Dole maintained media pressure in which it threatened to reincorporate out of Delaware and move its future port business if legislative action was not taken. Hals, *supra*; Hoffman, *supra* note 27.

Nor did the exposure of Dole's Murdock and Carter as fraudsters dampen criticism of stockholder litigation. In 2016, Professor Bainbridge published a law review article arguing that Delaware had harmed its pre-eminence in the incorporation market by legislating against fee-shifting bylaws and charter provisions, which might have "substantially reduced the volume and settlement value of shareholder litigation."[33] In 2017, Chandler co-authored a long essay advocating that Delaware "should reconsider its blanket prohibition of fee shifting bylaws or charter provisions" as a means to address the "tide of socially unwholesome M&A litigation [that] has only partially abated."[34]

Chandler's essay is telling. Its rhetoric and analysis is mostly aimed at M&A litigation that results in a fee award without a monetary recovery, a largely obsolete problem in Delaware. But Chandler acknowledges that fee-shifting bylaws would "eliminate our current version of stockholder litigation, with its mélange of often tenuous claims, brought to justify broad discovery and destined to be abandoned in settlement."[35] Nonetheless, Chandler does not discuss those cases that survive dismissal and summary judgment and yield substantial monetary recoveries. Chandler offers no insight into whether it is socially desirable for fee-shifting bylaws to deter or prevent cases such as *Dole* or *Chen v. Howard-Anderson et al.*, a long-running litigation presided over by Vice Chancellor Laster arising out of the $171 million acquisition of Occam Networks Inc. that resulted in settlements totaling $35

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[33] Stephen M. Bainbridge, *Fee-Shifting: Delaware's Self-Inflicted Wound*, 40 Del. J. Corp. L. 851, 868 (2016). *See also* Stephanie Resnick, *Fee-Shifting Ban May Put Delaware's Corporation-Friendly Status in Question*, LEGAL INTELLIGENCER (Feb. 23, 2016) ("This law effectively thwarts efforts to curb unwarranted and frivolous stockholder litigation. It will also block any attempts to quell the large runaway verdicts in directors and officers (D&O) matters in Delaware. Will this statute—which will undoubtedly encourage derivative [and] class action lawsuits against corporate management—incentivize companies to reconsider Delaware as the state of their incorporation?"), foxrothschild.com/publications/fee-shifting-ban-may-put-delaware's-corporation-friendly-status-in-question.

[34] William B. Chandler III & Anthony A. Rickey, *The Trouble with* Trulia*: Re-evaluating the Case for Fee-Shifting Bylaws as a Solution to the Overlitigation of Corporate Claims*, pp. 145-81, at [75-76], *in* CAN DELAWARE BE DETHRONED? EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW (Stephen M. Bainbridge, Iman Anabtawi, Sung Hui Kim eds. 2018), available at https://doi.org/10.1017/9781316670279.

[35] *Id. See also* Joel E. Friedlander, *Vindicating the Duty of Loyalty: Using Data Points of Successful Stockholder Litigation as a Tool for Reform*, 72 BUS. LAW. 623, 636-42 (2017) (discussing fee-shifting).

million, including a settlement with Wilson Sonsini, which was accused of aiding and abetting breaches of fiduciary duty and discovery misconduct.[36]

More recently, Leo Strine of Wachtell, Lipton, Rosen & Katz co-authored a law review article arguing for various doctrinal innovations that would restrict stockholder litigation, with the professed goal of "reduc[ing] rent-seeking in the litigation process."[37] Strine and his co-authors refer to "two prior waves of meritless litigation"[38] and note: "If a plaintiff can state *any viable* claim against any defendant, the suit proceeds to expensive, time-consuming discovery, and gives the plaintiffs' lawyers leverage to extract a settlement and its accompanying attorneys' fee."[39] Strine's proposed reforms lack any supporting cost-benefit analysis or scholarly study about the incidence of fiduciary misconduct and the effect of making it more difficult to obtain a judicial remedy.

Meanwhile, Chancellor McCormick has emerged as a prominent voice in support of the pursuit of meritorious stockholder litigation. Chancellor McCormick joined Vice Chancellor Laster in criticizing the contemporaneous ownership requirement and advocating for its statutory repeal.[40] They both endorsed the response of the Delaware courts to what they have described as "the problem of excessive deal litigation that did not provide value to stockholders,"[41] or

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[36] Jeff Montgomery, *$10M in Atty Fees Sought From $35M Occam Merger Suit Deal*, LAW360 (Aug. 2, 2016, 7:40 p.m.), https://www.cooley.com/-/media/cooley/pdf/reprints/10min-attyfees-soughtfrom35moccammergersuitdeal.pdf.

[37] Lawrence A. Hamermesh, Jack B. Jacobs, and Leo E. Strine, Jr., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 BUS. LAW. 321, 327 (Spring 2022).

[38] *Id.* at 338 n.80.

[39] *Id.* at 368.

[40] SDF Funding LLC v. Fry, C.A. No. 2017-0732-KSJM, 2022 WL 1511594, at *6 & n.23 (Del. Ch. May 13, 2022); Bamford v. Penfold, L.P., C.A. No. 2019-0005-JTL, 2020 WL 967942, at *24 n.18 (Del. Ch. Feb. 28, 2020). Abolition of the contemporaneous ownership requirement, which is codified at 8 *Del. C.* § 327 for derivative actions, would make stockholder class actions and derivative actions more like appraisal actions, in which a hedge fund can buy into a stock position with the intent of pursuing litigation for financial gain. *See In re* Appraisal of Transkaryotic Therapies, Inc., 2007 WL 1378345, at *5 (Del. Ch. May 2, 2007) ("That is, the result I reach here may, argue respondents, encourage appraisal litigation initiated by arbitrageurs who buy into appraisal suits by free-riding on Cede's votes on behalf of other beneficial holders—a disfavored outcome. To the extent that this concern has validity, relief more properly lies with the Legislature.").

[41] Anderson v. Magellan Health, Inc., 298 A.3d 734, 745 (Del. Ch. 2023).

"Delaware's multi-pronged response to the M&A litigation epidemic,"[42] which is different than a perceived ongoing problem with stockholder litigation generally. They both criticized what they describe as "hyperbolic"[43] or "extreme"[44] dicta in an opinion by then-Chancellor Strine, *In re Synthes, Inc. Shareholder Litigation*,[45] which purported to create a "safe harbor" for a controlling stockholder that received *pro rata* consideration in a challenged transaction, subject to a "very narrow" exception in which the controller engaged in a "fire sale" due to the controller's "immediate need" or "exigent need" for liquidity, "such as a margin call or default in a larger investment."[46]

The alignment of Chancellor McCormick and Vice Chancellor Laster in their general approach to stockholder litigation puts them at odds with the perspective of the defense bar generally and in particular with Chandler and Strine, two former judges who became defense practitioners, advocated for new restrictions on stockholder litigation, and figured prominently in the enactment of Senate Bill 313. A longstanding debate over the social utility of stockholder litigation and its perceived impact on Delaware's preeminence in the incorporation market sat in the background of the debate over Senate Bill 313 and Chandler's criticisms of Chancellor McCormick and Vice Chancellor Laster.

B. "Not Feeling Good About Delaware"

Chandler did not specify which decisions rendered by Chancellor McCormick and Vice Chancellor Laster left the corporate market "not feeling good about Delaware,"[47] but the recent decision that generated the most negative thoughts among incorporators about Delaware was the Chancellor's post-trial liability ruling in *Tornetta v. Musk*.[48] Musk responded to it by tweeting:

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[42] *In re* Dell Class V Litig., 300 A.3d at 686. *See also id.* at 694 n.5 (citing "discussions of the M&A litigation epidemic from different perspectives").
[43] Firefighters' Pension Sys. of City of Kansas City, Missouri Tr. v. Presidio, Inc., 251 A.3d 212, 256 (Del. Ch. 2021).
[44] *In re* Mindbody, Inc., C.A. No. 2019-0442-KSJM, 2020 WL 5870084, at *17 (Del. Ch. Oct. 2, 2020).
[45] 50 A.3d 1022 (Del. Ch. 2012).
[46] *Id.* at 1035, 1036.
[47] Hearing Video, *supra* note 3, at 7:32 p.m.
[48] 310 A.3d 430.

> Never incorporate your company in the state of Delaware[49]
>
> I recommend incorporating in Nevada or Texas if you prefer shareholders to decide matters[50]
>
> She has done more to damage Delaware than any judge in modern history[51]

Musk's tweets generated national discussion over the future of Delaware incorporations.[52] That discussion continued as a consequence of Vice Chancellor Laster's February 20, 2024 decision in a case now known as *TripAdvisor*,[53] which postulated a damages remedy for a controlling stockholder's decision to reincorporate in Nevada and avail himself of less stringent liability rules, and arguably created a blueprint for Musk to reincorporate out of Delaware.[54]

Several weeks before his testimony on the House floor, Chandler co-authored a blog post on Delaware's status in the corporation market. In it, he discussed how Musk's reaction to *Tornetta v. Musk* was one reason why Delaware's dominance had been called into question.[55]

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[49] Elon Musk (@elonmusk), X (Jan. 30, 2024, 5:14 p.m.), https://x.com/elonmusk/status/1752455348106166598.
[50] Elon Musk (@elonmusk), X (Jan. 30, 2024, 7:17 p.m.), https://x.com/elonmusk/status/1752486201083543842.
[51] Elon Musk (@elonmusk), X (Feb. 1, 2024, 8:17 p.m.), https://x.com/elonmusk/status/1753271394408829106.
[52] *See, e.g.*, Alexis Keenan, *Elon Musk wants to take away Delaware's incorporation crown. It won't be easy.*, YAHOO!FINANCE (Feb. 17, 2024), https://finance.yahoo.com/news/elon-musk-wants-to-take-away-delawares-incorporation-crown-it-wont-be-easy-090033669.html.
[53] Palkon v. Maffei, 311 A.3d 255 (Del. Ch. 2024), *interlocutory appeal accepted*, No. 125, 2024 (Del. April 16, 2024) (Order).
[54] *See, e.g.*, Jennifer Kay, *Musk Gets Blueprint for Moving Tesla With TripAdvisor Opinion*, BLOOMBERG L. (Feb. 21, 2024, 5:04 a.m.), https://news.bloomberglaw.com/litigation/musk-gets-guidelines-for-moving-tesla-with-tripadvisor-opinion.
[55] Amy Simmerman, William B. Chandler III, and David Berger, *Delaware's Status as the Favored Corporate Home: Reflections and Considerations*, HARV. L. SCHOOL FORUM ON CORP. GOV. (May 8, 2024), https://corpgov.law.harvard.edu/2024/05/08/delawares-status-as-the-favored-corporate-home-reflections-and-considerations/.

At a leading conference for M&A professionals in New Orleans in early March 2024, which was attended by a majority of the Justices of the Delaware Supreme Court and one Vice Chancellor, senior deal lawyers and defense lawyers criticized various recent Court of Chancery decisions. One implicit or explicit theme of their remarks was that reversals were needed from the Delaware Supreme Court.[56] Some panelists referred to *Tornetta v. Musk*, but there was a seeming reluctance to focus ire on that case. One reason may be a lack of affinity with Musk,[57] who notoriously disregards norms of corporate governance and processes afforded by Delaware law to minimize liability exposure in fiduciary duty cases.[58] Another reason may be because Chancellor McCormick had applied a body of law in *Tornetta v. Musk* that had been created by others.

