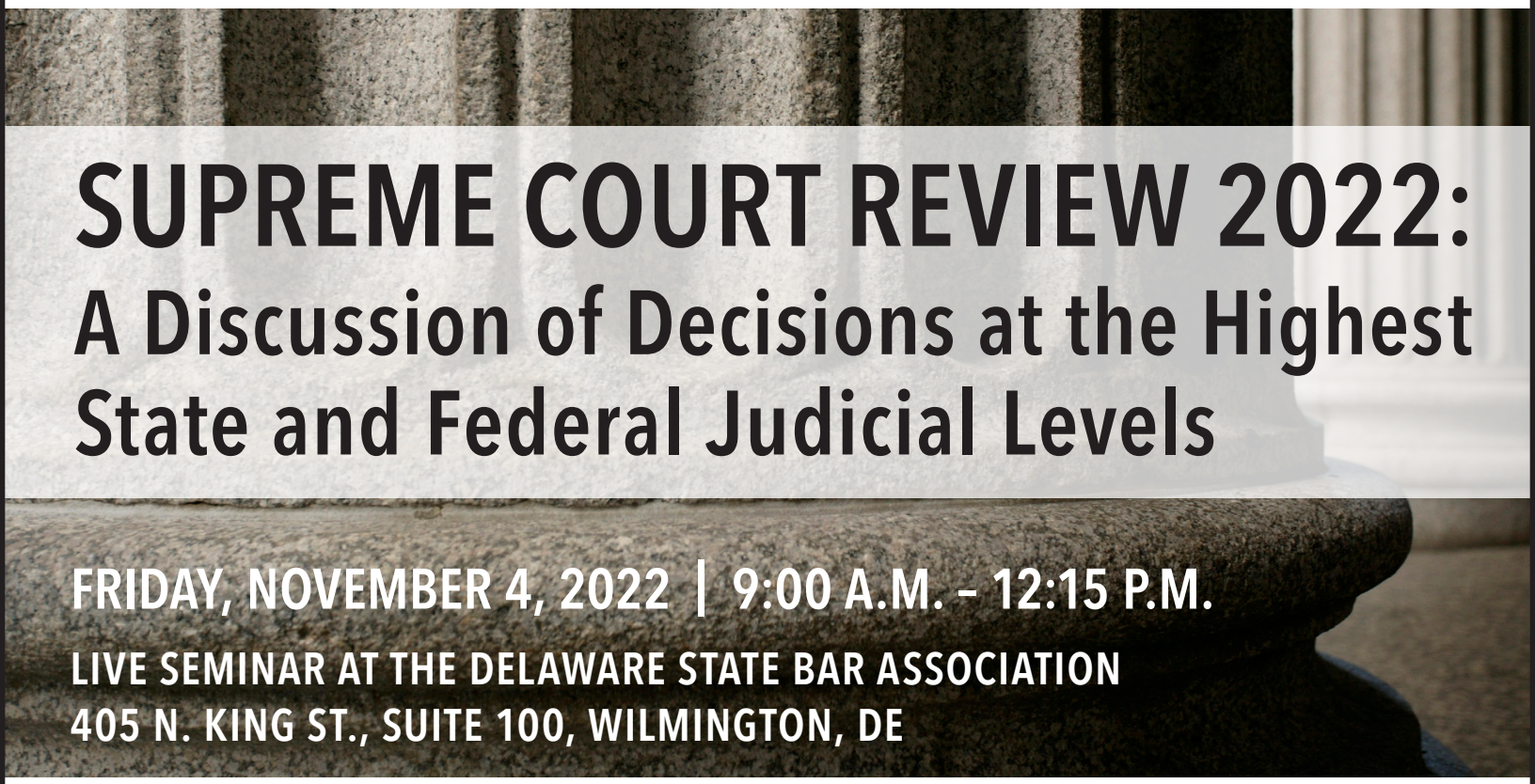
DELAWARE STATE BAR ASSOCIATION

CONTINUING LEGAL EDUCATION



SUPREME COURT REVIEW 2022:
A Discussion of Decisions at the Highest State and Federal Judicial Levels

FRIDAY, NOVEMBER 4, 2022 | 9:00 A.M. – 12:15 P.M.

LIVE SEMINAR AT THE DELAWARE STATE BAR ASSOCIATION
405 N. KING ST., SUITE 100, WILMINGTON, DE

MODERATOR

The Honorable Gary F. Traynor
Justice, Supreme Court of the State of Delaware

PROGRAM AGENDA

9:00 a.m. – 10:30 a.m.

Delaware Supreme Court

Corporate Law
Samuel L. Closic, Esquire
Prickett, Jones & Elliott, P.A.

Criminal Law
Kathryn J. Garrison, Esquire
Department of Justice

General Civil Litigation
Ryan P. Newell, Esquire
Young, Conaway, Stargatt & Taylor, LLP

10:30 a.m. – 10:45 a.m. | Break

10:45 a.m. – 12:15 p.m.

United States Supreme Court Cases and Upcoming Cases

Delaware Law School Professor Alan Garfield will discuss the highlights of the recently concluded 2021-2022 Supreme Court term and preview some of the significant cases in the Court's current 2022-2023 term

Alan E. Garfield, Esquire
Distinguished Professor
Delaware Law School

VISIT HTTPS://WWW.DSBA.ORG/EVENT/SUPREME-COURT-REVIEW-2022-A-DISCUSSION-OF-DECISIONS-AT-THE-HIGHEST-STATE-AND-FEDERAL-JUDICIAL-LEVELS/ FOR ALL THE DSBA CLE SEMINAR POLICIES.

Moderator

The Honorable Gary F. Traynor
Justice, Supreme Court of the State of Delaware

Justice Gary F. Traynor

Justice Traynor was sworn in for his first term as Justice of the Supreme Court of Delaware on July 5, 2017. Before his appointment, Justice Traynor was a practicing Delaware lawyer for 35 years.

A member of the Delaware Bar since 1982, Justice Traynor began his legal career with a small firm in Dover handling a diverse range of litigation matters. In 1990, he joined the firm of Prickett, Jones & Elliott, where he served as the firm's Managing Director from 2005 to 2007. For his first ten years with the Prickett firm, Justice Traynor continued to focus on general litigation matters, including criminal defense, personal injury litigation and domestic relations disputes. In 1999, he transitioned to the firm's corporate and commercial litigation practice where he remained until leaving the firm in 2014 to join the State of Delaware Office of Defense Services where he served as an Assistant Public Defender defending major felony cases until his appointment in 2017.

Justice Traynor received his undergraduate degree from Dartmouth College in 1978 and earned his law degree from Delaware Law School of Widener University in 1982.

Before joining the state's highest court, Justice Traynor served on the Delaware Supreme Court's Board on Professional Responsibility from 2011 to 2017, and was an appointed member of the U.S. 3rd Circuit Court of Appeals' Task Force on Management of Death Penalty Litigation from 1998 to 2001. Justice Traynor is a past-President of the Terry-Carey American Inn of Court.

In addition to his legal work, Justice Traynor was a commissioner of the Delaware River and Bay Authority from 2009 to 2014. He also served as an officer in the Delaware Army National Guard from 1990 to 1991. Justice Traynor and his wife, Kathleen Andrus, reside in Rehoboth Beach, Delaware.

Delaware Supreme Court

Corporate Law

Samuel L. Closic, Esquire

Prickett, Jones & Elliott, P.A.

Criminal Law

Kathryn J. Garrison, Esquire

Department of Justice

General Civil Litigation

Ryan P. Newell, Esquire

Young, Conaway, Stargatt & Taylor, LLP

PRICKETT, JONES & ELLIOTT

EST 1888

SAMUEL L. CLOSIC

Director

Prickett, Jones & Elliott, P.A.

Phone: 302-888-6517

Email: slclosic@prickett.com

SAMUEL L. CLOSIC focuses on business entity transactions and corporate and commercial litigation. Mr. Closic's practice primarily involves mergers and acquisitions, corporate governance, and other complex business matters in the Delaware Court of Chancery.

Mr. Closic received a B.S. from High Point University in 2005 and a J.D., *summa cum laude*, from Widener University School of Law in 2010. While at Widener,

Mr. Closic served as the External Managing Editor for *The Delaware Journal of Corporate Law*. Mr. Closic also had the pleasure of serving as a judicial extern to the Honorable Randy J. Holland of the Delaware Supreme Court and the Honorable Mary F. Walrath of the United States Bankruptcy Court for the District of Delaware.

Prior to becoming an attorney, Mr. Closic owned and operated a family retail furniture business.

Mr. Closic is admitted to practice in the courts of the State of Delaware and the United States District Court for the District of Delaware. Mr. Closic has been rated by his peers as AV Preeminent for his ethical standards and legal ability, and was recognized as a Rising Star in Business Litigation by *Super Lawyers, Delaware*.

Professional and Community Activities:

- Member, Richard S. Rodney American Inn Of Court
- Member, Delaware Bankruptcy Inn Of Court
- Member, Delaware State Bar Association
- Assistant Secretary, Delaware Board Of Bar Examiners
- Member, Jewish Federation Of Delaware Young Leaders Division

Education

- High Point University (B.S., 2005)
- Widener University School Of Law (J.D., 2010)

Bar Admissions

- Delaware
- United States District Court For The District Of Delaware

Publications

- *The Slow But Sure Evolution Of Brophy: Delaware's Common Law Action For Insider Trading, Business Law Today, April 30, 2014.*

PRICKETT, JONES & ELLIOTT
EST. 1888

DSBA Supreme Court Review 2022

Samuel L. Closic
Corporate Appellate Decision Review
FRIDAY, NOVEMBER 4, 2022
9:00 a.m. – 12:15 p.m.

1

Disclaimer

- This presentation is for educational purposes only. The information contained within this presentation constitutes neither legal advice nor the opinions or positions of Prickett, Jones & Elliott, P.A.
- Prickett, Jones & Elliott, P.A. strongly encourages anyone planning to rely on a case contained within this presentation to conduct independent review and research prior to reliance.

PRICKETT, JONES & ELLIOTT
EST. 1888

2

OptiNose AS v. Currax Pharm., LLC, 264 A.3d 629 (Del. Nov. 2, 2021) [Case No. 48, 2021]

- **Nature of Case**: Patent/Contract (License Agreement regarding a Patent)
- **Procedural Posture:** The Court of Chancery granted a motion for judgment on the pleadings for Licensee. Patent Holder appealed. The Court affirmed in part and reversed in part.
- **Precedential Value**:
  - The Court reversed the Court of Chancery, in part, because the Court of Chancery gave too limited a reading of what it means for a patent filing to "relate to or characterize" the tangible nasal spray product. Finding the words "relating to" signaled an intent to interpret expansively the connection between the patent office statements or filings and the tangible device used to administer nasal spray. 264 A.3d at 640.
  - The Court buttressed its contractual reading with the "real world implication[]" that, because tangible devices do not have a role in patent prosecutions, limiting the patent holder's rights to review patent filings limited to the tangible device (as opposed to the underlying intellectual property) would render the patent holder's prior approval right meaningless in patent prosecution proceedings. *Id*. at 639.

PRICKETT, JONES & ELLIOTT
EST. 1888

3

OptiNose AS v. Currax Pharm., LLC, 264 A.3d 629 (Del. Nov. 2, 2021) [Case No. 48, 2021]

- **Facts:** Two pharma companies entered into a licensing agreement where Optinose ("Patent Holder") agreed to license its patent to Currax ("Licensee"). The scope of the agreement allowed Licensee to sell powdered version of a nasal spray in North America. Patent Holder retained right to sell certain distinctive nasal powder spray and nasal liquid spray.
  - Patent Holder gave Licensee the "first right" to prosecute and maintain patent infringement claims for the licensee patent. Licensee attempted to prosecute a patent, but was rejected by the Patent Office because the patent at issue was too similar to another patent. In order to overcome the rejection, Licensee needed to file a "terminal disclaimer" over the patent at issue (i.e., a disclaimer that effectively concedes a patent's monopoly over the subject matter). To do this, Licensee needed Power of Attorney from Patent Holder.
- **Holdings:** Affirmed in Part; Reversed in part: (1) licensing agreement required licensor to provide licensee power of attorney to file terminal disclaimer in prosecution of patent application if needed to overcome double patenting rejection, but (2) terminal disclaimer was a filing that would trigger licensor's right of prior approval over patent office statements or filings relating to or characterizing device component.

PRICKETT, JONES & ELLIOTT
EST. 1888

4

Lehman Bros. Holdings, Inc. v. Kee, 268 A.3d 178 (Del. Dec. 6, 2021) [Case No. 416, 2020]

- **Nature of the Case:** Contract (Sales Agreement)
- **Procedural Posture**: The Superior Court granted a motion to dismiss for failure to state a claim. Purchaser and Purchaser's Mortgage Lender appealed. The Court affirmed.
- **Precedential Value** (2)**:**
  - **(1) Contracts under Seal** - Under Delaware law, a contract under seal is subject to a 20-year statute of limitations as opposed to the standard 3-year statute of limitations. *Id*. at 187; *see also* 10 Del. C. § 8106 ("Actions subject to 3-year limitation"). Because this extended statute of limitations may upset the reasonable expectations of typical contracting parties, "Delaware law requires a clea[r] indication of the intent to create a sealed instrument before increasing the three year statute of limitations by a factor of six." 268 A.3d at 190**.**
  - **(2) Accrual of Claims** - The three year statutory limitation clock for rescission claims concerning superior title to land begins on the date of closing because a cause of action accrues at the time of the underlying act and is not *per se* tolled because there are contingent claims to be resolved. "[T]he focus on the *Wal-Mart* ruling was 'that the limitations defense pose[d] issued that require[d] a more developed record, for which reason this matter was improperly disposed of on a motion to dismiss.' To the extent *Wal-Mart* can be read to establish [a rule that a claim is inherently unknowable – and therefore does not accrue – until any contingent claims are resolved], we limit that portion of the *Wal-Mart* decision to the unique facts and circumstances present in the case.") *Id*. at 194 (citing *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d at 312, 314 (Del. 2004)).