At the M&A conference, Bill Anderson of Evercore alluded to *Tornetta v. Musk* when discussing the type of recent case that could most negatively impact decisions whether to incorporate in Delaware:

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[56] Strine stated: "I have the utmost confidence in my state and its judiciary and we go through moments like this periodically, but there is a lot in play.... I believe in Delaware, I believe that it will eventually get right, but it is a situation right now where it's more difficult to counsel people.... I think the people in Delaware take all these concerns very seriously and I have no doubt that our courts will be addressing them and that next year we'll have more certainty as to a lot of these issues." *Hot Topics in M&A Practice aka "The Leo Strine Panel,"* 23 M&A J. No. 6, at 35, 37, 43 (March 2024) [hereinafter "*Hot Topics*"]. Catherine Dearlove of Richards, Layton & Finger stated: "It is by far not insoluble or incapable of being solved, but it feels more like the reaction post Singer versus Magnavox or Smith versus Van Gorkom that does ultimately lead to either a Supreme Court or a legislative change. And I think that's what we are seeing and the reaction you are likely to see coming out of Delaware in the nearest future." *Delaware Developments, A flurry of new rulings causes concern about predictability*, 23 M&A J. No. 7, at 4 (Apr. 2024) [hereinafter "*Delaware Developments*"].

[57] In the words of Scott Luftglass of Fried Frank LLP, with reference to Musk and other notoriously outspoken disappointed litigants: "And I think you can say in the same voice and have these voices live under the same roof that the Delaware courts are wonderful, *these people are crazy*, and yet there may be problems we need to address." *Delaware Developments*, *supra* note 56, 23 M&A J. No. 7, at 4 (emphasis added).

[58] *See, e.g.*, *In re* Tesla Motors, Inc. S'holder Litig., 298 A.3d 667, 708-09 (Del. 2023) ("In other words, our decisions — which we continue to adhere to — have established a 'best practices' pathway that, if followed, allow for conflicted transactions, such as the Acquisition, to avoid entire fairness review. Tesla's and Musk's determination not to form a special committee invited much risk (not to mention incursion of costs and diversion of personnel to litigation matters).").

> The controller cases are the ones that give me the most pause though.... Now, in every case there's a stated presumption that the directors are independent, but there's a great deal of skepticism sometimes bordering on cynicism about first are the directors in the pocket of a large stockholder who may have 15 or 20 or 25 or 30 percent of the stock, not a controlling amount of the stock?... With Delaware right now, you got to ask yourself where are the new companies that are going public? Where are they going to list?.... [I]f you are advising a controlled company going public right now, where to list, I think that cases are going to give you some pause about incorporating in Delaware when you go public.[59]

In the same panel discussion, Strine and Scott Barshay of Paul, Weiss alluded to Musk when responding to Anderson:

> Strine: ... I am not going to trivialize your concerns because I know that I'm hearing the same things as you .... And sometimes you got to be careful because if the wrong voices are out front, sometimes the message from the right people gets lost. And we have some of that in this debate, and I'm not going to say any more about that, but there's a pretty obvious ...
>
> Barshay: Okay. So I have a note card that says, "Don't go there," to give to him just in case.[60]

Anderson identified two separate legal issues that would give a large stockholder pause about incorporating in Delaware: (i) the uncertainty in determining whether a large stockholder is deemed a controlling stockholder; and (ii) the uncertainty whether an outside director will be deemed independent of the controller. As to the first issue, one of the key precedents for finding a minority stockholder to be a controlling stockholder is then-Vice Chancellor Strine's 2003 post-trial decision in *In re Cysive, Inc. Shareholders Litigation.*[61] As to the second issue, the standard for outside director independence was modified in 2003 by then-Vice Chancellor Strine in *In re Oracle Corporation Derivative Litigation.*[62] These

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[59] *Hot Topics*, *supra* note 56, 23 M&A J. No. 6, at 37.
[60] *Id.* at 42.
[61] 836 A.2d 531 (Del. Ch. 2003).
[62] 824 A.2d 917 (Del. Ch. 2003).

two sturdy precedents did not create bright-line rules favorable to major stockholders.

Cysive concerned a founder CEO who owned "a large enough block of stock to be the dominant force in any contested Cysive election" and was "involved in all aspects of the company's business, was the company's creator, and has been its inspirational force."[63] His "combination of stock voting power and managerial authority … enables him to control the corporation, if he so wishes."[64] That language does not lead to certain and predictable outcomes about when founder CEOs who are also major stockholders are not controlling stockholders.[65]

In *Oracle*, then-Vice Chancellor Strine wrote: "an emphasis on 'domination and control' would serve only to fetishize much-parroted language, at the cost of denuding the independence inquiry of its intellectual integrity."[66] Upon becoming Chief Justice, Strine authored a series of decisions for the Delaware Supreme Court in which particular outside directors were found not to be independent based on the allegations respecting their social and/or economic relationship with an insider.[67] The Supreme Court continued this line of authority in April 2024, when stating: "Longstanding business affiliations, particularly those based on mutual respect, are of the sort that can undermine a director's independence."[68] This line of authority does not lend itself to a bright-line rule favoring findings of independence if a controller nominates outside directors with whom the controller has longstanding relationships.

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[63] *Cysive*, 836 A.2d at 551-52.
[64] *Id.* at 553.
[65] *See, e.g.*, Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC, C.A. No. 11802-VCL, 2018 WL 3326693, at *27 (Del. Ch. July 6, 2018) ("Examples of broader indicia [of effective control] include ownership of a significant equity stake (albeit less than a majority), the right to designate directors (albeit less than a majority), decisional rules in governing documents that enhance the power of a minority stockholder or board-level position, and the ability to exercise outsized influence in the board room, such as through high-status roles like CEO, Chairman, or founder.") (footnotes omitted), *aff'd sub nom.* Davenport v. Basho Techs. Holdco B, LLC, 221 A.3d 100 (Del. 2019).
[66] *Oracle*, 824 A.2d at 937.
[67] Marchand v. Barnhill, 212 A.3d 805, 819 (Del. 2019); Sandys v. Pincus, 152 A.3d 124, 130 (Del. 2016); Delaware County Empls. Ret. Fund v. Sanchez, 124 A.3d 1017, 1022 (Del. 2015).
[68] *In re* Match Group, Inc. Deriv. Litig., 315 A.3d 446, 472 (Del. 2024).

These basic legal principles at issue in *Tornetta v. Musk* help explain a number of related concepts: (i) why there was nothing rogue about Chancellor McCormick's findings in *Tornetta v. Musk* that Musk was a controlling stockholder and that certain outside directors lacked independence from him; (ii) why top lawyers at the conference in New Orleans were unwilling to identify *Tornetta v. Musk* as a recent decision that created unpredictability and uncertainty; (iii) why Chancellor Chandler was wrong to suggest that dissatisfaction with Delaware as a corporate home following Musk's reaction to *Tornetta v. Musk* was a product of Chancellor McCormick having created uncertainty and unpredictability. The Chancellor's application of the entire fairness doctrine in *Tornetta v. Musk* raised ordinary legal issues on unique facts that are suitable for ultimate resolution on appeal.[69] In more typical situations in which norms of corporate governance are followed, CEO compensation packages are not the subject of trials in the Court of Chancery. The existence of a majority-independent board of directors is a bulwark against the prosecution of a stockholder derivative claim, as is a negotiating committee of truly independent outside directors.

Nonetheless, the ruling in *Tornetta v. Musk*, and Musk's reaction to it, naturally prompted concern among the legal and political elite in Delaware that the Chancellor's decision might prompt major stockholders and their lawyers not to incorporate in Delaware. Professor Bainbridge reports, based on various interviews, that "recent Delaware caselaw developments surrounding controller liability may yet motivate a subset of firms—especially tech firms with superstar CEOs—to consider DExit."[70]

In light of this market pressure, elite lawyers who lack the Chancellor's respect for stockholder litigation and the impartiality of justice might feel hostility toward the Chancellor's decision-making and wonder aloud why the Chancellor ruled in favor of a public stockholder who owned just nine Tesla shares and against the wealthiest and perhaps most influential businessman in the world. In the uncomprehending instant reaction on social media of one corporate law professor:

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[69] *See* Holger Spamann, *Tornetta v. Musk is the Rule of Law at Work*, HARV. L. SCHOOL FORUM ON CORP. GOV. (Feb. 27, 2024) ("The facts of the case are extraordinary, hence legal evaluation is difficult. At a recent online event that I co-organized, fifty of America's leading corporate law professors debated various aspects of the case, some defending Chancellor McCormick's decision, others critical."), https://corpgov.law.harvard.edu/2024/02/27/tornetta-v-musk-is-the-rule-of-law-at-work/.
[70] Stephen M. Bainbridge, *DExit Drivers: Is Delaware's Dominance Threatened?*, 50 J. CORP. L. ___, [81] (forthcoming 2025).

"I don't know whether it's a media deal or some sort of political angle, but the Chancellor is no longer protecting the Delaware cash cow."[71]

Enactment of new Section 122(18) can be interpreted as a political act to induce major stockholders to incorporate in Delaware and remain in Delaware, notwithstanding the uncertain boundaries of Delaware's liability regime for controlling stockholder transactions, which were tested by the unique facts of *Tornetta v. Musk.* Section 122(18) grants major stockholders the right to craft contractual governance arrangements that are unavailable in other jurisdictions.[72] The target market for Section 122(18) includes the same major stockholders who would be most concerned about potential liability following *Tornetta v. Musk.*

Chandler said nothing about the substance of *Tornetta v. Musk* or Senate Bill 313 on the House floor. Instead, he suggested, misleadingly, that Senate Bill 313 was a necessary corrective to unspecified rogue decisions by Chancellor McCormick and Vice Chancellor Laster that left "the corporate market ... not feeling good about Delaware." Members of the Court of Chancery should not be attacked by Delaware lawyers for the potential economic repercussions of ruling against a politically powerful fiduciary, whether it is David Murdock of Dole or Elon Musk. A willingness to adjudicate duty of loyalty cases impartially should be a prerequisite for holding judicial office and a point of pride respecting Delaware's judiciary.

C. "The Uncertainty and the Unpredictability of a Few Decisions"

Chandler did not explain what he meant by "the uncertainty and the unpredictability of a few decisions" rendered by Chancellor McCormick and Vice Chancellor Laster, but for anyone following the legislative debate or the months-long conversations that preceded it, the charge of "unpredictability" was familiar. It was a major rhetorical theme at the M&A conference in New Orleans. William Lafferty of Morris, Nichols, Arsht & Tunnell LLP opened a panel discussion with

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[71] Robert Anderson (@ProfRobAnderson), X (Jan. 30, 2024, 8:22 PM), https://x.com/ProfRobAnderson/status/1752502499276148792.