PRICKETT, JONES & ELLIOTT
EST. 1888

5

Lehman Bros. Holdings, Inc. v. Kee, 268 A.3d 178 (Del. Dec. 6, 2021) [Case No. 416, 2020]

- **Facts:**
  - Sweetwater ("Purchaser") bought land for $8 million, financing $6 million through Lehman Brothers ("Purchaser's Lender"). However, Purchaser was aware that the State had at least a *di minimis* claim to the land that did not appear in the chain of title (*i.e.*, there was a slight boundary encroachment). Thus, Purchaser had actual knowledge of State's claim, yet proceeded with sale anyway.
  - Two years after closing, the State began asserting ownership over the land, this included the State expressly directing Purchaser's representative to stop cutting trees down on the parcel and otherwise informing Purchaser of the State's intent to build a highway through the parcel based on the State's ownership of the same.
  - The State made a claim to entire parcel four years after closing, and after trial, the Court of Chancery ruled in State's favor. Purchaser and Purchaser's Lender filed separate lawsuits in the Superior Court against the sellers of the land, alleging, *inter alia*, they were entitled to rescission of the sale contract.
  - The Superior Court dismissed both actions, holding that the claims were time-barred. Purchaser and Purchaser's Lender appealed, arguing that their claims were timely because the statute of limitations did not begin to run until the Court of Chancery held that the State had superior title to the parcel.

PRICKETT, JONES & ELLIOTT
EST. 1888

6

Lehman Bros. Holdings, Inc. v. Kee, 268 A.3d 178 (Del. Dec. 6, 2021) [Case No. 416, 2020]

- **Holdings:** Affirmed.
  - (1) sale agreements were not contracts under seal subject to a 20-year limitations period for rescission claims;
  - (2) rescission claims accrued for limitations purposes at closing;
  - (3) discovery rule tolled limitations on rescission claims only until State first asserted ownership of parcel;
  - (4) unjust enrichment claims accrued for limitations purposes at closing;
  - (5) lender's false information claim accrued for limitations purposes at closing; and
  - (6) discovery rule tolled limitations on false information claim only until time that purchaser defaulted upon State's assertion of superior title.

PRICKETT, JONES & ELLIOTT
EST. 1888

7

Lehman Bros. Holdings, Inc. v. Kee, 268 A.3d 178 (Del. Dec. 6, 2021) [Case No. 416, 2020]

- **Additional Case Nuggets**
  - Contracts under Seal: The sale agreements were not contracts under seal subject to a 20-year limitations period for rescission claims. The Court affirmed the Court of Chancery's judgment that a reference to the contract being under seal in the recitals and the presence of a "(s)" symbol by the parties' signature lines did not evidence the parties' unmistakable intent to enter into a contract under seal. 268 A.3d at 189. Drawing from the Court's prior *Whittington* decision that set a "bright line standard" for identifying the parties' intent to enter into a sealed contract, the Supreme Court reaffirmed that the existence of a sealed contract can be ably demonstrated where the word "Seal" accompanies the parties' signatures in the contract. *Id.* (citing *Whittington v. Dragon Group, LLC*, 991 A.2d 1 (Del. 2009)).
  - Accural of Claims: The rescission claims accrued for limitations purposes at closing. Reiterating that a cause of action for breach of contract accrued under Section 8106 at the time of the wrongful act, the Court held that even if Purchaser was ignorant of the cause of action, or had not yet ascertained actual damages, each of Purchaser's claims accrued at closing when the defective title was exchanged. *Id.* at 190-91. At the latest, any tolling ceased when the State directly informed the buyer of the State's belief that it held superior title, thereby providing inquiry notice. *Id.* at 194-95.

PRICKETT, JONES & ELLIOTT
EST. 1888

8

Dir. of Revenue v. Verisign, Inc., 267 A.3d 371 (Del. 2021) (No. 18, 2021)

- **Nature of the Case:** Internal Revenue Code (Federal Tax deduction from Corporate loses)
- **Procedural Posture:** The Superior Court held that policy violated Constitution's Uniformity Clause. The Delaware Division of Revenue appealed to the Supreme Court. The Court affirmed in part and reversed in part.
- **Precedential Value:** This case applied the holdings to the Delaware tax code prior to a "2021 amendment." However, the Division of Revenue policy that prevented the company from claiming a Delaware state standalone net operating loss deduction that exceeded its Federal consolidated net operating loss deduction violated 30 *Del. C.* §§ 1901-1903.

PRICKETT, JONES & ELLIOTT
EST. 1888

9

Dir. of Revenue v. Verisign, Inc., 267 A.3d 371 (Del. 2021) (No. 18, 2021)

- **Facts:** The Corporate taxpayer ("Verisign") claimed large net operating loss deductions on its 2015 and 2016 state income tax returns, resulting in $0 in tax liability to Delaware each year. The Delaware Division of Revenue (the "Division") reviewed the returns and found that Verisign's use of net operating losses violated a longstanding, but non-statutory, Division policy.
  - Under the policy, a corporate taxpayer that filed its federal tax returns with a consolidated group (*i.e.*, multiple affiliated companies filing a single income tax return) was prohibited from claiming a net operating loss deduction in Delaware that exceeded the consolidated net operating loss deduction on the federal return in which it participated. The Division reviewed Verisign's consolidated federal filings, applied the Delaware policy determining that Verisign had underreported its income, and assessed the company $1.7 million in unpaid taxes and fees

PRICKETT, JONES & ELLIOTT
EST. 1888

10

Dir. of Revenue v. Verisign, Inc., 267 A.3d 371 (Del. 2021) (No. 18, 2021)

- **Holdings:**
  - (1) Refusing to allow corporation to claim its actual standalone net operating loss deduction caused corporation to pay taxes on amount of income that was not its taxable income.
  - (2) Statutory provisions imposing tax on each eligible corporation's standalone taxable income did not allow the Division to require each taxpayer to calculate its stand-alone federal taxable income, including all deductions, in accordance with the Internal Revenue Code (IRC) as if that corporation filed separate company, *i.e.*, non-consolidated, federal income tax return.
  - (3) The Division did not have discretionary authority under statutory provisions imposing tax on each eligible corporation's standalone taxable income to eliminate net operating loss deduction.
  - (4) The Division did not have authority under statutory provisions to manipulate corporate taxpayer's federal taxable income by substituting consolidated net operating loss figure for corporation's own, single-entity net operating loss.

PRICKETT, JONES & ELLIOTT
EST. 1888

11

AB Stable VIII LLC v. MAPS Hotels & Resorts One LLC, 268 A.3d 198 (Del. 2021) (No. 71, 2021)

- **Nature of the Case:** Contract (Real Estate Purchase Agreement)
- **Precedential Value:** A covenant in a land sale agreement that requires seller to continuously operate the premises in its "ordinary course consistent with past practices" was not excused by a global pandemic because the ordinary course covenant imposed "an overarching and absolute obligation" (*i.e.*, not qualified by reference to reasonable industry standards) and did not incorporate a "Material Adverse Event" (MAE) exception contained within a separate, "analytically distinct" and independent section of the agreement.
- **Procedural Posture:** The Court of Chancery granted judgment for Buyer. Seller appealed. The Supreme Court affirmed judgment.

PRICKETT, JONES & ELLIOTT
EST. 1888

12

AB Stable VIII LLC v. MAPS Hotels & Resorts One LLC, 268 A.3d 198 (Del. 2021) (No. 71, 2021)

- **Facts:** A hotel ("Buyer") and a company ("Seller") entered into an agreement to sell 15 hotels for $5.8 Billion. The COVID-19 pandemic forced the seller to drastically alter hotel practices prior to the closing of the deal. For example, seller closed multiple hotel locations, furloughed thousands of employees, and implemented changes to the routine business practices in compliance with COVID protocols. The combination thereof forced the buyer to call off the deal. Seller then filed an action in the Court of Chancery seeking specific performance to compel Buyer to complete the purchase.

PRICKETT, JONES & ELLIOTT
EST. 1888

13

AB Stable VIII LLC v. MAPS Hotels & Resorts One LLC, 268 A.3d 198 (Del. 2021) (No. 71, 2021)

- **Holdings:**
  - (1) Seller breached ordinary course covenant that required it to operate its hotels consistent with past practice, and therefore excused Buyer from closing on the transaction.
  - (2) The MAE provision that allocated pandemic risk to buyer did not relieve seller of obligation under ordinary course covenant.
  - (3) Ordinary course covenant required seller to respond to buyer's reasonable request for details before making drastic changes to its past practice.

PRICKETT, JONES & ELLIOTT
EST. 1888

14

AB Stable VIII LLC v. MAPS Hotels & Resorts One LLC, 268 A.3d 198 (Del. 2021) (No. 71, 2021)

- **Additional Case Nuggets:**
  - The Court rejected the Seller's argument because "the requirement that the Seller operate *only* in the ordinary course and consistent with past practice *in all material respects*, [coupled with the conspicuous absence of a reasonableness qualifier] means that its compliance is measured by its operational history and not that of the industry in which it operates." 268 A.3d at 212-13 (emphasis included). "[T]he parties did not choose the actions of industry participants as the yardstick to measure the Seller's actions, in a pandemic or outside of one." *Id.* at 212.
  - On appeal, Seller relied on the Supreme Court's *FleetBoston* decision for the proposition that an ordinary course covenant does not "preclude" a seller from taking action necessary to "be competitive in the marketplace." *FleetBoston Financial Corp. v. Advanta Corp.*, 2003 WL 240885, at *26 (Del. Ch. Jan. 22, 2003). The Court rejected the Seller's interpretation of *FleetBoston* as establishing a general rule, noting that "[u]nder *FleetBoston*, it is the facts–and the specific language of the contract's ordinary course covenant–that determine whether a seller has acted in the ordinary course of business." *AB Stable*, 268 A.3d at 214. To that end, the Court deferred to the Court of Chancery's finding that "overwhelming evidence" demonstrated that the Seller's changes "were wholly inconsistent with past practice." *Id.* at 215.

PRICKETT, JONES & ELLIOTT
EST. 1888

15

Lenois v. Sommers as Tr. for Erin Energy Corp., 268 A.3d 220 (Del. 2021) (No. 33, 2021)

- **Nature of the Case:** Fiduciary Duty/Bankruptcy
- **Precedential Value:** Bankruptcy trustees hold the legal right to control derivative litigation against a bankrupt company because a derivative claim is a part of the estate that is managed by the trustee; therefore, trustees may be substituted as a nominal defendant in a derivative action, be realigned as plaintiff and pursue the action even after bankruptcy has been filed and the derivative claims have been dismissed on derivative grounds (i.e., demand futility).
- **Procedural Posture:** The Court of Chancery dismissed the action. Shareholder appealed. Company then filed for bankruptcy. The Supreme Court vacated and remanded the motion to dismiss. On remand, the Court of Chancery denied trustee's motion for substitution of a party and motion for relief from order or judgment. Trustee appealed. The Supreme Court reversed and remanded.

PRICKETT, JONES & ELLIOTT
EST. 1888

16

Lenois v. Sommers as Tr. for Erin Energy Corp., 268 A.3d 220 (Del. 2021) (No. 33, 2021)

- **Facts:** The court notes this case presented "highly unusual facts" because "the complications arose after the nominal defendant was thrown into bankruptcy proceedings (allegedly as a result of the controller's actions) during the pendency of an appeal challenging dismissal of [plaintiff]'s derivative claims solely on derivative standing grounds [i.e., demand futility]" and, during the appeal, plaintiff "was divested of standing due to that intervening bankruptcy." 268 A.3d at 223.
  - The bankruptcy court then approved the Company's trustee's motion for leave to prosecute the derivative claim pending in the Court of Chancery on behalf of the estate. The trustee then moved in the Supreme Court to be substituted with the Company as the nominal defendant, and simultaneously be realigned as the plaintiff in the derivative suit in order to pursue the interests of the estate (*i.e.*, the derivative claim is an asset of the estate in bankruptcy). *Id.* at 228-29. The trustee argued that motion to dismiss should be vacated because, among other reasons, the demand futility issue is moot if the trustee is realigned as plaintiff. *Id.* at 222. The Supreme Court agreed and remanded the case to the Court of Chancery, where that court then denied the trustee's motion for substitution and realignment. *Id.* at 229-30.

PRICKETT, JONES & ELLIOTT
EST. 1888

17

Lenois v. Sommers as Tr. for Erin Energy Corp., 268 A.3d 220 (Del. 2021) (No. 33, 2021)

- **Holdings:** On an issue of first impression reflecting "an equitable resolution of a confluence of unusual procedural circumstances specific to this case," a Chapter 7 trustee could substitute and realign in place of nominal defendant corporation to directly pursue shareholder's derivative claims after those claims were dismissed on demand futility grounds. 268 A.3d at 222.

PRICKETT, JONES & ELLIOTT
EST. 1888

18

Lenois v. Sommers as Tr. for Erin Energy Corp., 268 A.3d 220 (Del. 2021) (No. 33, 2021)

- **Additional Case Nuggets:**
  - Observing that appellate courts in other jurisdictions "distinguish cases where, on the one hand, a dismissal is *immediately appealed* from cases where, on the other hand, the complaint is dismissed without a timely appeal or further immediate action, and the plaintiff later attempts to pursue several claims," the Supreme Court held that "the fact that [the original plaintiff]'s timely appeal was pending when the bankruptcy intervened is an important factor in our legal analysis and in our assessment of the equitable considerations involved." 268 A.3d at 234, 237.
  - The Supreme Court found the Court of Chancery erred in applying the "interest of justice" exception in Court of Chancery Rule 60 because the court below "focused on a situation not involving a pending appeal, but rather one where the appeal period had passed." *Id.* at 236-37. Further, the Court observed that its focus on the timeliness of the underlying appeal when considering equitable relief was consistent with Delaware's Saving Statute (10 *Del. C.* § 8118), which is "liberally construed" in favor of deciding issues on the merits and "alleviates the harsh consequences of the statute of limitations when an action, through no fault of the plaintiff, is technically barred." *Id.* at 238 n.79.

PRICKETT, JONES & ELLIOTT
EST. 1888

19

Noranda Aluminum Holding Corp. v. XL Ins. Am., Inc., 269 A.3d 974 (Del. 2021) (No. 443, 2020)

- **Nature of the Case:** Insurance/Post-Judgment Interest
- **Precedential Value:** Consistent with 6 *Del. C.* § 2301(a), the post-judgment interest rate to be applied to judgments awarded shall be determined by the date judgment is entered, as opposed to the date in which the insurance liability arose.
- **Procedural Posture:** The Superior Court awarded insured post-judgment interest at same rate as pre-judgment interest. Insured appealed. The Supreme Court reversed.

PRICKETT, JONES & ELLIOTT
EST. 1888

20

Noranda Aluminum Holding Corp. v. XL Ins. Am., Inc., 269 A.3d 974 (Del. 2021) (No. 443, 2020)

- **Facts:** After a jury trial in Superior Court, plaintiff won a judgment for $28 million and was awarded a post-judgment interest rate of 6% under 6 *Del. C.* § 2301(a). This rate reflected the same rate as pre-judgment interest. On appeal, plaintiff argues that the Superior Court should have applied a rate of 7.5% representing the legal rate on which the judgment was entered (the 1.5% difference would net about $430,000).
- **Holdings:** The Superior Court was required to award insured post-judgment interest at legal rate in effect on date judgment was entered, as opposed to date insurance liability arose.

PRICKETT, JONES & ELLIOTT
EST. 1888

21

Noranda Aluminum Holding Corp. v. XL Ins. Am., Inc., 269 A.3d 974 (Del. 2021) (No. 443, 2020)

- **Additional Case Nuggets:**
  - The Court rejected the Superior Court's application of a single rate of interest rather than separate pre- and post-judgment interest. "The 2012 addition to Section 2301(a) explicitly requires that post-judgment interest accrue at the legal rate 'from the date of judgment'–that is, in the word of sentence two, 'the time from which [post-judgment] interest is due.' This statutory text forecloses the use of *TranSched* to support a single rate of interest calculated on the date of liability and extending through final payment." 269 A.3d at 979 (citing *TranSched Systems Ltd. v. Versyss Transi Solutions*, LLC,2012 WL 1415466 (Del. Ch. Mar. 29, 2012)).
  - The Court grounded its ruling in real-world implications: "A litigant who is subject to a judgment at law–which often comprises elements, such as costs and fees, that are not components of the underlying liability–is not responsible for post-judgment interest until judgment is entered." *Id*. at 982.

PRICKETT, JONES & ELLIOTT
EST. 1888

22

Valley Joist BD Holdings, LLC v. EBSCO Indus., Inc., 269 A.3d 984 (Del. 2021) (No. 105, 2021)

- **Nature of the Case:** Fraud (Pleading Standard)
- **Precedential Value:** When pleading fraud under the heightened "particularity" pleading standard under Rule 9(b), a court must consider the totality of the plaintiff's well-pleaded facts to determine whether plaintiff has sufficiently created an inference that a misrepresented fact was "knowable" and "the defendants were in a position to know it" at the time the defendant made the fraudulent statement.
- **Procedural Posture:** The Superior Court granted defendant's motion to dismiss the fraud claim. The Supreme Court reversed and remanded.

PRICKETT, JONES & ELLIOTT
EST. 1888

23

Valley Joist BD Holdings, LLC v. EBSCO Indus., Inc., 269 A.3d 984 (Del. 2021) (No. 105, 2021)

- **Facts:** Plaintiff agreed to purchase the "Valley Joist" business from Defendant for $20 million. The stock purchase agreement contemplated that "the Assets of [Valley Joist] (including the Real Property and buildings, fixtures, mechanical and other systems and improvements thereon) are in good operating condition and repair[.]" 269 A.3d at 986.
  - At issue here is one building that has three crane bays, where each crane frequently required repair work, causing incidental costs of $500,000. *Id.* An engineer opined that the building could not support the weight of the cranes due to existing structural damage. *Id.* Plaintiff brought breach of contract and fraud in the inducement claims against Defendant in Superior Court. The Superior Court granted Defendant's motion to dismiss the fraud claim for failure to plead facts in satisfaction of the heightened "particularity" standard.
  - In dismissing the fraud claim, the Superior Court acknowledged that Defendant made misrepresentations concerning the quality of the building at issue; however, those representations did not amount to fraud in the inducement because the facts failed to support a reasonable inference that Defendant knew the representations were false at the time they were made (*i.e.*, the knowledge prong of the fraud claim was not satisfied). *Id.* at 988-89.

PRICKETT, JONES & ELLIOTT
EST. 1888

24

Valley Joist BD Holdings, LLC v. EBSCO Indus., Inc., 269 A.3d 984 (Del. 2021) (No. 105, 2021)

- **Holdings:** On *de novo* review, the Supreme Court held that the fraud claim satisfied Superior Court Rule 9(b).
  - Fraud must be pled with particularity as to the time, place, and contents of the false representations; the facts misrepresented; the identity of the person(s) making the misrepresentation; and what that person(s) gained from making the misrepresentation.
  - To that end, the Supreme Court held that a sufficient pleading of a defendant's knowledge requires the plaintiff to demonstrate the underlying issue was "knowable and the defendants were in a position to know it." 269 A.3d at 989. The Court determined that the Superior Court erred, *inter alia*, when it relied on only one invoice dated post-closing to determine whether a reasonable inference existed as to Defendant's state of mind. *Id*. at 990. In reversing the decision, the Supreme Court held that the Superior Court failed to consider other invoices for repair work done on the building dated pre-closing. *Id*. The Court held that plaintiff's pleaded facts must be taken as a whole when determining whether a reasonable inference exists, even where one fact is disadvantageous to a plaintiff. *Id*.

PRICKETT, JONES & ELLIOTT
EST. 1888

25

ACE Am. Ins. Co. v. Rite Aid Corp., 270 A.3d 239 (Del. 2022) (No. 339, 2020)

- **Nature of the Case:** Contract/Duty to Defend (Insurance Policy)
- **Precedential Value:** The coverage for companies' personal injury insurance policies are limited to personal injury lawsuits and do not cover all instances where persons or entities are seeking economic damages against the companies stemming from injury to the general public.
- **Procedural Posture:** The Superior Court entered summary judgment in favor of the Drugstore. Insurers applied to the Supreme Court for certification of an interlocutory appeal, which was accepted. The Supreme Court reversed the Superior Court's grant of summary judgment.

PRICKETT, JONES & ELLIOTT
EST. 1888

26

ACE Am. Ins. Co. v. Rite Aid Corp., 270 A.3d 239 (Del. 2022) (No. 339, 2020)

- **Facts:** Plaintiff is a drugstore ("Drugstore") that carried a general insurance policy for personal injury relating to the operation of its business.
  - The insurance policy at issue agreed to pay claims "for" or "because of" personal injury. Multiple counties in Ohio were suing the Drugstore for its role in marketing and supplying opioids at its pharmacies. The Drugstore filed an action for breach of contract in the Superior Court against its insurance company claiming that the insurance company had an obligation to defend the plaintiff in the opioid-related lawsuits.
  - The Superior Court held that the lawsuits sought damages "for" or "because of" personal injury as there was arguably a causal connection between the Ohio counties' economic damages and the injuries to their citizens from the opioid epidemic.

PRICKETT, JONES & ELLIOTT
EST. 1888

27

ACE Am. Ins. Co. v. Rite Aid Corp., 270 A.3d 239 (Del. 2022) (No. 339, 2020)

- **Holdings:** The Delaware Supreme Court disagreed with the Superior Court's determination that the Ohio lawsuits were "for" or "because of" personal injury, as contemplated by the policy.
  - The Court held that the above language from the insurance policy covered only: (1) the person injured, (2) those recovering on behalf of the person injured, and (3) people or organizations that directly cared for or treated the person injured. 270 A.3d at 241. The Court held that the Ohio counties did not seek damages "for or because of" bodily injury under an of the here categories above, and thus, the insurers owed no duty to defend.
  - Instead, the Ohio suits sought economic damages that arose in connection with personal injuries of its citizens caused by opioids sold by the Drugstore.

PRICKETT, JONES & ELLIOTT
EST. 1888

28

Cox Commc'ns, Inc. v. T-Mobile US, Inc., 273 A.3d 752 (Del. 2022), *reargument denied* (Mar. 22, 2022) (No. 340, 2021)

- **Nature of the Case:** Contract (Preliminary Agreement)
- **Precedential Value:** An agreement that leaves material terms open to future negotiations is a preliminary agreement that does not bring the parties beyond requiring each party to negotiate the open terms in good faith (*i.e.*, parties are not required to ultimately agree to a deal or transaction).
- **Procedural Posture:** After a bench trial, the Court of Chancery entered a permanent injunction against the communications company and that company appealed. The Supreme Court reversed.

PRICKETT, JONES & ELLIOTT
EST. 1888

29

Cox Commc'ns, Inc. v. T-Mobile US, Inc., 273 A.3d 752 (Del. 2022), *reargument denied* (Mar. 22, 2022) (No. 340, 2021)

- **Facts:** Cox Communications, Inc. ("Cox") and Sprint Corp. ("Sprint") entered into a settlement agreement. The agreement stipulated that Cox would enter into an exclusive provider agreement with Sprint prior to offering services to its customers. Soon thereafter, T-Mobile acquired Sprint, and consequently, Cox partnered with Verizon, ultimately deciding not to enter into the exclusive provider agreement with Sprint (or its successor).
  - T-Mobile, as Sprint's successor, sued Cox, claiming that Cox breached the settlement agreement when Cox elected not to enter into the exclusive provider agreement.
  - Cox brought an action in Chancery Court seeking declaratory judgment that the "agreement to agree" was unenforceable, or alternatively, the agreement was merely a preliminary agreement to negotiate at a later date in good faith, which Cox was released from when Sprint was acquired by T-Mobile.

PRICKETT, JONES & ELLIOTT
EST. 1888

30

Cox Commc'ns, Inc. v. T-Mobile US, Inc., 273 A.3d 752 (Del. 2022), *reargument denied* (Mar. 22, 2022) (No. 340, 2021)

- **Holdings:** The contemplated agreement was a preliminary agreement requiring good-faith negotiations on open terms (*i.e.*, a "Type II agreement").
  - "Section 9(e) does not reflect consensus on all open points that require negotiation" because it "contemplates a future 'definitive' agreement." 273 A.3d at 761. "Because [Section 9(e)] leaves material terms open to future negotiations, Section 9(e) is a paradigmatic Type II agreement of the kind we recognized in *SIGA v. Pharmathene[*, 67 A.3d 330, 339 (Del. 2013)]. Parties to such agreements must negotiate the open terms in good faith, but they are not required to make a deal" *Id.* at 760-61. "Type I agreements are fully binding; Type II agreements 'do not commit the parties to their ultimate contractual objective but rather to the obligation to negotiate the open issues in good faith." *Id.* at 761 (quoting *SIGA*, 67 A.3d at 349).
  - The agreement did not include an additional, immediately applicable, binding promise about the company not entering the market or making a deal with a competitor. "[T]he Court of Chancery's interpretation strayed from the plain text of the first sentence of Section 9(e) when it gleaned two distinct promises from a sentence in which Cox promised to do one thing." *Id.* at 765. "Conspicuously absent from [the first sentence of Section 9(e)] is any textual indicator–'and,' 'also,' 'additionally,' etc.–that it contains more than a single promise." *Id.* at 763.

PRICKETT, JONES & ELLIOTT
EST. 1888

31

N. Am. Leasing, Inc. v. NASDI Holdings, LLC, 276 A.3d 463 (Del. 2022) (No. 192, 2022)

- **Nature of the Case:** Contract (Indemnity Obligation)
- **Precedential Value:** Under the terms of the contract at issue, the reasonable time within which notice of a claim must be given does not begin to run until the indemnitee becomes aware of the existence of the claim, that is, sometime after the claim comes into existence.
- **Procedural Posture:** The Court of Chancery granted the motion and subsequently granted in part plaintiffs' motion for entry of final judgment. Defendants appealed. The Supreme Court affirmed.

PRICKETT, JONES & ELLIOTT
EST. 1888

32

N. Am. Leasing, Inc. v. NASDI Holdings, LLC, 276 A.3d 463 (Del. 2022) (No. 192, 2022)

- **Facts:** Seller owned NASDI and Yankee. Buyer was North American Leasing. Buyer's parent, Great Lakes, agreed that performance and payment bonds on existing projects being performed by NASDI and Yankee would remain in place for the duration of the projects, and that Great Lakes would indemnify NASDI for any losses incurred on projects. One project incurred losses when NASDI refused performance. When NASDI sought indemnification, Great Lakes refused, claiming the notice was untimely per the agreement.
- **Holdings:** Plaintiffs gave timely notice of their indemnification claims for losses arising from performance and payment bonds.
- Court of Chancery did not err in finding that defendants waived their affirmative defense of set-off/recoupment. Interpreting the contract's language, the Court found the indemnification request was timely. 276 A.3d at 469 ("The question, therefore, is whether the clause in Section 9.3(a) beginning 'but in any event' is a limitation on the preceding 'reasonable time' clause or, whether it is an exception to that clause applicable only to indemnification claims arising from the seller's representations and warranties as discussed in Section 9.5").