[72] *See* https://x.com/AnnMLipton/status/1803986726450303464 ("You know, under the new DGCL, Tesla could theoretically contract with Elon to give him final approval over all AI projects, regardless of his level of ownership. Texas doesn't allow that."). Section 7.32 of the Model Business Corporation Act authorizes shareholder agreements "under specified conditions." Joan Heminway, *Moelis, § 122(18), and DGCL Subchapter XIV - Knowing Legislative Policy Shift?!*, BUS. L. PROF. BLOG (June 13, 2014), https://lawprofessors.typepad.com/business_law/2024/06/moelis-12218-and-dgcl-subchapter-xiv-knowing-legislative-policy-shift.html.

remarks about how recent Court of Chancery opinions had "raised concerns and I think they're not taken lightly about a perceived lack of predictability right now or reliability in Delaware law. And they've disturbed what have largely had been settled market practices."[73] Catherine Dearlove of Richards, Layton & Finger added, "we are hearing it from all of our corresponding counsel that the decisions that are coming out of the courts are making them question the predictability of Delaware law."[74]

I interpret this charge of "unpredictability" as an accusation that it is a failure of judicial duty for a member of the Court of Chancery not to validate the hopes or expectations of transactional planners. That accusation fits *Crispo*,[75] *Moelis*,[76] and *Activision*,[77] the three cases overturned legislatively (for forward-looking purposes) by Senate Bill 313. In each case, transactional lawyers hoped or expected cases to be adjudicated in a way that did not unsettle the practices by which they put deals together. But certain practices of transactional lawyers may not be based on clear legal precedent. Well-advised clients may take calculated risks or reckless risks, or they or their lawyers may cut corners without first obtaining solid legal advice grounded in applicable Delaware law.

One might think that the task of the Court of Chancery's judges, when confronted with a novel claim challenging what may be a common practice, is to impartially and independently apply the law to the factual allegations and the evidence. During the same panel discussion in New Orleans referenced above, Chief Justice Collins Seitz, Jr. remarked that judicial impartiality is a source of predictability in Delaware corporate law:

> Through the history of Delaware corporate law, what triumphs is that Delaware judges strive to be fair and impartial. Delaware judges are not trying to win popularity contests. Public opinion is important

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[73] *Delaware Developments*, *supra* note 56, 23 M&A J. No. 7, at 1.

[74] *Id.* at 4. One recent case criticized by Dearlove for creating "a lot of uncertainty" was Vice Chancellor Will's decision in Kellner v. AIM ImmunoTech Inc., 307 A.3d 998 (Del. Ch. 2023), *aff'd in part, rev'd in part*, 320 A.3d 239 (Del. 2024), which deemed facially invalid certain amended advance notice bylaws. *Delaware Developments*, *supra* note 56, 23 M&A J. No. 7, at 11.

[75] Crispo v. Musk, 304 A.3d 567 (Del. Ch. 2023).

[76] West Palm Beach Firefighters' Pension Fund v. Moelis & Company, 311 A.3d 809 (Del. Ch 2024).

[77] Sjunde AP-fonden v. Activision Blizzard, Inc., C.A. No. 2022-1001-KSJM, 2024 WL 863290 (Del. Ch. Feb. 29, 2024, corrected, Mar. 19, 2024).

> and judges should not ignore it. The bar should feel free to comment about and to criticize the court's decisions. We have broad shoulders. But if we reach a point where Delaware judges start to decide cases not on the law, but based on public opinion, we sour the secret sauce that brings corporate America to Delaware. There will no longer be certainty and predictability in Delaware law. Only judges sticking a finger up to see which way the wind is blowing at a moment in time.[78]

Chief Justice Seitz invoked the example of his father, then-Chancellor Seitz, who in 1952, "unlike almost all the other state courts, bucked public opinion and in two cases ordered the desegregation of the Delaware school system."[79] The Chief Justice's father adjudicated these desegregation cases "against great political pressure" to "make a decision on something other than the merits."[80]

In the very different context of adjudicating cases of first impression respecting aspects of transactional practice, which creates its own form of political pressure, members of the modern Court of Chancery have taken different approaches. Sometimes, the Court asserts itself. Other times, the Court shies away. Four examples from a prior generation of Court of Chancery judges illustrate these alternative approaches.

The assertive cases include Chancellor Allen's 1991 decision in *In re USACafes, L.P. Litigation*,[81] at the dawn of alternative entity litigation. Prior to that decision, "most practitioners assumed that the directors of a corporate general

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[78] *Delaware Developments*, *supra* note 56, 23 M&A J. No. 7, at 6.

[79] *Id. See generally Delaware Supreme Court Chief Justice Seitz Attends White House Ceremony to accept Presidential Citizens Medal on behalf of his father, Chancellor Seitz* (Jan. 3, 2025), https://courts.delaware.gov/forms/download.aspx?id=275148; Joel E. Friedlander, *The Desegregation Decrees of the Delaware Court of Chancery*, 18 DEL. L. REV. 1, 8-18 (2023); Omari S. Simmons, *Chancery's Greatest Decision: Historical Insights on Civil Rights and the Future of Shareholder Activism*, 76 WASH & LEE L. REV. 1259, 1265-85 (2019).

[80] *Delaware Developments*, *supra* note 56, 23 M&A J. No. 7, at 6. In 1950, then-Vice Chancellor Seitz ordered the desegregation of the University of Delaware, which jeopardized his nomination to become Chancellor. *See* William J. Brennan Jr., *The Courage of Collins Seitz*, 40 VILL. L. REV. 547, 548-59 (1995).

[81] 600 A.2d 43 (Del. Ch. 1991).

partner owed no fiduciary duties to the limited partnership or the limited partners."[82] Chancellor Allen rejected that proposition. In the absence of "corporation law precedents directly addressing the question," Chancellor Allen looked to "general principles and by analogy to trust law."[83] Chancellor Allen's approach remained controversial with transactional planners, but it also commands respect.[84]

Similarly, in 2007, soon after the revelation of a widespread practice in Silicon Valley of backdating stock options,[85] which made them more valuable to their recipients than was publicly disclosed, Chancellor Chandler decided that the Court of Chancery should entertain claims of bad faith backdating. Rejecting a motion to stay a Delaware action in favor of earlier-filed federal litigation, Chancellor Chandler declared that Delaware fiduciary duty law "directly controls and affects many of the option backdating cases" and "Delaware has an overwhelming interest in resolving questions of first impression under Delaware law[.]"[86] Chancellor Chandler also rejected a Rule 12(b)(6) motion, stating: "I am convinced that the intentional violation of a shareholder approved stock option plan, coupled with fraudulent disclosures regarding the directors' purported compliance with that plan, constitute conduct that is disloyal to the corporation and is therefore an act in bad faith."[87] Shortly thereafter, then-Vice Chancellor Strine issued an opinion clarifying when a duty of loyalty claim is adequately pled, in which he disagreed with "some

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[82] Stephen E. Jenkins, *The Once and Future Judge?*, 22 DEL. J. CORP. L. 941, 954 (1997) (citing MARTIN L. LUBAROFF & PAUL M. ALTMAN, DELAWARE LIMITED PARTNERSHIPS § 11.2.11 (Supp. 1997)).

[83] *In re USACafes*, 600 A.2d at 48.

[84] *See Fannin v. UMTH Land Dev., L.P.*, C.A. No. 12541-VCF, 2020 WL 4384230, at *19 (Del. Ch. July 31, 2020) ("To depart from *USACafes* would require the Court to ignore that creators of Delaware limited liability companies have drafted their agreements with full knowledge of the *USACafes* holding as well as the ability of the drafters of their agreements to limit or eliminate fiduciary duties."); Mohsen Manesh, *The Case Against Fiduciary Entity Veil Piercing*, 72 BUS. LAW. 61 (Winter 2016-2017) (advocating for judicial rejection of *USACafes*); Jenkins, *supra* note 82, at 954 (noting that treatise authors "disagree with Allen's holding in *USACafes*, believing instead that the previous understanding was satisfactory").

[85] *See, e.g.*, Dylan Tweney, *New Report Ties Larry Sonsini, Steve Jobs to Backdating Scandal*, WIRED (Mar. 30, 2007, 2:35 p.m.), https://www.wired.com/2007/03/new-report-ties/.

[86] Ryan v. Gifford, 918 A.2d 341, 350 (Del. Ch. 2007).

[87] *Id.* at 358.

distinguished scholars" who had argued against the applicability of equitable principles to stock option backdating.[88]

On other occasions, members of the Court of Chancery opted not to adjudicate the merits of claims in the face of controversy. During the financial crisis, the Department of the Treasury and the Federal Reserve offered extraordinary financial support for JPMorgan Chase & Co. to acquire The Bear Stearns Companies Inc., which was facing bankruptcy. Bear Stearns stockholders were seemingly overpaid to go along. Nevertheless, some Bear Stearns stockholders filed actions in New York Supreme Court and the Delaware Court of Chancery challenging "perhaps the most extreme combination of deal protections approved by a board of directors of a public Delaware corporation ever considered by [the Court of Chancery]."[89] Rather than reevaluate Delaware law respecting deal protections, or balance the hardships in adjudicating a motion for a preliminary injunction, Vice Chancellor Parsons granted a motion to stay the Delaware litigation in favor of the New York action, reasoning: "I find the circumstances of this case to be *sui generis*. What is paramount is that *this Court* not contribute to a situation that might cause harm to a number of affected constituencies, including U.S. taxpayers and citizens, by creating the risk of greater uncertainty."[90] Sending the case to New York contributed to lingering uncertainty about Delaware law respecting extreme deal protections,[91] but ducking that question served an important political objective: "Delaware's treatment of the Bear Stearns litigation emphasizes the extent to which Delaware avoids the limelight in cases in which there is a danger of strong public criticism, a strategy that

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[88] Desimone v. Barrows, 924 A.2d 908, 931 (Del. Ch. 2007).

[89] *In re* Bear Stearns Companies, Inc. S'holder Litig., C.A. No. 3643-VCP, 2008 WL 959992, at *4 (Del. Ch. Apr. 9, 2008) (emphasis added).

[90] *Id.* at *6.

[91] The New York Supreme Court granted summary judgment for the defendants, applying Delaware law and holding that the board's approval of the deal protections was protected by the business judgment rule: "the board was apparently concerned with preserving Bear Stearns' existence by ensuring a merger with the only bidder possessing the credibility and financial strength to help facilitate a government-assisted rescue." *In re* Bear Stearns Litig., 870 N.Y.S.2d 709, 734 (N.Y. Sup. 2008). The New York Supreme Court "ignor[ed]" the Delaware Supreme Court's decision in Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914 (Del. 2003), which the Court of Chancery would not have done. Megan W. Shaner, *Revisiting Omnicare: What Does Its Status 10 Years Later Tell Us?*, 38 J. CORP. L. 865, 877 n.88 (2013).

we have argued elsewhere reduces the risk of a backlash against Delaware's status as maker of de facto national corporate law."[92]

Another example of tactical non-adjudication is Vice Chancellor Lamb's post-trial decision in *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals, Inc.*,[93] which begins by noting that it concerns the enforceability of a "commonplace" contractual provision:

> The principal issue addressed in this opinion is whether a commonplace provision found in a trust indenture governing publicly traded notes prevents the issuer's board of directors from "approving" as "continuing directors" persons nominated by stockholders in opposition to the slate nominated by the incumbent directors.[94]

Simply put, the question presented was whether a "commonplace provision" in trust indentures could be used to deter proxy contests. The stockholder action had proceeded on an expedited schedule due to two pending proxy contests pursued by non-plaintiffs which, in combination, sought to replace a majority of Amylin's directors. Upon the settlement of the two short-slate proxy contests, such that a majority of the incumbent board would remain in office, Vice Chancellor Lamb decided post-trial to "treat the issue as unripe"[95] (*i.e.*, whether the Amylin board's decision to "approve" the dissident nominees satisfied the trust indenture). Vice Chancellor Lamb reasoned: "an improvident decision made in a factual vacuum, at a time when there is no urgent need for decision, outweighs the potential costs of future litigation."[96] In lieu of ruling on the merits, the Vice Chancellor exhorted deal lawyers to educate their clients about "the troubling reality that corporations and