PRICKETT, JONES & ELLIOTT
EST. 1888

33

TransPerfect Glob., Inc. v. Pincus, 278 A.3d 630 (Del. 2022), *reargument denied* (June 21, 2022) (No. 154, 167, 175, 2021)

- **Nature of the Case:** Corporate Custodian under 8 *Del. C.* § 226.
- **Precedential Value:** "[T]o find a corporate office or shareholder in civil contempt of a court order, the trial court must specifically determine that the officer or shareholder bore personal responsibility for the contemptuous conduct. This is consistent with [the] requirement that, when an asserted violation of a court order is the basis for contempt, the party to be sanctioned must be bound by the order, have clear notice of it, and nevertheless violate it in a meaningful way." 278 A.3d at 650.
- **Procedural Posture:** Two co-founders of a company were gridlocked in their decision-making and required a court-order custodian, appointed under 8 *Del. C.* § 226, to step in to help sell the company. One co-founder cashed out here shares to the other co-founder. Three issues were consolidated and are at issue here on appeal. First, the Court of Chancery issued an jurisdiction order and held Shawe in contempt for violating the order. Second, the Court of Chancery granted a custodian's discharge order. Third, the Court of Chancery granted a fee award to the Custodian. Co-founder appeals all three issues. The Supreme Court reversed part of the first issue and affirmed the remaining issues.

PRICKETT, JONES & ELLIOTT
EST. 1888

34

TransPerfect Glob., Inc. v. Pincus, 278 A.3d 630 (Del. 2022), *reargument denied* (June 21, 2022) (No. 154, 167, 175, 2021)

- **Facts:** Two co-founders ("Etling" and "Shawe") of Transperfect Global, Inc. (the "Company") were gridlocked in their decision-making regarding the sale of the company. They applied for and received a court-appointed custodian as a result ("Custodian"). Subsequently, the Court of Chancery facilitated the sale of all of Etling's shares to Shawe (the "Final Order"). The Custodian requested reimbursement for his custodianship.
  - Shawe had been consistently uncooperative with the Custodian, causing years of litigation in multiple states, accumulating attorney's fees in the process. On appeal, this case addressed three challenges by Shawe and the company (together, "Defendants"): (1) a jurisdiction order that limited the parties' ability to litigate exclusively in Delaware, (2) the discharge order alleviating the Custodian of his custodianship and releasing his from future claims by the Defendants, and (3) the fee order awarding the Custodian $3.2 million in fees for his service.

TransPerfect Glob., Inc. v. Pincus, 278 A.3d 630 (Del. 2022), *reargument denied* (June 21, 2022) (No. 154, 167, 175, 2021)

- **Holdings:**
- (1) The Supreme Court affirmed the validity of the jurisdictional order limiting the Court of Chancery as the exclusive venue for litigation related to these issues, but reversed the Court of Chancery's contempt order for the filing of an action in Nevada by the company because Shawe cannot be personally responsible for the company's suit where he is not a named plaintiff. 278 A.3d at 635, 647-48.
- (2) The Supreme Court affirmed the discharge order that released the Custodian from future liability. Under 8 *Del. C.* § 226, the Court of Chancery has discretion to manage a custodianship.
- (3) The Supreme Court affirmed the fee award for the Custodian. Defendants argued the Fees and Expenses awarded to the custodian were excessive. The Chancery Court awarded $3.2 million to the Custodian for his work over year and a half period.

TransPerfect Glob., Inc. v. Pincus, 278 A.3d 630 (Del. 2022), *reargument denied* (June 21, 2022) (No. 154, 167, 175, 2021)

- **Additional Case Nuggets:**
  - The Court took up the issue of whether the Court of Chancery specifically found Shawe to have engaged in contemptuous conduct despite Shawe not raising the issue below after determining, pursuant to Supreme Court Rule 8, that the trial court committed plain error requiring review in the interests of justice. 278 A.3d at 649-650. ("The court never identified a specific action taken by Shawe personally that violated the Final Order, nor does Pincus point to one in his briefing. Nevertheless, the court found Shawe in contempt . . . . Given the seriousness of a civil contempt sanction, which may be accompanied by large fines and even imprisonment, this result would be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process and would not, therefore, comport with the interests of justice.").
  - Defendants argued that the Chancery Court erred in releasing the Custodian from "any claims against [him] related to his work as Custodian." The Supreme Court disagreed, stating that it is not an abuse of the Chancery Court's statutory discretion to release Custodians from future claims "spawned" from their duties. Of course, this determination is a case by case basis.

Stream TV Networks, Inc. v. SeeCubic, Inc., 279 A.3d 323 (Del. June 15, 2022) (No. 360, 2021).

- **Nature of the Case:** Charter Provision/Contract and 8. *Del. C.* § 271
- **Precedential Value:** A company's charter provision can take precedent over 8. *Del. C.* § 271 with respect to the procedure for the disposition of the company's assets.
- **Procedural Posture:** Controllers of the indebted company filed suit in the Court of Chancery seeking a temporary restraining order ("TRO") to prevent the agreement's execution. The assignee filed multiple counterclaims. The Court of Chancery, *inter alia*, granted the assignee's motion for preliminary injunction to prevent the company from thwarting the agreement. The company moved to modify or stay the injunction, but the court denied the motion. Company appealed. The Supreme Court vacated in part, reversed in part, and remanded.

Stream TV Networks, Inc. v. SeeCubic, Inc., 279 A.3d 323 (Del. June 15, 2022) (No. 360, 2021).

- **Facts:** The company ("Stream") is controlled by the Rajan family, who collectively own the majority of Stream's voting shares. Stream, owing millions of dollars to multiple creditors, pledged its assets as collateral on various loans. Eventually, Stream defaulted, and its senior creditor ("SLS") filed suit in Superior Court seeking foreclosure.
  - During its financial difficulties, Stream appointed four outside directors who negotiated with Stream's creditors to broker a resolution. Consequently, Stream executed an omnibus agreement with SLS and two junior creditors who also held a security interest in Stream's assets (respectively, "Hawk" and "Equity Investors").
  - The agreement provided that Stream would assign its assets to SeeCubic, Inc. ("SeeCubic") in exchange for SLS and Hawk to stay the foreclosure action pending in the Superior Court. However, in an apparent attempt to "creat[e] litigation chaos," the Rajan family, through Stream, filed suit in the Court of Chancery and moved for a TRO seeking to prevent SeeCubic from enforcing the Omnibus Agreement. *Id*. at 329. SeeCubic then filed its counterclaims seeking a TRO against Stream.

PRICKETT, JONES & ELLIOTT
EST. 1888

39

Stream TV Networks, Inc. v. SeeCubic, Inc., 279 A.3d 323 (Del. June 15, 2022) (No. 360, 2021).

- **Holdings:** The Supreme Court held that the charter provision at issue was materially different than Section 271. As a result, the Court did not look to Section 271 to interpret the Charter. Instead, because the charter included the term "or other disposition," the charter accounted for the disposition of assets occurring here and controlled. Thus, the shareholders should have voted to approve the transaction.
  - This case "address[ed] whether approval of a corporation's Class B stockholders was required to transfer pledged assets to secured creditors in connection with what was, in essence, a privately structured foreclosure transaction." 279 A.3d at 325. Section 271 of the Delaware General Corporation Law deals with the sale, lease or exchange of assets, consideration, and procedure.
  - The Court did not look beyond the unambiguous, bespoke language in the charter: "The drafters could have simply tracked the statute but did not." *Id*. at 340. "It follows that, there is no need to look to Section 271 as an interpretive guide in construing the language of the Class Vote Provision because the Charter's language does not track Section 271." *Id*. at 342. Language in a charter is not ambiguous where there is a "plain meaning" supported by "common dictionary definitions." *Id*. at 341.

PRICKETT, JONES & ELLIOTT
EST. 1888

40

Stream TV Networks, Inc. v. SeeCubic, Inc., 279 A.3d 323 (Del. June 15, 2022) (No. 360, 2021).

- **Additional Case Nuggets:**
  - The Court declined to read in an exception to Section 271 that eliminates the need for stockholders to approve a transaction in addition to the board of directors where the company is insolvent: "[T]here is no Delaware common law 'board only' insolvency exception under Section 271. Rather, the enactment of Section 271 and its predecessor superseded any such common law exception, to the extent one existed in Delaware." *Id*. at 337-38.
  - The Court's holdings were grounded in Delaware's public policy of promoting stability in the Delaware General Corporation Law: "As a matter of policy, unearthing a 'board only' insolvency exception cited only decades ago, and never by any Delaware court, would foster uncertainty and potential inconsistency in a context where predictability is crucial for corporations that have availed themselves of Delaware law. . . . Promoting stability in our DGCL is an remains of paramount importance." *Id*. at 354-55; *see also id.* at 355 ("[E]nforcing the unambiguous Charter provision is consistent with our policy of seeking to promote stability and predictability in our corporate laws, and with recognition that Delaware is a contractarian state.").

Diep on behalf of El Pollo Loco Holdings, Inc. v. Trimaran Pollo Partners, L.L.C., 2022 WL 2334396 (Del. June 28, 2022) (No. 313, 2021).

- **Nature of the Case:** Special Litigation Committee member independence and *Zapata* review.
- **Precedential Value:** Establishes a standard for evaluating independence and disinterestedness of a Special Litigation Committee member: "[T]he court must ask whether the SLC member would be more willing to risk her reputation than the personal or professional relationship with the director subject to investigation." 2022 WL 2334396, at *13.
- **Procedural Posture:** The Court of Chancery denied Defendants' motion to dismiss, prompting the company to designate a special litigation committee ("SLC") with exclusive authority to investigate the claims and take any action in the best interests of the company. After a lengthy investigation, the SLC recommended terminating both claims. The Court of Chancery granted the SLC's motion under a "Zapata Review" (from *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981)). Shareholder appealed, alleging there were material issues of fact concerning both the independence of the SLC and the reasonableness of its investigation. The Supreme Court affirmed the Court of Chancery's judgment.

Diep on behalf of El Pollo Loco Holdings, Inc. v. Trimaran Pollo Partners, L.L.C., 2022 WL 2334396 (Del. June 28, 2022) (No. 313, 2021)

- **Facts:** The company ("El Pollo") is a fast food restaurant chain that conducted an initial public offering in 2014. El Pollo adopted an insider trading policy that restricted insiders from trading the company's stock outside of specified windows of time. Between 2014 and 2015, El Pollo increased its prices by 3% across the board. Sales decreased more than expected.
  - El Pollo's CFO presented the CEO with a survey showing a decrease in customer satisfaction. The CEO requested the CFO keep the survey a secret. El Pollo recorded a metric called Same Store Sales ("SSS") which measured "the year-to-year change in the number of transaction and the aggregate amount spent per transaction at each store." *Id*. at *2.
  - On a mid-quarter earnings call, management told investors the projected SSS would range from 3-5%, but documents showed management projected an SSS score at the low end of the range. Multiple insiders subsequently sold stock before it decreased further. In total, $130 million of stock was sold. When the quarter ended, the actual SSS was 1.3%, well below the 3-5% projection. Shareholder then filed his complaint in the Court of Chancery.

PRICKETT, JONES & ELLIOTT
EST. 1888

43

Diep on behalf of El Pollo Loco Holdings, Inc. v. Trimaran Pollo Partners, L.L.C., 2022 WL 2334396 (Del. June 28, 2022) (No. 313, 2021)

- **Holdings:**
  - (1) The committee members' "mere familiarity" with derivative claims through their roles on the board of directors and as defendants did not compromise their independence.
  - (2) Similarly, the committee members' professional and personal relationships with private investment firm's founder did not impact committee's independence.
  - (3) The committee had reasonable basis to conclude that derivative claims lacked merit.
  - (4) Court of Chancery's decision under *Zapata*'s discretionary second step to dismiss was warranted.

PRICKETT, JONES & ELLIOTT
EST. 1888

44

Diep on behalf of El Pollo Loco Holdings, Inc. v. Trimaran Pollo Partners, L.L.C., 2022 WL 2334396 (Del. June 28, 2022) (No. 313, 2021)

- **Additional Case Nuggets:**
  - *Zapata*'s second step, whereby the Court uses its discretion to evaluate the reasonableness of a special litigation committee's conclusions, is based on the objectivity and thoroughness of its report, not whether the report resolved all issues of disputed fact in the underlying litigation: "[T]he question is not whether there were disputed issues of material fact about the three merits-based issues raised by Diep. Instead, the question is whether disputed issues of material fact were raised about the scope of the investigation and the reasonableness of the SLC's conclusions." *Id*. at *15.
  - The Court found the SLC's report was reasonable, including because the SLC relied on "contemporaneous" board communications in drawing its conclusions that the case should be dismissed: "The court of Chancery did not abuse its discretion when it applied *Zapata*'s second step. The record surrounding the SLC's report and its conclusions did not reveal any unusual concerns about the merits of the claims, the committee's process, or matters of law and policy such that the court should have intervened and refused to dismiss the derivative suit as a matter of its own business judgment." *Id*. at *16-17.

NVIDIA Corp. v. City of Westland Police & Fire Ret. Sys., 2022 WL 2812718 (Del. July 19, 2022), *as revised* (July 25, 2022) (No. 259, 2021).