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[92] Marcel Kahan & Edward B. Rock, *How to Prevent Hard Cases from Making Bad Law: Bear Stearns, Delaware and the Strategic Use of Comity*, 58 EMORY L.J. 713, 757 (2009).
[93] San Antonio Fire & Police Pension Fund v. Amylin Pharms., Inc., 983 A.2d 304 (Del. Ch.), *aff'd*, 981 A.2d 1173 (Del. 2009).
[94] *Id.* at 306.
[95] *Id.* at 317.
[96] *Id.* at 318. Separately, the Vice Chancellor dismissed as moot a claim about a similar provision in a credit agreement, due to Amylin having paid a fee to the bank lenders to waive an event of default. *Id.* at 312. The appeal of that mootness dismissal was resolved on the eve of oral argument in the Delaware Supreme Court, when the bank lenders permanently disabled the continuing director provision in the credit agreement. San Antonio Fire & Police Pension Fund v. Bradbury, C.A. No. 4446-VCN, 2010 WL 4273171, at *6 (Del. Ch. Oct. 28, 2010).

their counsel routinely negotiate contract terms that may, in some circumstances, impinge on the free exercise of the stockholder franchise."[97] I am unaware of any public criticism of Vice Chancellor Lamb's approach.[98] Transactional planners were seemingly content with non-adjudication of a commonplace provision. Further development of the law required future stockholder challenges before judges who reached the merits of the claims.[99]

This historical background is intended to clarify the criticism of Chancellor McCormick and Vice Chancellor Laster that their recent decisions created "unpredictability" and "uncertainty." What transactional planners really want is the dismissal or non-adjudication of stockholder challenges, even if that entails lingering uncertainty over the underlying legal issues, which may remain unresolved until a high-stakes corporate control contest or busted deal. What angers defense lawyers and deal lawyers is when the Court of Chancery renders a decision that invalidates or calls into question a common contractual provision or transactional practice. That is what happened in *Crispo*, *Activision*, and *Moelis*, which is why the three decisions were treated with open hostility by the transactional bar and defense bar.

The three judicial decisions were thoughtful and scholarly. The reasoning in each speaks for itself. Virtually no effort was taken by any proponent of the legislation to explain how any of the judicial decisions in question were wrongly

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[97] 983 A.2d at 319.

[98] *See* Gordon Smith, *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals, Inc.*, THE CONGLOMERATE (May 12, 2009) ("This is not a monumental case, but it reminded me how much I like reading Steve Lamb's opinions. His writing is economical, and he is always sophisticated about the implications of his opinions."), https://www.theconglomerate.org/2009/05/san-antonio-fird-police-pension-fund-v-amylin-pharmaceuticals-inc.html.

[99] *See, e.g.*, Kallick v. Sandridge Energy, Inc., 68 A.3d 242, 264 (Del. Ch. 2013) (enjoining incumbent board from soliciting consent revocations "unless and until the board approves the TPG slate for the limited purposes of the Proxy Put"); F. William Reindel, *"Dead Hand Proxy Puts"—What You Need to Know*, HARV. L. SCHOOL FORUM ON CORP. GOV. (June 10, 2015) ("[S]ince *Healthways*, the plaintiffs' bar has been conducting a campaign challenging dead hand proxy puts in debt of public companies. As a result, pending further judicial clarification, companies with dead hand proxy puts in their debt, and their banks, now may face the cost, time, disruption and uncertainty of litigation or books-and-records requests."), https://corpgov.law.harvard.edu/2015/06/10/dead-hand-proxy-puts-what-you-need-to-know/.

decided.[100] Each of the three decisions helped clarify the contours of the law. Some comments from some leading lawyers at the same M&A conference in New Orleans explained how the three judicial decisions did not *create* uncertainty. In each case, deal lawyers had failed pre-adjudication to take steps to reduce known uncertainty, or there was no obvious legal basis for a judge to reach a contrary, certain ruling on the merits. Yet, deal lawyers and defense lawyers blamed Chancellor McCormick and Vice Chancellor Laster for the collective failure of the transactional bar to draft or approve contracts with a firm legal foundation.

1. *Crispo*

In *Crispo v. Musk*,[101] Chancellor McCormick denied an attorneys' fee to a stockholder plaintiff in companion litigation to Twitter's successful effort to effectuate the closing of its merger agreement with Musk. The Chancellor held that stockholders of Twitter were not third-party beneficiaries of the contract provision respecting lost-premium damages, and the Chancellor further reasoned that "a damages-definition defining a buyer's damages to include lost-premium is only enforceable if it grants stockholders third-party beneficiary status."[102]

As a matter of judicial administration, the Chancellor chose to rule on an open question of Delaware contract law with broad applicability in a low-stakes procedural context. The Twitter-Musk transaction had already closed. If the real-time, busted-deal phase of the Twitter-Musk litigation had turned on this issue, a holding that lost-premium damages to the target corporation are an impermissible penalty could have reduced Twitter's collectible damages by tens of billions of dollars. Nevertheless, even a decision in a low-stakes procedural context had an immediate, market-wide impact on targets in then-pending M&A deals. Empirical scholarly analysis confirms that "the *Crispo* decision was a negative shock to Delaware targets, and the decision had a meaningful economic impact on affected mergers."[103] Deal lawyers were displeased.

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[100] The Corporation Law Council prepared a summary presentation for lawmakers stating: "*These amendments are not intended to, and should not be interpreted as, criticizing Court decisions*." CORPORATION LAW COUNCIL, OVERVIEW OF SENATE BILL NO. 313, at 3 (May 2024) (on file with the author).
[101] 304 A.3d 567 (Del. Ch. 2023).
[102] *Id.* at 584.
[103] Dhruv Aggarwal, Albert H. Choi, and Geeyoung Min, *Contractual Remedies in Mergers: Lessons from Crispo v. Musk*, Law & Econ. Working Paper 272, at 3 (June 30, 2024),

The same scholars describe the question whether a target can collect lost-premium damages as a "structural and contractual conundrum" that has "surprisingly vexed M&A practitioners and judges over the years."[104] Even though a federal appellate court had rejected awarding lost-premium damages to a target under New York law, in *Consolidated Edison v. Northeast Utilities*,[105] "M&A lawyers seemed to operate with a plausible assumption that the Delaware courts would honor such a provision."[106] In the words of two transactional lawyers in the immediate aftermath of *Crispo*: "This is the price paid for allowing our hopes, rather than established law, to guide public merger agreement drafting for the last 18 years."[107]

One criticism of *Crispo* is that Chancellor McCormick rendered Delaware law unpredictable by not disregarding or distinguishing contrary authority, not embracing the public policy of allowing merger targets to collect lost-premium damages, and not satisfying the expectations of transactional planners. Strine stated in New Orleans:

> I remember when this came up out of the New York courts where you somehow couldn't get expectation damages on behalf of the people you negotiated the contract for.... And now you could solve this problem, that it wasn't really a problem in Delaware, but there was a problem if you start not realizing the corporate law context of these contracts.... I can't see the public policy problem.... And again, we haven't heard from the Delaware Supreme Court on this, but it is again a thing where the architecture of agreements everybody thought was pretty well settled and there is a real issue.[108]

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https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1383&context=law_econ_current.

[104] *Id.* at 2.

[105] 426 F.3d 524 (2d Cir. 2005).

[106] Aggarwal et al., *supra* note 103, at 7 (citing LOU R. KLING AND EILEEN T. NUGENT, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES, AND DIVISIONS §15A (2022), which states: "The Con Ed standing/damages issue certainly appears to be a problem in New York; whether it will be followed in Delaware is still an open question").

[107] Neil Q. Whoriskey and Scott Golenbock, *ConEd Is Not Dead In Delaware*, HARV. L. SCHOOL FORUM ON CORP. GOV. (Nov. 23, 2023), *https*://corpgov.law.harvard.edu/2023/11/23/coned-is-not-dead-in-delaware/.

[108] *Hot Topics*, *supra* note 56, 23 M&A J. No. 6, at 40-41.

A contrary perspective is that contractual expectations were not "pretty well settled." Barshay responded to Strine by saying that the M&A bar was to blame for not having solved a legal conundrum:

> I'm extremely sympathetic to the judge on this case.... [T]he hundreds or thousands I guess of merger agreements since [*ConEd*] have not had a common architecture, have not had a clear architecture. In fact, they basically had a mud architecture. And that's on all of us and all of you because we haven't figured this out, we haven't figured out how to deal with the *ConEd* issue. So the judge was facing a problematic merger agreement that had *ConEd* language but didn't declare the shareholders [are] third party beneficiaries under various events. And we've got to fix that.[109]

Barshay further explained why he did not expect deal lawyers to create standard contract language allowing targets to collect lost-premium damages:

> My prediction is that we will not fix this issue. That's my prediction. And there's two reasons for that. The first is .... [i]t's very difficult to define what damages the buyer should pay if the deal breaks up. And the result of that is buyers are not going to be, they have not been cooperative and they're not going to be cooperative. And the second thing, I mentioned this before, because specific performance is now the ubiquitous remedy, there isn't a compelling need for the buyers to sit there and define what those expectation damages are.[110]

The experience of the *Twitter v. Musk* litigation a year prior to the *Crispo* decision warned transactional planners that there was no sturdy legal architecture for the collection of lost-premium damages, and also that there was legal risk respecting specific performance. Twitter's stock price did not correspond with the general assessment of legal observers that Twitter should prevail on the merits, which Professor John Coffee explained by pointing to the potential outcome that Twitter might only collect $1 billion:

> So what best explains the failure of the arbs to buy in quantity and boost the price of Twitter when they think it will win? At first glance, the most plausible answer involves the uncertain availability of specific

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[109] *Id.* at 41-42.
[110] *Id.* at 42-43.

performance. If Musk escapes with only a $1 billion liability, he is the real winner, and the stock price of Twitter can be expected to sink well below its current level. In short, the difference between Twitter's value if it is not acquired by Musk and the deal price of $54.20 per share may be as much as $20 billion (or more).[111]

During the pendency of the Twitter-Musk litigation, Professor Robert Anderson posted a draft academic article on the contractual remedies available to Twitter, which article was read by merger arbitrageurs and their counsel, making it his most downloaded article on SSRN.[112] He concluded: "This broken deal reveals a certain brittleness of the current standard private equity deal documentation in general, and likely defective specific performance provisions in this case in particular, which place enormous economic consequences on the court's choice of remedy."[113] Professor Anderson discussed how the Twitter-Musk merger agreement appeared to cap damages for a knowing and intentional breach of contract at $2 billion.[114] He also pointed to a Twitter thread by Professor Eric Talley outlining an argument for uncapped expectation damages, which Professor Talley described as a "long shot argument"[115] with less than a 10% probability of success.[116]

The above commentary rebuts the notion that it was supposedly predictable that the Delaware judiciary would reject *Con Ed* and award lost-premium damages. The accusation of "unpredictability" as applied to *Crispo* betrays a lack of critical self-examination by transaction planners. They had not created a robust legal architecture for lost-premium damages before or after *Twitter v. Musk*. Perhaps deal lawyers should have been grateful for, rather than hostile to, the Chancellor's

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[111] John C. Coffee, Jr., *Twitter v. Musk: Where Are the Arbs?*, CLS BLUE SKY BLOG (July 27, 2022), https://clsbluesky.law.columbia.edu/2022/07/27/twitter-v-musk-where-are-the-arbs/.
[112] Robert Anderson, *Limited Specific Performance in the Musk-Twitter Case and Beyond* 2 (Sept. 19, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4222557.
[113] *Id.* at 2.
[114] *Id.* at 1-2, 6-7.
[115] @ProfEricTalley@lor.sh (@ProfEricTalley), X (Sept. 9, 2023, 12:31 a.m.), https://x.com/ProfEricTalley/status/1568094622726987776.
[116] @ProfEricTalley@lor.sh (@ProfEricTalley), X (Sept. 9, 2023, 12:45 a.m.), https://x.com/ProfEricTalley/status/1568098123561541632.

decision in *Crispo*. It galvanized deal lawyers to improve the legal architecture respecting a target's contractual remedies before the next wave of busted deals.[117]

2. *Moelis*

The second decision addressed by Senate Bill 313 was issued by Vice Chancellor Laster in *Moelis*.[118] According to supporters of the legislation, the outcome in *Moelis* had not been predicted by deal lawyers based on their understanding of judicial precedent.