- **Nature of the Case:** Books and Records Demand 8 Del. C. § 220.
- **Precedential Value(2):**
  - (1) Endorsing the Court of Chancery's decision in *In re Facebook, Inc. Section 220 Litigation*, 2019 WL 2320842, at *18 (Del. Ch. May 30, 2019), the Supreme Court here held that "Section 220 plaintiffs may narrow their requests during litigation if they do so in good faith and such narrowing is not prejudicial to the company." 2022 WL 2812718, at *8.
  - (2) Reaffirming the exception to hearsay evidence for stockholders establishing a credible basis under 8 Del. C. § 220 ("Section 220") that was established in the Supreme Court's prior decision in *Thomas & Betts Corp. v. Leviton Mfg. Co., Inc.*, 681 A.2d 1026 (Del. 1996) and held the exception applies to Section 220 generally and "encompasses more than just the credible basis context." *Id.* at *13.
- **Procedural Posture:** Under Section 220, the Court of Chancery ordered the Company to produce certain records related to the communications surrounding the demand for computer chips. The Company appealed the order to produce books and records. The Supreme Court affirmed in part and reversed in part.

NVIDIA Corp. v. City of Westland Police & Fire Ret. Sys., 2022 WL 2812718 (Del. July 19, 2022), *as revised* (July 25, 2022) (No. 259, 2021).

- **Facts:** NVIDIA (the "Company") sold computer chips used for video games. Demand for computer chips increased in 2017 when consumers began using the chips to mine or cryptocurrency. In response, the Company manufactured special cryptocurrency computer chips.
  - Throughout 2017 and 2018, the Company's executives made a series of statements concerning the effect of cryptocurrency mining on the business. *Id.* at *2. The Company's CEO and CFO sold millions of dollars of company stock at the end of 2017. *Id.* at *3. By the end of 2018, the executives admitted that the demand for computer chips it had predicted had not materialized. *Id.*
  - Plaintiffs then served a Section 220 inspection demand to investigate potential wrongdoing related to the statements made about the demand for computer chips. Stockholders suspected that certain executives knowingly made false or misleading statements during earnings calls that inflated the company's stock price, then, those executives then sold their stock at inflated prices.

PRICKETT, JONES & ELLIOTT
EST. 1888

47

NVIDIA Corp. v. City of Westland Police & Fire Ret. Sys., 2022 WL 2812718 (Del. July 19, 2022), *as revised* (July 25, 2022) (No. 259, 2021).

- **Holdings:** The Court of Chancery did not abuse its discretion ordering the production of documents, or determining that stockholders had a proper purpose and credible basis to suspect corporate wrongdoing. The only issue reversed was the Court of Chancery's holding that the stockholders were able to rely on certain hearsay evidence. The Court of Chancery said, to that end, that the stockholders "could show a proper purpose by relying on the Original Demands and interrogatories[.]" *Id.* at *15. The Supreme Court disagreed.
  - However, the Court reaffirmed the low bar for credible basis standard: The credible basis standard is satisfied where the court can "'connect the dots' in order to be able to reasonably infer the possibility of wrongdoing." *Id.* at *16 (quoting Court of Chancery's transcript ruling). "While th[e] evidence [at bar] likely would fall short of that necessary to support an actual claim, we cannot say that it is insufficient to meet the lowest possible burden of proof – a credible basis from which the Court of Chancery can infer there is possible mismanagement that would warrant further investigation." *Id.* at *16; *see also id.* at *16 ("When showing a credible basis for wrongdoing, Section 220 plaintiffs are not confined to a single theory and "need not identify the particular course of action the stockholder will take. . . .") (quoting *AmerisourceBergen Corp. v. Lebanon Cnty. Employees' Ret. Fund*, 243 A.3d 417, at 421 (Del. 2020)).

PRICKETT, JONES & ELLIOTT
EST. 1888

48

NVIDIA Corp. v. City of Westland Police & Fire Ret. Sys., 2022 WL 2812718 (Del. July 19, 2022), *as revised* (July 25, 2022) (No. 259, 2021).

- **Additional Case Nuggets:**
  - When the requests included in a Section 220 demand change between the time of the demand and trial in a Section 220 proceeding, there is no prejudice to the company where "although the wording [of the requests during litigation] is slightly different, the gist of the request remains the same." *Id*. at *8. Applying that logic to the appeal at issue, the Court held that any "changes to the Stockholders' requests [were appropriate because they] had the effect of narrowing exactly which documents and records might fulfill that demand." *Id*. at *9.
  - Delaware Rules of Evidence apply in "all actions and proceedings in Delaware courts[.]" *Id*. However, a doctrinal exception applies in Section 220 cases (*see Thomas & Betts*, and *Skoglund* cases) which allows "reliable" hearsay in Section 220 demand letters to establish the proper purpose and credible basis standard.
    - **Thomas & Betts Corp. v. Leviton Mfg. Co., Inc.*, 681 A.2d 1026 (Del. 1996); *Skoglund v. Ormand Indus., Inc.*, 372 A.2d 204 (Del. Ch. 1976).

PRICKETT, JONES & ELLIOTT
EST. 1888

49

In re GGP, Inc. Stockholder Litig., 2022 WL 2815820 (Del. July 19, 2022) (No. 202, 2021)

- **Nature of the Case:** Stockholder Suit (Breach of Fiduciary Duty of Disclosure & Quasi-Appraisal Remedy)
- **Precedential Value:** Disclosures that describe the merger consideration or appraisal remedy in a confusing manner are materially misleading and incomplete because they fail to provide stockholders with the information necessary to decide whether to dissent and seek appraisal.
- **Procedural Posture:** The Court of Chancery granted a motion to dismiss for failure to state a claim on all counts. Stockholder-plaintiffs appealed. Plaintiffs' complaint alleged six counts, but only two are at issue on appeal. First, plaintiffs alleged that the structure of a merger eviscerated stockholders' appraisal rights and that the individual directors of the target company breached their fiduciary duties of loyalty by failing to accurately disclose material information to stockholders when soliciting votes for a proposed merger. Second, plaintiffs alleged that the acquiring company aided and abetted the target company's directors in designing said disclosure. The Court affirmed in part and reversed in part.

PRICKETT, JONES & ELLIOTT
EST. 1888

50

In re GGP, Inc. Stockholder Litig., 2022 WL 2815820 (Del. July 19, 2022) (No. 202, 2021)

- **Facts:** The acquirer ("Brookfield") made an unsolicited offer to purchase the remaining 65% of GGP shares it did not own. *Id.* at *3. After months of negotiation between GGP's five-member Special Committee and Brookfield, the companies agreed Brookfield would acquire GGP for $23.50 per share. *Id.* at *4.
  - The Special Committee, however, refused to include an appraisal-rights closing condition during negotiations. "Generally speaking, an appraisal-rights closing condition allows the purchaser to terminate the transaction if a specified number of shares demands appraisal." *Id.* at *4.
  - Instead, the companies agreed to structure the merger consideration in two parts: first, GGP shareholders would receive a "pre-closing dividend" consisting of cash and shares funded by Brookfield; second, GGP shareholders would receive a "per share merger consideration" worth $0.312 per share. *Id.* at *5-6. The pre-closing dividend amounted to 98.5% of the total merger consideration. *Id.* at *6. Plaintiffs alleged that the merger consideration was structured in this manner to limit Brookfield's exposure to appraisal claims. In other words, following the close of the merger, stockholders' appraisal would be limited to the much smaller "per share consideration" worth approximately $0.312, as opposed to the full $23.50.

PRICKETT, JONES & ELLIOTT
EST. 1888

51

In re GGP, Inc. Stockholder Litig., 2022 WL 2815820 (Del. July 19, 2022) (No. 202, 2021)

- **Facts Continued:** GGP provided its stockholders with a Proxy ahead of the merger vote. In discussing the structure of the merger consideration, the Court noted that the "exact figures were not ascertainable from the Proxy." *Id.*
  - Further, the Proxy did not make clear whether stockholders would be entitled to appraisal with respect to the entire merger consideration (i.e., $23.50 per share), or merely the "per share merger consideration" (*i.e.*, $0.312 per share). 2022 WL 2815820, at *7-8.
  - The stockholders voted to approve the merger. Soon thereafter, plaintiffs filed suit, alleging, among other things, that the structure of the merger consideration was designed to "eviscerate GGP stockholders' appraisal rights" and that the director defendants breached their duty of disclosure by failing to provide GGP stockholders "with a fair summary of their appraisal rights and not disclosing all material information" relevant to the transaction or appraisal. *Id.* at *8. Plaintiffs also alleged that Brookfield aided and abetted the design of the misleading disclosure.

PRICKETT, JONES & ELLIOTT
EST. 1888

52

In re GGP, Inc. Stockholder Litig., 2022 WL 2815820 (Del. July 19, 2022) (No. 202, 2021)

- **Holdings:** The Court affirmed the Court of Chancery's determination that the transaction did not eviscerate stockholders' appraisal rights. However, the Court reversed and remanded the remaining two issues, holding plaintiffs sufficiently pled that:
  - (1) the director defendants breached their duty of disclosure because the Proxy was materially misleading, and
  - (2) Brookfield aided and abetted the director defendants in designing the materially misleading Proxy.

In re GGP, Inc. Stockholder Litig., 2022 WL 2815820 (Del. July 19, 2022) (No. 202, 2021)

- **Additional Case Nuggets:**
  - The Court held, "[D]ividends that are conditioned on the consummation of a merger are treated as merger consideration under Delaware law" and accepting such a dividend "does not result in the abandonment of a stockholder's appraisal right." *Id*. at *10. Relying on *Crawford*, the Court noted that appraisal proceedings "determine the value of the corporation at the time of the merger as if it had not occurred, [and] dividends expressly conditioned on the merger—like all other merger consideration—must be treated as if they had not been paid." *Id*. at *15 (citing *Louisiana Municipal Police Employees Retirement System v. Crawford*, 918 A.2d 1172 (Del. Ch. 2007)).
    - Therefore, the bifurcated merger consideration did not eviscerate the stockholders' appraisal rights because any judicial determination of the fair value of GGP shares would account for the pre-closing dividend.

In re GGP, Inc. Stockholder Litig., 2022 WL 2815820 (Del. July 19, 2022) (No. 202, 2021)

- **Additional Nuggets Continued:**
  - Here, the Proxy misled stockholders into believing their appraisal remedy would be approximately $0.312, rather than approximately $23.50—an important factor in deciding how to vote. Thus, the Proxy's statements were material "because they deprived stockholders of necessary information about the fair value available in an appraisal proceeding and misled stockholders about the operation of [Delaware's appraisal statute]." *Id*. at *22.
  - Last, the Court held it is "reasonably conceivable" that Brookfield aided and abetted the disclosure violations "as another method of limiting Brookfield's exposure to appraisal demands." *Id*. at *23.

Baldwin v. New Wood Res. LLC, 2022 WL 3364169 (Del. Aug. 16, 2022) (No. 303, 2021).

- **Nature of the Case:** Contract (LLC Agreement & Indemnification)
- **Precedential Value:** Addressing a narrow issue, the court held that an agreement containing a covenant to indemnify a person acting in good faith also contained an implied covenant that required a good faith determination of whether that person was entitled to indemnification.
- **Procedural Posture:** A limited liability company ("LLC") brought breach of contract action against its manager in Delaware Superior Court, alleging that the manager's failure to repay monies advanced to the manager by LLC for litigation expenses pursuant to LLC agreement's indemnification provision constituted a breach of the LLC agreement. The Superior Court agreed, granting judgment for the LLC. The manager appealed, arguing that the LLC was required to make a good faith determination as to whether the Manager was entitled to indemnification and/or advancement based on the implied reading of the agreement. The Supreme Court reversed and remanded.

Baldwin v. New Wood Res. LLC, 2022 WL 3364169 (Del. Aug. 16, 2022) (No. 303, 2021).

- **Facts:** LLC and Manager operated under an LLC agreement that contained an indemnification and advancement provision. Manager was fired from his position, and various actions were filed in response. *Id*. at *4-5. Manager sought advancement of litigation expenses pursuant to the LLC agreement, but the LLC refused.
  - Manager then filed an advancement action in the Court of Chancery. After a series of motions, the Court of Chancery ordered LLC to pay Manager about $870,000 (combining advancement and indemnification payments). 2022 WL 3364169, at *8.
  - The LLC then filed a breach of contract action in Superior Court to claw back the money it paid to Manager. *Id*. at *9. The LLC claimed the Manager did not act in good faith during his tenure as a manager because he did not act with the company's best interests in mind. *Id*. The Superior Court entered judgment in favor of the LLC, ordering Manager to repay about $541,000 in money advanced to him. *Id*. at *11. The Superior Court rejected the Manager's argument that there was an implied good faith and fair dealing provision in the LLC agreement that required the company to determine in good faith whether advancement is owed to the Manager. *Id*. at *12.

Baldwin v. New Wood Res. LLC, 2022 WL 3364169 (Del. Aug. 16, 2022) (No. 303, 2021).

- **Holding:** The LLC agreement's indemnification and advancement provision required the LLC to make a good faith determination whether the Manager was owed advancement. That determination was implied by the language of the agreement, which entitled the Manager to advancement only where he manager himself was acting in good faith.
  - Relying on the Supreme Court's decision in *Dieckman*, where the Supreme Court found it was reasonably conceivable that "implied in the language of the [limited partnership agreement's] conflict resolution provision was a requirement that the General Partner not act to undermine the protections afforded to unitholders in the safe harbor process," the Court held that "although a good faith requirement is not expressly stated in Section 8.2, it is implicit in Section 8.2's language." *Id*. at *16 (quoting *Dieckman v. Regency GP LP*, 155 A.3d 358, 368 (Del. 2017)); *id*. at *16 ("Just as it would be 'too obvious' to demand the inclusion of an express condition that a general partner not subvert a safe harbor protection through materially misleading disclosures, here too, it would be 'too obvious' to demand the inclusion of an express condition that the person or persons making a determination as to whether a Person has met the standard of conduct to do so in good faith.").

Baldwin v. New Wood Res. LLC, 2022 WL 3364169 (Del. Aug. 16, 2022) (No. 303, 2021).