The Corporation Law Council prepared a summary presentation for lawmakers stating: "Stockholders have invested in Delaware corporations based on a reading of the DGCL that has been called into question.[119] On the House floor, Representative Griffith spoke of the "longstanding practice by corporations" and the new "confusion and uncertainty in the marketplace" due to their understanding of prior "case law":

> It had been longstanding practice by corporations to be able to enter into shareholder agreements that were private contracts with shareholders. Those agreements were not included in [the] certificate of incorporation, which is a public document. The decision caused confusion and uncertainty in the marketplace, as practitioners believed -- based on the interpretation of the General Corporation Law and case law -- that this was not required, that these rights were only were able to be put in an agreement and not the certificate of incorporation. So, what SB 313 will do is bring the law into conformity with how corporations have been operating, while preserving the formidable protections that are upheld by fiduciary duties and responsibilities.[120]

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[117] Aggarwal et al., *supra* note 103, at 24 ("Market participants therefore seem to rely on both private ordering and legislative change to respond to unexpected changes in deals jurisprudence.").

[118] West Palm Beach Firefighters' Pension Fund v. Moelis & Company, 311 A.3d 809 (Del. Ch. 2024). The above ruling on cross-motions for summary judgment respecting the merits was issued on February 23, 2024. On February 12, 2024, Vice Chancellor Laster issued a decision rejecting the defenses of laches and lack of ripeness. West Palm Beach Firefighters' Pension Fund v. Moelis & Co., 310 A.3d 985 (Del. Ch. 2024).

[119] CORPORATION LAW COUNCIL, *supra* note 100, at 2.

[120] Hearing Video, *supra* note 3, at 6:39 p.m.

Three months earlier, in New Orleans, Scott Luftglass of Fried Frank LLP made a similar comment about *Moelis* and "predictability":

> [T]his is as polarizing an opinion as I can recall in recent memory. And I think as the Chief Justice [Seitz] said, it comes from a Vice Chancellor that put an extraordinary amount of thought into it and a very detailed opinion and a roadmap. And I want to make sure that we're being respectful of that fact while taking into account, I think, three framing points. One is, this is a decision that upends what has been a practice that has gone on for many, many years, which goes to the question of predictability that we talked about at the top of the meeting, so to speak....[121]

Anyone who heard these accusations about lack of "predictability" might be surprised to read *Moelis*. Vice Chancellor Laster did not interpret Section 141(a) of the Delaware General Corporation Law in a manner that swept aside decades of prior precedent. In his first *Moelis* opinion, Vice Chancellor Laster discussed how a short passage in one prior Court of Chancery opinion authored by then-Vice Chancellor Strine in 2007, *Sample v. Morgan*,[122] was an "outlier"[123] compared to decades of prior and subsequent case law interpreting Section 141(a). Vice Chancellor Laster wrote:

> The *Sample* decision only addressed three decisions. It did not discuss the Section 141(a) cases that have considered challenges to stockholder agreements, director agreements, rights plans, merger agreements, a management agreement, CEO employment agreements, and stockholder-adopted bylaws, plus assorted other scenarios involving allegedly improper delegations of authority.[124]

In his second *Moelis* opinion, Vice Chancellor Laster stated that *Sample* was "the only case that proposes rejecting the Section 141(a) inquiry entirely"[125] and that it "stands alone and on dubious ground in arguing for eliminating Section 141(a) challenges to corporate contracts."[126]

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[121] *Delaware Developments*, *supra* note 56, 23 M&A J. No. 7, at 13.
[122] 914 A.2d 647 (Del. Ch. 2007).
[123] *Moelis*, 310 A.3d at 1008.
[124] *Id.* at 1006-07 (footnotes omitted).
[125] *Moelis*, 311 A.3d at 831.
[126] *Id.* at 855.

Stated differently, then-Vice Chancellor Strine had floated the argument in *Sample* that Section 141(a) should be deemed virtually non-justiciable, unless "the directors are essentially no longer in control of the corporation," [127] and that infringements on board authority should only be analyzed under equitable principles. In making that argument, then-Vice Chancellor Strine expressed disagreement with the reasoning of two decisions of the Delaware Supreme Court.[128] In subsequent years, the Delaware Supreme Court never adopted then-Vice Chancellor Strine's approach.

Perhaps some lawyers for major stockholders believed that *Sample* was the most persuasive authority for how a future court would analyze a provision in a governance agreement. But the criticism respecting "predictability" cannot be predicated on the supposed clarity of the weight of authority prior to *Moelis*. Moreover, the governance agreement at issue in *Moelis* had been singled out in a law review article respecting the breadth of the veto rights it conveyed to a major stockholder,[129] which itself suggests that it could not predictably be deemed non-justiciable under Section 141(a).

One potential takeaway from *Moelis* is that a wide divergence had evolved over time between the practice of some attorneys in drafting or opining on governance agreements and case law under Section 141(a). If so, this problem was not created by Vice Chancellor Laster. It festered while the statute remained unamended.

If *Moelis* was wrongly decided, and it needlessly created uncertainty and opened the door to future litigation respecting other Delaware corporations, then the logical way to proceed would be an appeal. The drafting of Senate Bill 313 suggests that sophisticated lawyers were not sanguine about the prospects of an appeal. Chief Justice Seitz suggested in New Orleans that an amendment to Section 141(a) might be necessary to protect governance agreements that infringe on the statutory authority of a board of directors:

> The Delaware legislature moves at the speed of business when amendments are required[.] [A] fundamental tenet of Delaware law and

[127] *See Sample*, 914 A.2d at 671 n.77.

[128] *See id.* at 672 n.79 ("I understand that certain Supreme Court decisions have purported to address board decisions that limit the future flexibility of the board in a starker manner, reflecting a view that such decisions were illegal, not just inequitable.").

[129] Gabriel Rauterberg, *The Separation of Voting and Control: The Role of the Contract in Corporate Governance*, 38 YALE J. REG. 1124, 1172-73 (2021).

> that statutory law, which carries over to judge-made law, is that the business and affairs of a Delaware corporation are the province of the board of directors.[130]

The *Moelis* decision forced deal lawyers and defense lawyers to reckon with a "fundamental tenet of Delaware law." In the aftermath of the enactment of Senate Bill 313, the bill's sponsor, Senate Majority Leader Townsend, acknowledged that *Moelis* was widely viewed as having been decided correctly on the merits:

> [I]t is important to be clear that few people, if any, criticized the *Moelis* decision as flawed from the perspective of statutory interpretation. In other words, people are saying that Vice Chancellor Laster got it right: technically, the DGCL did not permit certain kinds of contracts that for 17+ years everyone seemed to have thought were permitted. As the *Moelis* decision explains, a judge is not permitted to set aside clear statutory language in deference to market practice, however widespread or meritorious that practice is.[131]

So why was *Moelis* so polarizing? The answer, I suggest, is because of the stark consequences in ruling that a governance agreement can run afoul of Section 141(a). Vice Chancellor Laster's first opinion in *Moelis* rejected procedural defenses to a Section 141(a) challenge. It did not matter how long ago the governance agreement had been adopted, whether or not the stockholder plaintiff held stock at the time of adoption, or whether the powers granted by the agreement had been exercised. The plaintiff needed to establish a violation of Section 141(a), but did not need to establish the bad faith of any particular board decision. Nor did it matter whether the contractual provision in question was common. Any stockholder of any other corporation subject to the same contractual provision could raise the same statutory challenge. By comparison, if the Court of Chancery or the Delaware Supreme Court followed *Sample v. Morgan*, the same contractual provisions might be insulated from judicial review for all practical purposes. The approach of then-Vice Chancellor Strine in *Sample v. Morgan* would shut down a form of stockholder litigation that otherwise would be as commonplace as the violative governance agreements. Dissatisfaction with Vice Chancellor Laster is

[130] *Delaware Developments*, *supra* note 56, 23 M&A J. No. 7, at 5.
[131] Andrew Galvin, *Townsend responds to corporate law uproar*, DELAWARE CALL (Jyl 20, 2014), https://delawarecall.com/2024/07/20/townsend-responds-to-corporate-law-uproar/.

thus attributable to his unwillingness to follow a case that allowed for the dismissal of an otherwise meritorious statutory claim.

Stockholder challenges to the validity of provisions in governance agreements are like stockholder challenges to the validity of advance notice bylaws in that they are not subject to certain defenses found in other forms of stockholder litigation, such as the business judgment rule or demand futility. In New Orleans, William Lafferty stated:

> I'd say the decisions invalidating the shareholder agreement and the bylaws have now spurred a new little cottage industry that has popped up where there are shareholders and lawyers making demands on Delaware companies to make changes to those shareholder agreements and bylaws and demanding fees. And this feels like the type of rent seeking and tax on corporations that we dealt with back in the disclosure only settlement era that I don't think any of us want to go back to or that any of us feel all that good about.[132]

The blog post co-authored by Chandler stated that one supposed reason for reconsidering incorporation in Delaware was "the sense" of boards and management that they are "planning around 'gotcha' litigation driven by plaintiffs' lawyers."[133]

Annoyance with follow-on litigation and follow-on litigation demands is understandable, but it ignores three things. First, viable follow-on demands require a prior finding of judicial invalidity on the merits. That itself is distinguishable from a daisy chain of disclosure settlements.[134] Second, there is necessarily some friction associated with bringing governance practices into line with judicial rulings invalidating a bylaw or contract provision. Deal lawyers and defense lawyers will initiate efforts to bring existing clients and potential future clients into compliance. Stockholder lawyers will initiate their own efforts. The end result is that corporate governance provisions will conform with judicial rulings that are no longer being challenged in litigation. Third, the Court of Chancery is empowered with equitable

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[132] *Delaware Developments*, *supra* note 56, 23 M&A J. No. 7, at 1.
[133] Simmerman et al., *supra* note 55.
[134] One troubling feature of disclosure settlement practice is that it perpetuated legal limbo about whether various types of disclosures or non-disclosures were violative of law. Joel E. Friedlander, *How* Rural/Metro *Exposed the Systemic Problem of Disclosure Settlements*, 40 DEL. J. CORP. L. 877, 916-19 (2016).

discretion to determine the appropriate legal fee for any follow-on litigation or litigation demand.[135]

3. *Activision*

On February 29, 2024, Chancellor McCormick denied a post-closing motion to dismiss a novel statutory claim—that a merger agreement had not been validly approved by a board of directors under Section 251 of the Delaware General Corporation Law because as of the date and time of board approval, various aspects of the draft merger agreement had not yet been finalized.[136]

Chancellor McCormick followed a Delaware treatise in holding that Section 251(b) "requires a board to approve an essentially complete version of the merger agreement."[137] Chancellor McCormick cited *Moelis* for the proposition that the Court of Chancery would not defer to the practices of highly experienced transactional attorneys in the face of a statutory requirement.[138] The Chancellor also held that stating a claim of invalidity under Section 251(b) logically implied that the plaintiff had pleaded a tort claim of conversion of the plaintiff's shares.[139]

Several days later, in New Orleans, Barshay of Paul Weiss spoke at length about the supposed danger of *Activision*, which he deemed a "freaking cheap shot," or an affront, because the Chancellor had identified an inconsistency—a "foot fault"—between the statutory requirement and the contemporary elite transactional practice of obtaining board approval of a merger agreement before key terms are fully negotiated:

> It's a little scary because it really is telling all of us that a lot of the ways we have routinely done deals in the past puts those deals, put those

[135] *See, e.g.*, Fire and Police Fund, San Antonio v. Stanzione, C.A. No. 10078-VCG, tr. at 8 (Del. Ch. Feb. 25, 2015) ("Moreover, as our case law describing the use of similar proxy puts as problematic becomes more developed, the value of removing such a device decreases. The situation begins to be less like chaining up a vicious bulldog and more like chaining up a toothless bulldog."), *aff'd sub nom.*, Fire and Police Pension Fund, San Antonio v. Arris Group Inc., 125 A.3d 1100 (Del. 2015) (Table).

[136] Sjunde AP-fonden v. Activision Blizzard, Inc., C.A. No. 2022-1001-KSJM, 2024 WL 863290 (Del. Ch. Feb. 29, 2024, corrected, Mar. 19, 2024).

[137] *Id.* at *7 (citing 1 DAVID A. DREXLER ET AL., DELAWARE CORPORATION LAW AND PRACTICE § 35.04).

[138] *Id.* at *6, *7.

[139] *Id.* at *10.

> public company M&A deals at risk of being thrown out and even opening up the buyer to a claim of conversion.
>
> . . .
>
> … So if you're giving the directors all of the information they need, but you're not giving them every word to the agreement is somehow the merger that subsequently occurs invalid. Now in that case, what I think the judge viewed as the most extreme thing was that a committee was given the authority to negotiate what the dividends that the target was able to pay between signing and closing would be. I don't know the record. I don't know the minutes. I don't know what the minutes say. Oh my God, what a freaking cheap shot. I did everything right in my view. There are scattered people here. They did everything exactly the way I would've done it.
>
> So they did everything and just the way I would've done it, a lot of times you say, all right, we're going to approve this deal. It's 11 o'clock at night, the deal's got to get done overnight, announced in the morning, we're willing to do the deal on the table, but go try and do better. We're fine with the deal on the table, but you committee go try and do better. That is totally appropriate, and it's what you do to try and maximize the value for your shareholders. That's what you're supposed to do. But if you get nothing, it's still okay. And we do that with exchange ratio. We do that with cash value, we do that with dividends, we do it with everything. This case is calling that into question. Now, by the way, it may be on an incomplete record, but we're all going to have to be really careful until this gets resolved. We're all going to have to be really careful in how we do deals because there's now a foot fault possibility that could throw your whole merger, throwing the baby out with the bath.[140]

Strine responded that there was an easy solution for transactional lawyers:

> you're going to have to have a cleanup board meeting right now just to go once it's all kind of done and just make sure that you did it…. [I]n terms of the technical stuff, it may have just been driven by the statute. I'm not sure where the remedial calculus goes in that, if it's that scary. But I think there is some lessons about hygiene here that you probably have to learn and may not be as hard as some other things to solve.[141]

[140] *Hot Topics*, *supra* note 56, 23 M&A J. No. 6, at 38.
[141] *Id.* at 38-39.

Audra Cohen of Sullivan & Cromwell LLP agreed with Strine about the efficacy of a cleanup board meeting, elaborating:

> So I think we do need to think about one, do we have to a cleanup board meeting or a unanimous written consent at some point right before the announcement is going out? And also, how do we address this notice provision because do you also include a summary of all the material parts as part of the annex, because that's also an option under the statute.[142]

The drafters of Senate Bill 313 were not assuaged by the notion that a board of directors could avoid a violation of Section 251 and a conversion claim by holding a clean-up board meeting after the dividend limits were negotiated and the disclosure schedules were drafted that would be deemed to satisfy common law director ratification. Senate Bill 313 contained a suite of statutory provisions, including a "substantially final form" standard and the excision of disclosure schedules from the meaning of a merger agreement, which create new defenses to any future *Activision* claim without changing transactional practice.[143] The new "substantially final form" standard may be as vague and as open to judicial interpretation as the old "essentially complete" standard, but achieving clarity was not the actual goal. The important thing was to repudiate *Activision*.

* * *

The three judicial decisions addressed by Senate Bill 313 and criticized by Chandler and the deal lawyers and defense lawyers in New Orleans for creating "unpredictability" and "uncertainty" were the product of the thoughtful application of law to fact. In each of *Crispo*, *Moelis*, and *Activision*, there was no readily predictable contrary outcome on the merits. The hostility expressed toward Chancellor McCormick and Vice Chancellor Laster was directed to their good-faith, highly competent discharge of their constitutional responsibility as judges. The critics did not demand something better—an ideally correct legal interpretation of

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[142] *Id.* at 39.

[143] *See* Michael Hanrahan, *Statement Regarding the Activision Amendments*, HARV. L. SCHOOL FORUM ON CORP. GOV. (July 10, 2024), https://corpgov.law.harvard.edu/2024/07/10/statement-regarding-the-activision-amendments/.

the facts.[144] They demanded something different—that judges find a way to dispose of a case in a manner that would not trouble transactional planners.

II. The Criticism That Judicial Comment on Proposed Legislation Is an Unprecedented Assertion of Legislative Power

On March 28, 2024, three weeks after the conference in New Orleans, a Delaware law firm published a lengthy memorandum summarizing proposed amendments to the Delaware General Corporation Law that had been approved by the Corporation Law Council.[145] One week later, a blog post by Professors Sanga and Rauterberg expressed astonishment at the scope of proposed Section 122(18):

> The Amendments may be well-intentioned, but regardless of one's view of *Moelis*, they are not well-suited to their purpose. They would not resolve the deep legal uncertainties inherent in stockholder agreements such as the one at issue in *Moelis*. Instead, they would replace a century of nuanced if imperfect Delaware jurisprudence with an open-ended statement that enables too much to be taken at face value.
>
> On its face, the Amendment seemingly authorizes corporations to enter into *any* contract changing *any* aspect of corporate governance. But that cannot be its intended effect. Do the Amendments intend, for example, to empower a corporation to promise its directors that it will never sue them, even for an intentional tort or bad faith act? Do the Amendments intend to empower a board to cede 100 percent of its decisionmaking power to a single person? The answers to these questions cannot be yes.[146]

One week later, on April 12, 2024, Chancellor McCormick sent a letter to the Executive Committee of the Delaware State Bar Association, which needed to

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[144] *See* H.L.A. Hart, *Ascription of Responsibility and Rights*, 49 PROC. ARISTOTELIAN SOC'Y 171, 182 (1949) ("what a Judge does is to judge .... It is not his function to give an ideally correct legal interpretation of the facts ....").

[145] RICHARDS, LAYTON & FINGER, DELAWARE CORPORATE LAW UPDATE (Mar. 28, 2024), https://www.rlf.com/2024-proposed-amendments-to-the-general-corporation-law-of-the-state-of-delaware/.

[146] Sanga and Rauterberg, *supra* note 2.

approve any proposed legislative amendments.[147] Chancellor McCormick criticized the manner in which the proposed legislation had been drafted:

> [T]he rare instances of legislative intervention have involved a cautious and highly deliberative process that allowed time for countervailing views to inform the policy discussion. The resulting legislation was targeted and, by the time of adoption, uncontroversial.
>
> . . .
>
> These are the hallmarks of reasoned legislative intervention in Delaware corporate law. Each are integrity-enhancing and insulate the process from the whims, pressure, and politics of private interests. Each prevent collateral attacks on the rule of law. Each serve as important roadblocks preventing a race to the bottom. Each ensure Delaware's continued credibility and preeminence in the field of corporate law.
>
> None of the hallmarks of Delaware's tradition are present this year. The Proposal was not the product of a cautious and deliberative process. The Proposal is not targeted in scope or uncontroversial. The Proposal does not address Delaware Supreme Court decisions.[148]

Chancellor McCormick also disclaimed the notion that her decisions "invite[d] this dramatic departure from Delaware's esteemed tradition."[149]

Subsequently, the language of proposed Section 122(18) was amended to restrict its breadth. The version of proposed Section 122(18) found in Senate Bill 313, which was introduced on May 23, 2024, provided that a contract could not bind a corporation "to the extent such contract provision is contrary to the certificate of incorporation or would be contrary to the laws of this State (other than § 115 of this title) if included in the certificate of incorporation."[150] That revision validated the

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[147] Let. from Chancellor McCormick to Delaware State Bar Association Executive Committee of 4/12/24, at 5, *available at The Long Form – Special Edition*, CHANCERY DAILY (May 28, 2024).
[148] *Id.* at 4-5.
[149] *Id.* at 6.
[150] Delaware General Assembly, 152nd General Assembly, Senate Bill 313, https://legis.delaware.gov/BillDetail/141480.

substantive criticism of Professors Sanga and Rauterberg and the procedural criticism of Chancellor McCormick.

In the following four weeks leading up to the final legislative vote on Senate Bill 313, Vice Chancellor Laster posted essays to his personal LinkedIn account[151] and elsewhere[152] questioning the scope, draftsmanship, logic, desirability, and potential unintended consequences of Senate Bill 313, as well as the interaction of the proposed new statutory sections with black-letter law. Meanwhile, academics[153] and lawyers[154] weighed in with various criticisms.

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[151] *See, e.g.*, J. Travis Laster, *After the Market Practice Amendments, What Does Your Merger Agreement Actually Say* (May 25, 2024), J. Travis Laster, *Hello Contractual Voidness; Bye-Bye Brazen* (May 27, 2024); J. Travis Laster, *The Unintended Beneficiaries of Section 122(18)* (May 29, 2024); J. Travis Laster, *Moelis, Novelty, And Hyperbole* (May 30, 2024); J. Travis Laster, *The Apotheosis Of A Footnote* (May 31, 2024); J. Travis Laster, *Crispo and Its Discontents* (June 1, 2024); J. Travis Laster, *Who Knew Everyone Liked Omnicare?* (June 2, 2024); J. Travis Laster, *An Unsolicited Edit of Section 122(18)* (June 3, 2024); J. Travis Laster, *An Even Less Welcome Edit of Section 122(18)* (June 4, 2024); J. Travis Laster, *Some thoughts on the Senate testimony in support of 122/18, part one*; J. Travis Laster, *Some thoughts on the Senate testimony in support of 122/18, part two*; J. Travis Laster, *It isn't there* (June 20, 2024). The articles are available at https://www.linkedin.com/today/author/travis-laster-397079216?trk=public_profile_see-all-articles.