- **Additional Case Nuggets:**
  - The Court's ruling was guided by real-world implications: "If indemnification under Section 8.2 of the LLC Agreement could be denied for any reason, even in bad faith, the standard in Section 8.2 – requiring the indemnitee to act in good faith – would be rendered meaningless." *Id.* at *17. The Court took note of the parties decision to include "fullest extent" language in Section 8.2: "[T]he parties bargain for indemnification 'to the fullest extent permitted' so long as the indemnitee acted in good faith and in the best interests of [the LLC]. This 'fullest extent' statement is consistent with Delaware's policy of favoring indemnification and advancement rights.
  - The Supreme Court observed that its holding was consistent with the Court of Chancery's decisions in *Wilmington Leasing v. Parrish Leasing*, where the court relied on a principle of contract construction providing that "if one party is given discretion in determining whether [a] condition in fact has occurred[,] that party must use good faith in making that determination." 1996 WL 560190, at *2 (Del. Ch. Sept. 25, 1996). The Supreme Court also relied on *Sheehan v. AssuredPartners, Inc.*, where the court stated that the implied covenant "protects an agreement's spirit again underhanded tactics that deny a party the fruits of its bargain." 2020 WL 2838575, at *11 (Del. Ch. May 28, 2020).

PRICKETT, JONES & ELLIOTT
EST. 1888

59

Griffith v. Stein on behalf of Goldman Sachs Grp., Inc., 2022 WL 3365025 (Del. Aug. 16, 2022) (No. 264, 2021)

- **Nature of the Case**: Scope of Settlement Release
- **Precedential Value (2):**
  - (1) Release for class action at issue offended due process because it was overbroad in that the settlement "release released claims contemplated by the settlement itself that were not alleged in the underlying action or part of its operative facts." *Id.* at *7.
  - (2) At present, the adequacy of the class representative is not a factor in making this determination. Ct. Ch. R. 23.1 (governing derivative suits and implicitly requiring an adequate representative similar to direct, class-action claims), is silent on adequacy of representatives in context of settlement issues. The Supreme Court, however, recommended the Court of Chancery Rules Committee consider an amendment as to whether there should be an adequacy requirement.
- **Procedural Posture:** Stockholder successfully settled over the objection of an objector. The Court of Chancery granted the settlement, which included broad release of future claims. Objector appealed. The Supreme Court reversed and remanded.

PRICKETT, JONES & ELLIOTT
EST. 1888

60

Griffith v. Stein on behalf of Goldman Sachs Grp., Inc., 2022 WL 3365025 (Del. Aug. 16, 2022) (No. 264, 2021)

- **Facts:** Stockholder filed suit against corporation and board of directors asserting direct and derivative claims contending that corporation's non-employee director compensation was grossly excessive and, therefore, board's approval was breach of duty of loyalty.
  - Initially, the Court of Chancery denied a motion to dismiss, which prompted settlement negotiations. After reaching an agreement, the Chancery Court agreed with an objector and refused to approve a non-monetary settlements. It awarded fees to the objector.
  - After a second round of settlement negotiations, the Court of Chancery approved a settlement over the second objection by the objector, who argued that the plaintiff was not an adequate representative for the company's interest and the settlement was improper because it released the company from future claims.

Griffith v. Stein on behalf of Goldman Sachs Grp., Inc., 2022 WL 3365025 (Del. Aug. 16, 2022) (No. 264, 2021)

- **Holdings:**
  - (1) The settlement release was overbroad and therefore in violation of due process because it purported to release claims for future acts that had yet to occur.
  - (2) As a matter of first impression, adequacy of plaintiff as representative was not factor to be considered in approval of settlement of derivative claims.
  - (3) The Court of Chancery acted within its discretion in its consideration of factors in awarding fees to settlement objector.

Griffith v. Stein on behalf of Goldman Sachs Grp., Inc., 2022 WL 3365025 (Del. Aug. 16, 2022) (No. 264, 2021)

- **Additional Case Nuggets:**
  - The Supreme Court refused to accept objector's argument regarding the adequacy of the representative in the context of the settlement because the Court of Chancery Rules do not require this consideration when a court approves a settlement. 2022 WL 3365025, at *11.
  - Adopting the Court of Chancery's logic in *UniSuper Ltd. v. News Corp.*, 898 A.2d 344, 347 (Del. Ch. 2006), and consistent with the Supreme Court's decision in *In re Philadelphia Sock Exchange* (relying on *UniSuper*), the Court held that "a release is overbroad if it releases claims based on a set of operative facts that will occur in the future." *Id.* at *7.
  - The Supreme Court notes that "Defendants are motivated to reach an agreement that provides the broadest possible protection from future disputes." *Id.* at *6. Due to this fact, settlement releases cannot be "limitless;" otherwise, stockholders "could have their claims released without an opportunity to be heard." *Id.* In class actions, class-based settlements must not offend due process to the members of the class (i.e., preclude their potential claims from being heard). *Id.* "In the class action context, the Court of Chancery must scrutinize releases to 'ensure the fiduciary nature of the class action is respected, and that its approval of any class-based settlement does not offend due process." *Id.* at *6 (quoting *In re Celera Corp. Shareholder Litigation*, 59 A.3d 418, 434 (Del. 2012)).

PRICKETT, JONES & ELLIOTT
EST. 1888

63

Conclusion

- Thank you for your time and attention.

PRICKETT, JONES & ELLIOTT
EST. 1888

64

DSBA Supreme Court Year in Review

PRICKETT, JONES & ELLIOTT

EST. 1888

Corporate Appellate Decision Review

Samuel L. Closic

Friday, November 4, 2022

9:00 a.m. – 12:15 p.m.

1. *OptiNose AS v. Currax Pharm., LLC*, 264 A.3d 629 (Del. 2021) (Case No. 48, 2021)

A. Type:

Patent/Contract (License Agreement Concerning a Patent)

B. Precedential Value:

The Delaware Supreme Court reversed the Court of Chancery, in part, because the Court of Chancery read too narrowly what it means for a patent filing to "relate to or characterize" the tangible nasal spray product. The Court found that the words "relating to" signaled an intent to interpret expansively the connection between the patent office statements or filings and the tangible device used to administer nasal spray. *Id.* at 640. The Court buttressed its contractual reading with the "real world implication[]" that, because tangible devices do not have a role in patent prosecutions, limiting the patent holder's rights to review patent filings limited to the tangible device (as opposed to the underlying intellectual property) would render the patent holder's prior approval right meaningless in patent prosecution proceedings. *Id.* at 639.

C. Procedural Posture:

Licensee brought action against Patent Holder seeking order of specific performance, pursuant to Licensee's first right to prosecute product patents in licensing agreement, requiring Patent Holder to grant licensee power of attorney to file terminal disclaimer in patent application prosecution. Patent Holder counterclaimed seeking declaration that license agreement did not require it to provide power of attorney but it did afford Patent Holder the opportunity to review any terminal disclaimer filed with the patent office related to the patent. The Court of Chancery granted a motion for judgment on the pleadings for Licensee. Patent Holder appealed. The Court affirmed in part and reversed in part.

D. Facts:

Two pharma companies entered into a licensing agreement where Optinose ("Patent Holder") agreed to license its patent to Currax ("Licensee"). The patent concerned a powdered nasal spray. The scope of the agreement allowed Licensee to sell the powdered nasal spray in North America while Patent Holder retained the right to sell certain distinctive powdered nasal spray and liquid nasal spray. *Id.* at 631. Patent Holder gave Licensee the "first right" to prosecute and maintain patent infringement claims for the patent. *Id.* Licensee attempted to prosecute a patent but the Patent Office rejected the prosecution because the patent at issue was too similar to another patent. In order to overcome the rejection, Licensee needed to file a "terminal disclaimer" over the patent at issue (*i.e.*, a disclaimer that effectively concedes a patent's monopoly over the subject matter). To do this, Licensee needed Power of Attorney from Patent Holder.

E. Holdings:

(1) The licensing agreement required Licensor to provide Patent Holder power of attorney to file terminal disclaimer in prosecution of patent application if needed to overcome double patenting rejection, but (2) the terminal disclaimer was a filing that would trigger Patent Holder's right of prior approval over patent office statements or filings relating to or characterizing device component.

2. *Lehman Bros. Holdings, Inc. v. Kee*, 268 A.3d 178 (Del. 2021) (Case No. 416, 2020)

A. Type:

Contract (Sales Agreement)

B. Precedential Value (2):

(1) Contracts Under Seal - Under Delaware law, a contract under seal is subject to a 20-year statute of limitations as opposed to the standard 3-year statute of limitations for contracts. *Id.* at 187; *see also* 10 *Del. C.* § 8106 ("Actions subject to 3-year limitation"). Because this

extended statute of limitations may upset the reasonable expectations of typical contracting parties, "Delaware law requires a clea[r] indication of the intent to create a sealed instrument before increasing the three year statute of limitations by a factor of six." *268* A.3d at 190.

(2) Accrual Dates - The three year statutory limitation clock for rescission claims concerning superior title to land begins on the date of closing because a cause of action accrues at the time of the underlying act and is not *per se* tolled where there are contingent claims to be resolved. "[T]he focus of [the *Wal-Mart* ruling] was 'that the limitations defense pose[d] issues that require[d] a more developed record, for which reason this matter was improperly disposed of on a motion to dismiss.' To the extent *Wal-Mart* can be read to establish [a rule that a claim is inherently unknowable – and therefore does not accrue – until any contingent claims are resolved], we limit that portion of the *Wal-Mart* decision to the unique facts and circumstances present in the case.") *Id.* at 194 (citing *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d at 312, 314 (Del. 2004)).

C. Procedural Posture:

Purchaser and Purchaser's Mortgage Lender brought actions against Vendors asserting claims for rescission, unjust enrichment, false information, and declaratory judgment after a judicial determination that the state of Delaware had superior title to the parcel of land at issue. The Superior Court granted a motion to dismiss for failure to state a claim. Purchaser and Purchaser's Mortgage Lender appealed. The Court affirmed.

D. Facts:

Sweetwater ("Purchaser") bought land for $8 million,[1] financing $6 million through Lehman Brothers ("Purchaser's Lender"). However, Purchaser was aware that the state of Delaware ("State") had at least a *di minimis* claim to the land that did not appear in the chain of title (i.e., there was a slight boundary encroachment). Thus, Purchaser had actual knowledge of the State's claim, yet proceeded with the sale anyway. Two years after the closing date, the State began asserting ownership over the land, including: (i) expressly directing Purchaser's representative to stop cutting down trees on the parcel and (ii) informing Purchaser of State's intent to build a highway through the parcel. The State filed a claim in the Court of Chancery alleging it had superior title to the entire parcel four years after closing. After trial, the Court of Chancery ruled in the State's favor. Purchaser and Purchaser's Lender then filed separate lawsuits in Superior Court against the *sellers*, alleging, *inter alia*, that they were entitled to rescission of the sales contract. The Superior Court dismissed both actions, holding that the claims were time-barred. Purchaser and Purchaser's Lender appealed, arguing that their claims were timely because the statute of limitations period did not begin until the Court of Chancery held that State had superior title to the parcel.

E. Holdings:

(1) Contracts Under Seal: The sale agreements were not contracts under seal subject to a 20-year limitations period for rescission claims. The Court affirmed the Court of Chancery's judgment that a reference to the contract being under seal in the recitals and the presence of a "(s)" symbol by the parties' signature lines did not evidence the parties' unmistakable intent to enter into a contract under seal. *Id.* at 189. Drawing from the Court's prior *Whittington* decision that

[1] Third party Oriskany, Inc. purchased the land and assigned the sale agreements to Sweetwater.

set a "bright line standard" for identifying the parties' intent to enter into a sealed contract, the Supreme Court reaffirmed that the existence of a sealed contract can be ably demonstrated where the word "Seal" accompanies the parties' signatures in the contract. *Id.* (citing *Whittington v. Dragon Group, LLC*, 991 A.2d 1 (Del. 2009)).

(2) Accrual Dates: The rescission claims accrued for limitations purposes at closing. Reiterating that a cause of action for breach of contract accrued under Section 8106 at the time of the wrongful act, the Court held that even if Purchaser was ignorant of the cause of action, or had not yet ascertained actual damages, each of Purchaser's claims accrued at closing when the defective title was exchanged. *Id.* at 190-91. At the latest, any tolling ceased when the State directly informed the buyer of the State's belief that it held superior title, thereby providing inquiry notice. *Id.* at 194-95.

The Appellants contended the State's claim to the parcel was not knowable until the Court of Chancery ruled in the State's favor, relying on the Supreme Court's prior decision in *Wal-Mart* for the proposition that a claim is inherently unknowable – and therefore does not accrue – until any contingent claims are resolved. The Supreme Court rejected that argument, explaining that the State's communication with Purchaser gave notice of the State's claim just as a leaky window gives inquiry notice to a homeowner of shoddy repair work. *Id.* at 195 (citing *Lee v. Linmere Homes, Inc.*, 2008 WL 4444552, at *1 (Del. Super. Ct. Oct. 1, 2008)). By contrast, in *Wal-Mart*, there was no publicly available, objectively apparent facts showing that the insured had reason to believe the insurance policy entered for tax management purposes would instead create a massive tax liability. The Court further limited that portion of *Wal-Mart* to its facts, which included a fact-intensive review of the information available to the insured, including by means of non-public

Internal Revenue Service private letter rulings directed to third-parties, that could not be resolved on a motion to dismiss. *Id.* at 192-94.

3. *Dir. of Revenue v. Verisign, Inc.*, 267 A.3d 371 (Del. 2021) (No. 18, 2021)

A. Type:

Internal Revenue Code (Federal Tax deduction from Corporate loses)

B. Precedential Value:

This case applied the holdings to the Delaware tax code prior to a "2021 amendment." However, the Division of Revenue policy that prevented the company from claiming a Delaware state standalone net operating loss deduction that exceeded its Federal consolidated net operating loss deduction violated 30 *Del. C.* §§ 1901-1903.