[152] J. Travis Laster, *After Section 122(18), What Happens To The Merger Recommendation*, HARV. L. SCHOOL FORUM ON CORP. GOV. (June 19, 2024), https://corpgov.law.harvard.edu/2024/06/19/after-section-12218-what-happens-to-the-merger-recommendation/.

[153] *See supra* note 2.

[154] *See, e.g.*, *The Long Form – Special Edition*, CHANCERY DAILY (May 21, 2024) (noting submissions to the Executive Committee by the Council of Institutional Investors and lawyer Joel Fleming); Neil Whoriskey, *Contracting Out of Corporate Law: Should Public Company Board Be Allowed to Delegate Governance to a Single Stockholder*, MILBANK GENERAL COUNSEL BLOG (June 4, 2024), https://www.milbankgeneralcounsel.com/2024/06/contracting-out-of-corporate-law-should-public-company-boards-be-allowed-to-delegate-governance-to-a-single-stockholder/; *The Long Form – Special Edition*, CHANCERY DAILY (June 10, 2024) (editorializing about the proposed legislation); Paul Swegle, *Delaware General Assembly About to Allow Boards to Contract Away Governance Responsibilities*, OPEN LEGAL BLOG ARCHIVE (June 19, 2024), https://www.openlegalblogarchive.org/2024/06/18/delaware-general-assembly-about-to-allow-boards-to-contract-away-governance-responsibilities/.

Is the real-time commentary by Chancellor McCormick and Vice Chancellor Laster deserving of criticism on the House floor? Chandler attacked Chancellor McCormick and Vice Chancellor Laster for acting in a manner inconsistent with the role of a judge. According to Chandler, "judges need to stay in their own lane" and not "intrude upon the process of making law because if they do, they now have become really powerful" as "makers of the law as well as the appliers, the adjudicators of the law."[155] Chandler accused Chancellor McCormick and Vice Chancellor Laster of acting in unprecedented fashion, and insinuated that they spoke out for a personal reason—because the legislation affected "their decisions."[156]

The admonition that "judges need to stay in their own lane" must account with Rule 3.1 of the Delaware Judges' Code of Judicial Conduct, which authorizes judges to write about the law:

> A judge, subject to the proper performance of judicial duties, may engage in the following law-related activities if in doing so the judge does not cast reasonable doubt on the capacity to decide impartially, independently and with integrity any issue that may come before the judge:
>
> (A) A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice (including projects directed to the drafting of legislation).[157]

It is only fair to evaluate Chancellor McCormick's letter and Vice Chancellor's Laster's posts in the context of what other Delaware judges have written or done in connection with proposed legislation. The historical record cannot be squared with Chandler's rhetoric about the judicial "lane."

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[155] Hearing Video, *supra* note 3, at 7:32-7:33 p.m.
[156] *Id.* at 7:32 p.m.
[157] Del. Judges' Code Judicial Conduct R. 3.1. *See also id.* R. 3.4(B) Comment ("As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that the judge's time permits, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.").

In 2003, then-Chancellor Chandler and then-Vice Chancellor Strine co-authored a law review article that contained a proposal for new legislation. They wanted to expand the jurisdictional reach of the Court of Chancery so that non-director corporate officers could be sued in Delaware for breach of fiduciary duty:

> What is lacking in Delaware law is a key executive counterpart of our director service statute.... Given that the 2002 Reforms will increase the trend toward fewer management directors, it would make sense for Delaware to adopt a new subsection of Section 3114 designed to cover top executives. This provision could be modeled on Section 3114 and simply state that top executives of Delaware companies consent to service of process in Delaware for claims brought against them in their official capacities as an officer or employee.[158]

Then-Chancellor Chandler and then-Vice Chancellor Strine possessed sufficient political influence and persuasiveness that their legislative proposal was put forward by the Delaware State Bar Association and enacted by the General Assembly in June 2003.[159]

In January 2009, then-Chancellor Chandler appeared before the House Judiciary Committee to testify in favor of House Bill 49, which would authorize members of the Court of Chancery to arbitrate commercial disputes confidentially. Then-Chancellor Chandler described the bill as helping the Court of Chancery stay on the cutting edge with regards to Delaware's reputation for offering efficient options to resolve corporate disputes.[160] *The New York Times* later wrote: "The Delaware Supreme Court and Chancery Court judges highlighted the provisions publicly, and there was talk that this was a game-changer. Companies would flock to Delaware to take advantage of this expertise through private arbitration."[161]

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[158] William B. Chandler III & Leo E. Strine, Jr., *The New Federalism of the American Corporation Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953, 1003 (2003).

[159] Hamermesh, Jacobs & Strine, *supra* note 37, at 366 ("The General Assembly reacted by amending § 3114 to grant jurisdiction over key officers even if they were not directors."); Senate Bill 126, 142nd General Assembly (2003 – 2004), https://legis.delaware.gov/BillDetail/13970

[160] Delaware General Assembly, House Bill 49, 145th General Assembly, Judiciary Committee, Report Details (Jan. 28, 2009), https://legis.delaware.gov/BillDetail/19375.

[161] Steven Davidoff Solomon, *The Life and Death of Delaware's Arbitration Experiment*, N.Y. TIMES (Aug. 31, 2012, 11:58 a.m.),

In June 2014, after the federal courts struck down the Delaware statute authorizing confidential arbitration in the Court of Chancery as unconstitutional under the First Amendment,[162] then-Chief Justice Strine delivered a speech in which he described a new bill authorizing commercial arbitration in Delaware as a "top priority."[163] Strine stated that the courts, the Governor, and the bar association were "working on a different approach" that would be ready for consideration by the General Assembly the following year.[164] The then-chair of the Corporation Law Council stated that a few judges, several lawyers, and some state officials had developed a concept draft of proposed legislation.[165] The Delaware Rapid Arbitration Act was enacted in April 2015, and it was described as "the product of the collaboration of arbitration practitioners from Delaware, New York, Washington and abroad, led by Delaware's Chief Justice, Leo E. Strine, Jr., Delaware's Chancellor, Andre G. Bouchard and Delaware's Secretary of State, Jeffrey Bullock."[166]

Perhaps the most high-profile involvement of a Delaware judge in the legislative process featured then-Chief Justice Strine. In 2014, he successfully pushed the General Assembly for funding to create a Criminal Justice Improvement Committee that would work on rewriting Delaware's criminal code.[167] Chief Justice Strine and Superior Court Judges William C. Carpenter, Jr. and Ferris W. Wharton participated in the drafting process.[168] Then-Chief Justice Strine pushed this effort in the face of opposition from Attorney General Matt Denn, who refused to participate in the drafting process and criticized the exercise as dangerous and

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https://archive.nytimes.com/dealbook.nytimes.com/2012/08/31/the-life-and-death-of-delawares-arbitration-experiment/.

[162] Delaware Coalition for Open Gov't, Inc. v. Strine, 733 F.3d 510 (3d Cir. 2013).

[163] Maureen Milford, *Strine pushes new arbitration process*, News J. (Dec. 6, 2014, 10:05 a.m.), https://www.delawareonline.com/story/news/local/2014/12/06/strine-pushes-new-arbitration-process/20000083/

[164] *Id.*

[165] *Id.*

[166] Gregory Varallo and Sara T. Toner, *The Delaware Rapid Arbitration Act: 5 Considerations for a Practitioner*, THE TEMPLE 10-Q (2015), https://www2.law.temple.edu/10q/delaware-rapid-arbitration-act/.

[167] Jessica Masulli Reyes, *Sweeping changes proposed for bail, criminal code*, News J. (Mar. 17, 2017, 11:32 a.m.), https://www.delawareonline.com/story/news/local/2017/03/21/sweeping-changes-delaware-proposed-bail-criminal-code/98914824/.

[168] *Id.*

misguided.[169] In June 2018, this legislative effort was abandoned under pressure from Denn.[170] The two-volume final report of the Criminal Justice Improvement Committee, dated March 22, 2019, remains available on the Delaware Supreme Court's website.[171] It is accompanied by a cover letter addressed to State Senator Harris B. McDowell, III, on letterhead that lists Chief Justice Strine and three other judges.

To summarize, then-Chancellor Chandler and then-Vice Chancellor Strine successfully pushed two separate legislative initiatives that expanded the powers of the Court of Chancery. Then-Chief Justice Strine and then-Chancellor Bouchard successfully pushed a later legislative initiative respecting arbitrations that would be appealable to the Delaware Supreme Court. Then-Chief Justice Strine failed in his legislatively funded effort to rewrite Delaware's criminal code. It is striking that Chandler omitted mention of Strine, who succeeded Chandler as Chancellor:

> Judges don't need to intrude upon the process of making law because if they do, they now have become really powerful. They now have become makers of the law as well as the appliers, the adjudicators of the law. That, to me, is probably even more worrisome, more concerning to me, than whether this legislation passes at all, because that's never happened in our history. ***Never. Not while I was Chancellor, not while Bill Allen was Chancellor, not while Grover Brown or Bill Marvel, not while Andy Bouchard was Chancellor***.[172]

In 2006, when Chandler was Chancellor and Strine was a Vice Chancellor, Professor Lawrence Hamermesh wrote a law review article in which he noted that some Delaware judges help guide the development of Delaware corporate law through the Corporation Law Council, via private conversations:

> Similarly, and in view of the small size and close-knit character of the relations among Delaware's judges and corporate lawyers, private conversations among members of these two groups on the subject of potential changes to the DGCL have not been uncommon. Recognizing

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[169] *Id.*

[170] Xerxes Wilson, *Criminal code rewrite effort shelved after pressure from Attorney General Matt Denn*, News J. (June 6, 2018, 6:07 p.m.), https://www.delawareonline.com/story/news/2018/06/06/criminal-code-rewrite-effort-collapses-under-attorney-general-pressure/677014002/

[171] https://courts.delaware.gov/Supreme/criminalcode.aspx.

[172] Hearing Video, *supra* note 3, at 7:32-7:33 p.m.

> the importance of the separation of coequal branches of government, however, these communications are rare, informal, and, most importantly, preliminary.[173]

In the same article, Professor Hamermesh wrote approvingly about how some Delaware judges, "particularly of late," publicly express their views "on potentially desirable changes to the DGCL,"[174] and how, "[e]specially in recent years," some "have become prolific authors on corporate law matters."[175] Additionally, the judicial life is not monastic. Professor Hamermesh writes approvingly about how Delaware judges "participate in conferences throughout the world on the subject of corporate law as speakers, panelists, and audience members," during which they "interact … with lawyers (domestic and foreign, litigation and transactional, plaintiff and defense), as well as other judges, investment bankers, institutional shareholder representatives, and of course, academics."[176]

Given this history, it is difficult to accept Chandler's testimony at face value. There is nothing unprecedented about a member of the Court of Chancery writing about, or communicating with others about, potential changes in Delaware corporate law. It is hard to comprehend how raising questions about proposed legislation is an unprecedented, highly worrisome, and highly concerning aggrandizement of power—by which judges become "makers of the law as well as the appliers, the adjudicators of the law"—given that Chandler and Strine both pushed for the enactment of laws that they later applied. It is an unjust criticism.

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[173] Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 Colum. L. Rev. 1749, 1757 (2006).

[174] *Id.* (citing Chandler & Strine, *supra* note 158, and Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 Harv. L. Rev. 1759, 1777-79 (2006)).

[175] *Id.* at 1759 (citing articles authored by judges and draft academic articles on which Delaware judges had commented). Then-Vice Chancellor Strine had occasion to revise in litigation a view he had expressed in extra-judicial writing. *See In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1022 n.80 (Del. Ch. 2005) ("In a speech in an academic setting, I once ventured the notion that such blue-penciling might possibly make policy sense. Leo E. Strine, Jr., *Categorical Confusion: Deal Protection Measures In Stock-for-Stock Merger Agreements*, 56 BUS. LAW. 919, 941 n.71 (2001)…. [T]here is a good deal to be said for the notion that this court should simply enjoin a merger agreement's closing preliminarily if it finds that the deal protection measures threaten the irreparable preclusion of materially higher bids or the coercion of a stockholder vote.").

[176] Hamermesh, *supra* note 173, at 1759-60.

Chandler could have rephrased his testimony in a manner consistent with recent history, but if he had done so, the rhetoric would not be very compelling. Chandler could have said that it is perfectly appropriate for a judge to advocate for legislation and consult with the Corporation Law Council, the Delaware State Bar Association, the General Assembly, the Secretary of State, and/or the Governor to enact it. He then could have argued that it is over-reaching for a judge to criticize proposed legislation put forward by others. That argument would be illogical. Proposing legislation is a greater expression of political power than criticizing proposed legislation.

In principle, responding to a proposed statutory change is no different than advocating for a statutory change, communicating by letter with the Executive Committee is no different than a private conversation with the Chair of the Corporation Law Council, and posting on LinkedIn is no different than delivering a speech. In a recent case, a litigant put at issue certain of Vice Chancellor's Linked-In posts about the desirability of legislation that would limit Court of Chancery jurisdiction over restrictive covenant cases. Vice Chancellor Laster defended his posts as having the same type of content that he and his colleagues regularly convey by other means:

> The Linked-In posts seem no different to me than the comments that my colleagues and I often provide at conferences about our workload, including the types of cases that contribute to it and possible solutions. The posts brought my comments to a larger audience than a Practicing Law Institute seminar, an American Bar Association event, or the Tulane Conference, but the content was the same. If I were to write a law review article and say the same things, I do not think anyone would complain. The medium may be different, but the canon operates similarly.[177]

If the original or revised version of what became Section 122(18) had been proposed by a law professor in a law review article, it would be natural for a Delaware judge to respond to it. If a symposium was convened at which law professors and lawyers discussed contractual or statutory responses to the *Consolidated Edison* case, it would be natural for a Delaware judge to participate. What Chandler finds galling is that Chancellor McCormick and Vice Chancellor raised questions about proposed legislation that already had been put forward by the

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[177] Sunder Energy, LLC v. Jackson, C.A. No. 2023-0988-JTL, 2023 WL 8868407, at *12 (Del. Ch. Dec. 22, 2023).

Corporation Law Council on an expedited basis, in response to certain of their recent judicial decisions.

The expedited drafting and presentation of Senate Bill 313 was a bid for supremacy by the dominant forces on the Corporation Law Council[178] over the judiciary in the realm of Delaware corporate law.[179] Chandler's testimony served a complementary political purpose. It was a public rebuke of Chancellor McCormick and Vice Chancellor Laster for having issued decisions that purportedly jeopardized Delaware's primacy in incorporations.

Chandler's distorted history allowed him to discredit Chancellor McCormick and Vice Chancellor Laster without engaging with the substance of what they wrote. Representative Wilson-Anton, who opposed Senate Bill 313, asked Chandler about the merits of objections made by Chancellor McCormick and Vice Chancellor Laster:

> So, Chancellor McCormick wrote a letter to the State Bar Association saying that the proposal reflects "the broadest set of substantive amendments since the 1960s" and that the Council's process was "rushed," "flawed," and "a dramatic departure from Delaware's esteemed tradition." Vice Chancellor Laster has written

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[178] *See* Hamermesh, *supra* note 173, at 1756 ("as a matter of practice, the members of the Council include a number of lawyers—a small minority, to be sure—whose litigation practice is dominated by representation of shareholder plaintiffs").

[179] Something similar happened in 2022. In response to early-stage rulings in recent or pending cases in the Court of Chancery, Strine co-authored a law review article proposing an amendment to Section 102(b)(7) of the Delaware General Corporation Law that would enable limited exculpation of corporate officers. *See* Hamermesh, Jacobs & Strine, *supra* note 37, at 366-70. The legislation was promptly enacted before any critical commentary appeared. This "much-heralded" reform has had a "tepid rate of uptake" by Delaware corporations in its first year. Jens Frankenreiter & Eric L. Talley, *Sticky Charters? The Surprisingly Tepid Embrace of Officer-Protecting Waivers in Delaware*, European Corporate Governance Institute - Law Working Paper No. 762/2024, at 1 (Mar. 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4764290#. *See also* Ann Lipton, *Exculpation*, BUS. L. PROF. BLOG (Aug. 6, 2022) ("The specific scenarios where protections for officers are proposed are also scenarios that offer the greatest threat to shareholders, and where shareholders bear the least risk of frivolous litigation costs. And so it's not obvious that shareholders of publicly traded companies would be wise to approve charter amendments that exculpate officers.").

> that Section 122(18) "blows up the edifice that was Section 141(a). There are many ways to draft the statutory amendment that would be both helpful to the development of the law and comprehensible to a literate reader. The blunderbuss of 122(18) achieves neither."
>
> Do you think that both of these sitting members of the court are wrong and that you're right?[180]

Chandler responded by resting on his judicial resume: "Yes. I do. I have served longer than both of them. Combined."[181]

Conclusion

Chandler's testimony on the House floor was not a fleeting moment in the long history of Delaware corporate law that is undeserving of scrutiny. Chandler's testimony not only punctuated a significant legislative effort, it symbolized or epitomized it. Senate Bill 313 is the legislative expression of hostility toward the judiciary that was expressed by Chandler on the House floor and, prior to that, by practitioners publicly in New Orleans and, presumably, in innumerable private settings. Chandler's public hostility toward Chancellor McCormick and Vice Chancellor Laster was further amplified via social media. A post on X embedded composite clips of Chandler's testimony accompanied by the following text:

> Former Chancellor Chandler chastises Chancellor McCormick and Vice Chancellor Laster for their inappropriate and unprofessional activism.
>
> Interestingly, McCormick rendered a highly controversial activist judgment regarding Elon Musk's comp package and Laster is profusely cited by Plaintiff's attorneys in their motions for fees that are presented to McCormick.
>
> *"Right now, the corporate market is not feeling good about Delaware because of the uncertainty and unpredictability of a few decisions by*

[180] Hearing Video, *supra* note 3, at 7:40 p.m.
[181] *Id.*

just 2 judges (McCormick & Laster). As chancellor, I was taught that judges need to stay in their lane."[182]

The above-quoted post has garnered over 298,000 views.

The livestreamed, public circulation of Chandler's testimony compels a public response. Chancellor McCormick and Vice Chancellor Laster are owed a defense from unjust criticism, not post-enactment silence.[183]

Moreover, the future direction of Delaware law, judicially and legislatively, depends on public perception of, and personal reflection on, the events culminating on the evening of June 20, 2024. Who feels chastened? Who feels emboldened? Who is unbowed?

Chandler's testimony also provides an opportunity for observers of the judicial creation of Delaware corporate law to ponder the efficacy of Delaware's legislative processes. Holmes's most famous sentence applies not only to the judiciary, but also to former judges who work legislatively to reverse the decisions of their judicial successors:

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good

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[182] ALEX (@ajtourville), X (June 22, 2024, 3:37 p.m.), https://x.com/ajtourville/status/1804599633831661803 (italics in original; bolding omitted).

[183] Subsequent public attacks by Musk on Chancellor McCormick prompted the submission of a letter to the Committee on Response to Public Comment of the Delaware Bar Association demanding a public defense of Chancellor McCormick. *See* Alison Frankel, *Judge in Musk pay case is backed by law profs and plaintiffs' lawyers in letter to bar group*, REUTERS (Dec. 10, 2024, 5:09 p.m.), https://www.reuters.com/legal/legalindustry/column-judge-musk-pay-case-is-backed-by-law-profs-plaintiffs-lawyers-letter-bar-2024-12-10/. None of the signatories are self-identified as being affiliated with a defense firm. *See* Sign Letter to DSBA's Public Response Committee Re Attacks on Chancellor McCormick by Elon Musk, https://docs.google.com/forms/d/e/1FAIpQLSc5vCbi6GGBSJs06kgg8dPwrQ5hkGAVs1J9g0hKC2vk2N_Ytg/viewform. The Delaware State Bar Association issued a public statement entitled "The Delaware Bar Stands with the Delaware Judiciary," which does not refer by name to either Musk or Chancellor McCormick. dsba.org.

deal more to do than the syllogism in determining the rules by which men should be governed.[184]

It is not foreordained that the intuitions of the transactional bar, the defense bar, or of former judges-turned-defense practitioners will overturn decisional law and become legislated Delaware law.[185]

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[184] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Lawbook Exchange Ltd. 2005) (1881).

[185] On January 9, 2025, the Corporation Law Section of the Delaware State Bar Association is scheduled to vote on proposed statutory amendments that include a proposed new Section 115(c) of the DGCL, which would require a forum selection bylaw or charter provision to afford access to the District of Delaware for a securities claim that must be brought in federal court. New Section 115(c) would legislatively overrule *Lee v. Fisher*, 70 F.4th 1129 (9th Cir. 2023) (en banc), which upheld the dismissal of a federal securities claim based on a forum selection bylaw requiring that derivative claims be brought in the Court of Chancery, which lacked subject matter jurisdiction over the federal claim. Section 115(c) would also refute the position taken in *Lee v. Fisher* by nine former Delaware judges-turned-defense practitioners who filed a letter as *amici curiae* in support of dismissal. Letter of Former Delaware Chief Justices, Justices, Chancellors, and Vice Chancellors in Support of Defendants-Appellees, Noelle Lee v. Robert Fisher et al., No. 21-15923 (9th Cir. Nov. 28, 2022). These former Delaware judges expressly concurred with the position taken in an *amicus curiae* brief of two law professors who wrote: "enforcing a forum provision directing all derivative lawsuits to Delaware courts raises no serious equitable concern.... [T]here is no reason to deny enforceability of an otherwise lawful forum provision directing derivative shareholder suits to Delaware courts." Brief of *Amici Curiae* Professors Joseph A. Grundfest and Mohsen Manesh in Support of Defendants-Appellees at 20, Noelle Lee v. Robert Fisher et al., No. 21-15923 (9th Cir. Nov. 23, 2022). Rather than identify the law firms with which the former judges were affiliated—*i.e.*, Leo E. Strine, Jr. (Wachtell, Lipton, Rosen & Katz); Myron T. Steele (Potter Anderson); Henry duPont Ridgely (formerly of DLA Piper); Jack B. Jacobs (Young Conaway); William B. Chandler III (Wilson Sonsini); Andre G. Bouchard (Paul Weiss); John W. Noble (Morris James); Donald F. Parsons, Jr. (Morris Nichols Arsht & Tunnell); Joseph R. Slights III (Wilson Sonsini)—the letter of the former judges contained the following disclaimer: "The Former Delaware Chief Justices, Justices, Chancellors, and Vice Chancellors submit this letter solely in their individual capacities and do not purport to speak on behalf of the Delaware Judiciary or the State of Delaware."