C. Procedural Posture:

A Corporate taxpayer filed its federal tax returns as a consolidated group. The Delaware Division of Revenue observed a long-standing policy (not contained within any statute) that prevented a company from claiming a net operating loss deduction in Delaware that exceeded the consolidated net operating loss deduction on its federal return in which it participated. The Division of Revenue applied the policy to the company, resulting in an increased tax obligation. The company protested. The Division of Revenue denied the protest and the company appealed to the Superior Court. The Superior Court held that policy violated Constitution's Uniformity Clause. The Delaware Division of Revenue appealed to the Supreme Court. The Court affirmed in part and reversed in part.

D. Facts:

The Corporate taxpayer ("Verisign") claimed large net operating loss deductions on its 2015 and 2016 state income tax returns, resulting in $0 in tax liability to Delaware each year. The

Delaware Division of Revenue (the "Division") reviewed the returns and found that Verisign's use of net operating losses violated a longstanding, but non-statutory, Division policy. Under the policy, a corporate taxpayer that filed its federal tax returns with a consolidated group (i.e., multiple affiliated companies filing a single income tax return) was prohibited from claiming a net operating loss deduction in Delaware that exceeded the consolidated net operating loss deduction on the federal return in which it participated. Delaware does not allow consolidated tax returns, so Verisign filed standalone returns in Delaware. Verisign then filed its federal taxes, claiming virtually no Delaware deductions. The Division looks to federal tax returns as a starting point to determine its assessment. The Division reviewed Verisign's consolidated federal filings, applied the Delaware policy determining that Verisign had underreported its income, and assessed the company $1.7 million in unpaid taxes and fees. After the administrative protest was denied, the company commenced this action in Superior Court.

E. Holdings:

(1) Refusing to allow corporation to claim its actual standalone net operating loss deduction caused corporation to pay taxes on amount of income that was not its taxable income.

(2) Statutory provisions imposing tax on each eligible corporation's standalone taxable income did not allow the Division to require each taxpayer to calculate its stand-alone federal taxable income, including all deductions, in accordance with the Internal Revenue Code (IRC) as if that corporation filed separate company, *i.e.*, non-consolidated, federal income tax return.

(3) The Division did not have discretionary authority under statutory provisions imposing tax on each eligible corporation's standalone taxable income to eliminate net operating loss deduction.

(4) The Division did not have authority under statutory provisions to manipulate corporate taxpayer's federal taxable income by substituting consolidated net operating loss figure for corporation's own, single-entity net operating loss.

4. *AB Stable VIII LLC v. MAPS Hotels & Resorts One LLC*, 268 A.3d 198 (Del. 2021) (No. 71, 2021)

A. Type:

Contract (Real Estate Purchase Agreement)

B. Precedential Value:

A covenant in a land sale agreement that requires seller to continuously operate the premises in its "ordinary course consistent with past practices" was not excused by a global pandemic because the ordinary course covenant imposed "an overarching and absolute obligation" (*i.e.*, not qualified by reference to reasonable industry standards) and did not incorporate a "Material Adverse Event" (MAE) exception contained within a separate, "analytically distinct" and independent section of the agreement.

C. Procedural Posture:

Buyer and Seller entered into an agreement to sell 15 hotel and resort properties for $5.8 billion. After the Buyer called off the deal, Seller brought an action for specific performance in the Court of Chancery to compel Buyer to complete the transaction. The Court of Chancery granted judgment for Buyer. Seller appealed. The Supreme Court affirmed judgment.

D. Facts:

A hotel ("Buyer") and a company ("Seller") entered into an agreement to sell 15 hotels for $5.8 Billion. The COVID-19 pandemic forced the seller to drastically alter hotel practices prior to the closing of the deal. For example, seller closed multiple hotel locations, furloughed thousands

of employees, and implemented changes to the routine business practices in compliance with COVID protocols. The combination thereof forced the buyer to call off the deal. Seller then filed an action in the Court of Chancery seeking specific performance to compel Buyer to complete the purchase.

E. **Holdings**:

(1) Seller breached ordinary course covenant that required it to operate its hotels consistent with past practice, and therefore excused Buyer from closing on the transaction. Seller claimed it was entitled to take "reasonable, industry-consistent steps to preserve the business in response to the COVID-19 pandemic." 268 A.3d at 212. The Court rejected the Seller's argument because "the requirement that the Seller operate *only* in the ordinary course and consistent with past practice *in all material respects*, [coupled with the conspicuous absence of a reasonableness qualifier] means that its compliance is measured by its operational history and not that of the industry in which it operates." *Id.* at 212-13 (emphasis included). In other words, "the parties did not choose the actions of industry participants as the yardstick to measure the Seller's actions, in a pandemic or outside of one." *Id.* at 212.

On appeal, Seller relied on the Supreme Court's *FleetBoston* decision for the proposition that an ordinary course covenant does not "preclude" a seller from taking action necessary to "be competitive in the marketplace." *FleetBoston Financial Corp. v. Advanta Corp.*, 2003 WL 240885, at *26 (Del. Ch. Jan. 22, 2003). The Court rejected the Seller's interpretation of *FleetBoston* as establishing a general rule, noting that "[u]nder *FleetBoston*, it is the facts–and the specific language of the contract's ordinary course covenant–that determine whether a seller has acted in the ordinary course of business." *AB Stable*, 268 A.3d at 214. To that end, the Court

deferred to the Court of Chancery's finding that "overwhelming evidence" demonstrated that the Seller's changes "were wholly inconsistent with past practice." *Id.* at 215.

(2) The MAE provision that allocated pandemic risk to buyer did not relieve seller of obligation under ordinary course covenant. The Court drew a distinction between the Ordinary Course Covenant and MAE exception in the agreement, finding the "parties intended the provisions to act independently" by using "analytically distinct" standards in the different provisions. *Id.* at 216.

(3) Ordinary course covenant required seller to respond to buyer's reasonable request for details before making drastic changes to its past practice.

5. *Lenois v. Sommers as Tr. for Erin Energy Corp.*, 268 A.3d 220 (Del. 2021) (No. 33, 2021)

A. Type:

Fiduciary Duty/Bankruptcy

B. Precedential Value:

Bankruptcy trustees hold the legal right to control derivative litigation against a bankrupt company because a derivative claim is a part of the estate that is managed by the trustee; therefore, trustees may be substituted as a nominal defendant in a derivative action, be realigned as plaintiff and pursue the action even after bankruptcy has been filed and the derivative claims have been dismissed on derivative grounds (i.e., demand futility).

C. Procedural Posture:

Shareholder in oil and gas exploration company brought an action in the Court of Chancery against company's board of directors, controlling stockholder and affiliate of controlling stockholder, alleging breach of fiduciary duty and aiding and abetting breach of fiduciary duty.

The Court of Chancery dismissed the action. Shareholder appealed. Company then filed for

D. Facts:

The court notes this case presented "highly unusual facts" because "the complications arose after the nominal defendant was thrown into bankruptcy proceedings (allegedly as a result of the controller's actions) during the pendency of an appeal challenging dismissal of [plaintiff]'s derivative claims solely on derivative standing grounds [i.e., demand futility]" and, during the appeal, plaintiff "was divested of standing due to that intervening bankruptcy." 268 A.3d at 223.

Erin Energy Corporation ("Company") entered into an agreement with a third party company and the Company's controlling stockholder in which the Company would exchange a 30% equity stake for an investment and the rights to certain oil assets. According to the plaintiff's class action and derivative complaint, these "two integrated transactions . . . funneled hundreds of millions of dollars . . . from [the Company] to [the defendants]." *Id.* at 224. The Court of Chancery granted defendants' motion to dismiss because plaintiff failed to make a demand and demand was not excused as futile where plaintiff failed to plead non-exculpated claims against a majority of the Company's directors. During plaintiff's appeal on the motion to dismiss, and while the parties were preparing for oral argument on the issue, the Company filed for bankruptcy, automatically staying the Delaware action and appeal. *Id.* at 226.

The bankruptcy court then approved the Company's trustee's motion for leave to prosecute the derivative claim pending in the Court of Chancery on behalf of the estate. The trustee then moved in the Supreme Court to be substituted with the Company as the nominal defendant, and

simultaneously be realigned as the plaintiff in the derivative suit in order to pursue the interests of the estate (*i.e.*, the derivative claim is an asset of the estate in bankruptcy). *Id.* at 228-29. The trustee argued that motion to dismiss should be vacated because, among other reasons, the demand futility issue is moot if the trustee is realigned as plaintiff. *Id.* at 222. The Supreme Court agreed and remanded the case to the Court of Chancery, where that court then denied the trustee's motion for substitution and realignment. *Id.* at 229-30.

E. Holdings:

On an issue of first impression reflecting "an equitable resolution of a confluence of unusual procedural circumstances specific to this case," a Chapter 7 trustee could substitute and realign in place of the nominal defendant corporation to directly pursue shareholder's derivative claims after those claims were dismissed on demand futility grounds. *Id.* at 222. Observing that appellate courts in other jurisdictions "distinguish cases where, on the one hand, a dismissal is *immediately appealed* from cases where, on the other hand, the complaint is dismissed without a timely appeal or further immediate action, and the plaintiff later attempts to pursue several claims," the Supreme Court held that "the fact that [the original plaintiff]'s timely appeal was pending when the bankruptcy intervened is an important factor in our legal analysis and in our assessment of the equitable considerations involved." *Id.* at 234, 237 (emphasis supplied).

The Supreme Court found the Court of Chancery erred in applying the "interest of justice" exception in Court of Chancery Rule 60 because the court below "focused on a situation not involving a pending appeal, but rather one where the appeal period had passed." *Id.* at 236-37. Further, the Court observed that its focus on the timeliness of the underlying appeal when considering equitable relief was consistent with Delaware's Saving Statute (10 *Del. C.* § 8118), which is "liberally construed" in favor of deciding issues on the merits and "alleviates the harsh

consequences of the statute of limitations when an action, through no fault of the plaintiff, is technically barred." *Id.* at 238 n.79.

6. *Noranda Aluminum Holding Corp. v. XL Ins. Am., Inc.*, 269 A.3d 974 (Del. 2021) (No. 443, 2020)

A. Type:

Insurance/Post-Judgment Interest

B. Precedential Value:

Consistent with 6 *Del. C.* § 2301(a), the post-judgment interest rate to be applied to judgments awarded shall be determined by the date judgment is entered, as opposed to the date in which the insurance liability arose.

C. Procedural Posture:

Insured brought action against property insurers to recover under business interruption coverage for loss of income from explosion and breakdown of electrical equipment at aluminum smelting and casting plant that insured decided not to rebuild. The Superior Court entered judgment upon jury verdict awarding insured $28 million. Insured moved for post-judgment interest and the Superior Court granted post-judgment interest at the same rate as pre-judgment interest. Insured appealed. The Superior Court awarded insured post-judgment interest at same rate as pre-judgment interest. Insured appealed. The Supreme Court reversed.

D. Facts:

Plaintiff operated an aluminum smelting plant in Missouri. Plaintiff held various insurance policies covering various different risks. After a serious accident, plaintiff shut down the plant and sought payouts from the insurance companies. However, the carriers refused to pay for losses stemming from lost business, so plaintiff filed an action against those insurance carriers alleging

that it was owed a payout for "business interruption loss." *Id.* at 975. After a jury trial in the Delaware Superior Court, plaintiff won a judgment for $28 million and was awarded a post-judgment interest rate of 6% under 6 *Del. C.* § 2301(a). This rate reflected the same rate as pre-judgment interest.

On appeal, the plaintiff-below argued that the Superior Court should have applied a rate of 7.5% representing the legal rate on which the judgment was entered (the 1.5% difference would net about $430,000). The legal rate at issue states the post-judgment rate should be 5% over the Federal Reserve discount rate. The issue here seeks to resolve which date shall be used to determine the Federal Reserve date.

E. Holdings:

The Superior Court was required to award insured post-judgment interest at legal rate in effect on date judgment was entered, as opposed to date insurance liability arose. The Court found that the unambiguous text of the statute controlled the appeal: "We hold that, to quote Section 2301(a)'s final sentence, the judgment entered by the Superior Court in [plaintiff]'s favor 'shall, from the date of the judgment, bear post-judgment interest of 5% over the Federal Reserve discount rate." *Id.* at 975. Because the text of the statute was clear, the Court did not "go on to consider the act's legislative history." *Id.* at 978.

The Court rejected the Superior Court's application of a single rate of interest rather than separate pre- and post-judgment interest. "The 2012 addition to Section 2301(a) explicitly requires that post-judgment interest accrue at the legal rate 'from the date of judgment'–that is, in the word of sentence two, 'the time from which [post-judgment] interest is due.' This statutory text forecloses the use of *TranSched* to support a single rate of interest calculated on the date of liability and extending through final payment." *Id.* at 979 (citing *TranSched Systems Ltd. v. Versyss Transi*

Solutions, LLC,2012 WL 1415466 (Del. Ch. Mar. 29, 2012)). The Court grounded its ruling in real-world implications: "A litigant who is subject to a judgment at law–which often comprises elements, such as costs and fees, that are not components of the underlying liability–is not responsible for post-judgment interest until judgment is entered." *Id.* at 982.

7. *Valley Joist BD Holdings, LLC v. EBSCO Indus., Inc.*, 269 A.3d 984 (Del. 2021) (No. 105, 2021)

A. Type:

Fraud (Pleading Standard)

B. Precedential Value:

When pleading fraud under the heightened "particularity" pleading standard under Rule 9(b), a court must consider the totality of the plaintiff's well-pleaded facts to determine whether plaintiff has sufficiently created an inference that a misrepresented fact was "knowable" and "the defendants were in a position to know it" at the time the defendant made the fraudulent statement.

C. Procedural Posture:

The parties entered into a stock purchase agreement whereby the defendant sold all of its stock to the plaintiff. After closing, plaintiff discovered structural defects in a building that was an asset sold in the transaction. Plaintiff sought indemnification from defendant under the terms of the agreement. Defendant refused and plaintiff filed an action for breach of contract and fraud in the inducement in Superior Court. The Superior Court granted defendant's motion to dismiss the fraud claim. The Supreme Court reversed and remanded.

D. Facts:

Plaintiff is involved in the business of manufacturing custom-made steel joists used in commercial roofing and flooring. Plaintiff, a holding company, agreed to purchase the "Valley

Joist" business from Defendant for $20 million. The stock purchase agreement contemplated that "the Assets of [Valley Joist] (including the Real Property and buildings, fixtures, mechanical and other systems and improvements thereon) are in good operating condition and repair[.]" 269 A.3d at 986. At issue here is one building that has three crane bays, where each crane frequently required repair work, causing incidental costs of $500,000. *Id.* An engineer opined that the building could not support the weight of the cranes due to existing structural damage. *Id.*

Plaintiff brought breach of contract and fraud in the inducement claims against Defendant in Superior Court. The Superior Court granted Defendant's motion to dismiss the fraud claim for failure to plead facts in satisfaction of the heightened "particularity" standard. To support its claim, Plaintiff relied on five main facts to show Defendant knew of the building's structural damage: (1) Defendant's expenses report detailing roof and crane repairs, (2) an email from a crane operator reporting a crane malfunction, (3) an email sent to Defendant detailing capital expenditures, (4) an employee's statement to a superior concerning knowledge of structural issues to the building, and (5) the same employee showing his superior repair quotes indicating repairs would cost $3-4 million. *Id.* at 987.

In dismissing the fraud claim, the Superior Court acknowledged that Defendant made misrepresentations concerning the quality of the building at issue; however, those representations did not amount to fraud in the inducement because the facts failed to support a reasonable inference that Defendant knew the representations were false at the time they were made (*i.e.*, the knowledge prong of the fraud claim was not satisfied). *Id.* at 988-89. In making that determination, the Superior Court declined to consider an invoice for repair work dated *after* the stock purchase agreement and held the remaining facts were insufficient to plead fraud. *Id.* at 989.

E. Holdings:

On *de novo* review, the Supreme Court held that the fraud claim satisfied Superior Court Rule 9(b). "To state a claim for fraud, a plaintiff must allege: (1) a false representation made by the defendant; (2) the defendant knew or believed the representation was false or was recklessly indifferent to its truth; (3) the defendant intended to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted or refrained from acting in justifiable reliance on the representation; and (5) damage resulted from such reliance." *Id.* at 988. Fraud must be pled with particularity as to the "time, place, and contents of the false representations; the facts misrepresented; the identity of the person(s) making the misrepresentation; and what that person(s) gained from making the misrepresentation." *Id.*

To that end, the Supreme Court held that a sufficient pleading of a defendant's knowledge requires the plaintiff to demonstrate the underlying issue was "knowable and the defendants were in a position to know it." *Id.* at 989. The Court determined that the Superior Court erred, *inter alia*, when it relied on only one invoice dated post-closing to determine whether a reasonable inference existed as to Defendant's state of mind. *Id.* at 990. In reversing the decision, the Supreme Court held that the Superior Court failed to consider other invoices for repair work done on the building dated pre-closing. *Id.* The Court held that plaintiff's pleaded facts must be taken as a whole when determining whether a reasonable inference exists, even where one fact is disadvantageous to a plaintiff. *Id.* In discussing the invoice dated post-closing, the Court noted that "it is unclear why this [singular repair] quote would undercut the allegation in the complaint." *Id.*

8. *ACE Am. Ins. Co. v. Rite Aid Corp.*, 270 A.3d 239 (Del. 2022) (No. 339, 2020)

A. Type:

Contract/Duty to Defend (Insurance Policy)

B. Precedential Value:

The coverage for companies' personal injury insurance policies are limited to personal injury lawsuits and do not cover all instances where persons or entities are seeking economic damages against the companies stemming from injury to the general public.

C. Procedural Posture:

Drugstore owner brought action against its liability insurers for breach of contract and declaratory judgment that insurers owed duty to defend counties' suits for economic damages as result of the Drugstore' distribution of opioids. The Superior Court entered summary judgment in favor of the Drugstore. Insurers applied to the Supreme Court for certification of an interlocutory appeal, which was accepted. The Supreme Court reversed the Superior Court's grant of summary judgment.

D. Facts:

Plaintiff is a drugstore ("Drugstore") that carried a general insurance policy for personal injury relating to the operation of its business. The insurance policy at issue agreed to pay claims "for" or "because of" personal injury. Multiple counties in Ohio were suing the Drugstore for its role in marketing and supplying opioids at its pharmacies. The Drugstore filed an action for breach of contract in the Superior Court against its insurance company claiming that the insurance company had an obligation to defend the plaintiff in the opioid-related lawsuits.

The Superior Court held that the lawsuits sought damages "for" or "because of" personal injury as there was arguably a causal connection between the Ohio counties' economic damages and the injuries to their citizens from the opioid epidemic.

E. Holdings:

The Delaware Supreme Court disagreed with the Superior Court's determination that the Ohio lawsuits were "for" or "because of" personal injury, as contemplated by the policy. The Court held that the above language from the insurance policy covered only: (1) the person injured, (2) those recovering on behalf of the person injured, and (3) people or organizations that directly cared for or treated the person injured. 270 A.3d at 241. The Court held that the Ohio counties did not seek damages "for or because of" bodily injury under an of the here categories above, and thus, the insurers owed no duty to defend.

Instead, the Ohio suits sought economic damages that arose in connection with personal injuries of its citizens caused by opioids sold by the Drugstore. Although the insurance company would be required to defend the Drugstore for costs incurred by an organization (such as a government entity) caring for individuals who were harmed, the Ohio plaintiffs failed to plead for personal injury, and thus the policy here is not triggered. As a result, the insurance carriers did not breach their contract with the Drugstore when they refused to pay the Drugstore under the personal injury policy for the Ohio suits.

9. *Cox Commc'ns, Inc. v. T-Mobile US, Inc.*, 273 A.3d 752 (Del. 2022), *reargument denied* (Mar. 22, 2022) (No. 340, 2021)

A. Type:

Contract (Preliminary Agreement)

B. Precedential Value:

An agreement that leaves material terms open to future negotiations is a preliminary agreement that does not bring the parties beyond requiring each party to negotiate the open terms in good faith (*i.e.*, parties are not required to ultimately agree to a deal or transaction).

C. Procedural Posture:

A communications company brought an action seeking declaration as to the enforceability of its settlement agreement with a mobile network operator's predecessor-in-interest that contemplated an agreement under which the communication company would resell wireless mobile services as an exclusive partner. The operator counterclaimed for breach of contract. After a bench trial, the Court of Chancery entered a permanent injunction against the communications company and that company appealed. The Supreme Court reversed.

D. Facts:

Cox Communications, Inc. ("Cox") and Sprint Corp. ("Sprint") entered into a settlement agreement. The agreement stipulated that Cox would enter into an exclusive provider agreement with Sprint prior to offering services to its customers. Essentially, Sprint would sell wireless mobile services to Cox, who would then resell those services to its own customers. Soon thereafter, T-Mobile acquired Sprint, and consequently, Cox partnered with Verizon, ultimately deciding not to enter into the exclusive provider agreement with Sprint (or its successor).

T-Mobile, as Sprint's successor, sued Cox, claiming that Cox breached the settlement agreement when Cox elected not to enter into the exclusive provider agreement. Cox and Sprint never formally entered into the exclusive provider agreement; instead, the parties effectively agreed to enter into the agreement later. Cox brought an action in Chancery Court seeking declaratory judgment that the "agreement to agree" was unenforceable, or alternatively, the agreement was merely a preliminary agreement to negotiate at a later date in good faith, which Cox was released from when Sprint was acquired by T-Mobile.

E. Holdings:

(1) The contemplated agreement was a preliminary agreement requiring good-faith negotiations on open terms (*i.e.*, a "Type II agreement"). "Section 9(e) does not reflect consensus

on all open points that require negotiation" because it "contemplates a future 'definitive' agreement." 273 A.3d at 761. "Because [Section 9(e)] leaves material terms open to future negotiations, Section 9(e) is a paradigmatic Type II agreement of the kind we recognized in *SIGA v. Pharmathene*[, 67 A.3d 330, 339 (Del. 2013)]. "Parties to such agreements must negotiate the open terms in good faith, but they are not required to make a deal." *Id.* at 760-61. "Type I agreements are fully binding; Type II agreements 'do not commit the parties to their ultimate contractual objective but rather to the obligation to negotiate the open issues in good faith." *Id.* at 761 (quoting *SIGA*, 67 A.3d at 349).

(2) The agreement did not include an additional, immediately applicable, binding promise about company not entering the market or making a deal with a competitor. "[T]he Court of Chancery's interpretation strayed from the plain text of the first sentence of Section 9(e) when it gleaned two distinct promises from a sentence in which Cox promised to do one thing." *Id.* at 765. "Conspicuously absent from [the first sentence of Section 9(e)] is any textual indicator–'and,' 'also,' 'additionally,' etc.–that it contains more than a single promise." *Id.* at 763.

(3) The company made binding judicial admission as to operator's status as successor-in-interest. "We agree with the Court of Chancery that Cox's concessions of T-Mobile's standing over months of litigation precludes it from now arguing that T-Mobile is a stranger to Section 9(e)." *Id.* at 760. "Cox made clear, direct, and direct concessions that T-Mobile had stepped into Sprint's contractual shoes. These admissions formed the basis of Cox's declaratory judgment action, which forced T-Mobile into court and required it to make compulsory counterclaims and cooperate with discovery." *Id.* at 768.

10. *N. Am. Leasing, Inc. v. NASDI Holdings*, LLC, 276 A.3d 463 (Del. 2022) (No. 192, 2022)

A. Type:

Contract (Indemnity Obligation)

B. Precedential Value:

Under the terms of the contract at issue, the reasonable time within which notice of a claim must be given does not begin to run until the indemnitee becomes aware of the existence of the claim, that is, sometime after the claim comes into existence.

C. Procedural Posture:

Seller of two companies and seller's parent corporation brought action against purchaser, purchaser's affiliate, and companies, asserting claims for breach of indemnity obligation, equitable subrogation, and declaratory judgment. Plaintiffs filed motion for partial summary judgment. The Court of Chancery granted the motion and subsequently granted in part plaintiffs' motion for entry of final judgment. Defendants appealed. The Supreme Court affirmed.

D. Facts:

Seller owned two Delaware companies: NASDI and Yankee. Buyer was North American Leasing. Buyer's parent, Great Lakes, agreed that performance and payment bonds on existing projects being performed by NASDI and Yankee would remain in place for the duration of the projects, and that Great Lakes would indemnify NASDI for any losses incurred on projects. One project incurred losses when NASDI refused performance. When NASDI sought indemnification, Great Lakes refused, claiming the notice was untimely per the agreement.

E. Holdings:

(1) Plaintiffs gave timely notice of their indemnification claims for losses arising from performance and payment bonds.

(2) Court of Chancery did not err in finding that defendants waived their affirmative defense of set-off/recoupment. Interpreting the contract's language, the Court found the indemnification request was timely. *See id.* at 469 ("The question, therefore, is whether the clause in Section 9.3(a) beginning 'but in any event' is a limitation on the preceding 'reasonable time' clause or, whether it is an exception to that clause applicable only to indemnification claims arising from the seller's representations and warranties as discussed in Section 9.5").

11. *TransPerfect Glob., Inc. v. Pincus*, 278 A.3d 630 (Del. 2022), *reargument denied* (June 21, 2022) (No. 154, 167, 175, 2021)

A. Type:

Corporate Custodian under 8 *Del. C.* § 226.

B. Precedential Value:

"[T]o find a corporate office or shareholder in civil contempt of a court order, the trial court must specifically determine that the officer or shareholder bore personal responsibility for the contemptuous conduct. This is consistent with [the] requirement that, when an asserted violation of a court order is the basis for contempt, the party to be sanctioned must be bound by the order, have clear notice of it, and nevertheless violate it in a meaningful way." 278 A.3d at 650.

C. Procedural Posture:

Two co-founders of a company were gridlocked in their decision-making and required a court-order custodian, appointed under 8 *Del. C.* § 226, to step in to help sell the company. One co-founder cashed out here shares to the other co-founder. Three issues were consolidated and are at issue here on appeal. First, the Court of Chancery issued a jurisdiction order and held Shawe in contempt for violating the order. Second, the Court of Chancery granted a custodian's discharge

order. Third, the Court of Chancery granted a fee award to the Custodian. Co-founder appeals all three issues. The Supreme Court reversed part of the first issue and affirmed the remaining issues.

D. Facts:

Two co-founders ("Etling" and "Shawe") of Transperfect Global, Inc. (the "Company") were gridlocked in their decision-making regarding the sale of the company. They applied for and received a court-appointed custodian as a result ("Custodian"). Subsequently, the Court of Chancery facilitated the sale of all of Etling's shares to Shawe (the "Final Order"). The Custodian requested reimbursement for his custodianship. Shawe had been consistently uncooperative with the Custodian, causing years of litigation in multiple states, accumulating attorney's fees in the process. On appeal, this case addressed three challenges by Shawe and the company (together, "Defendants"): (1) a jurisdiction order that limited the parties' ability to litigate exclusively in Delaware, (2) the discharge order alleviating the Custodian of his custodianship and releasing his from future claims by the Defendants, and (3) the fee order awarding the Custodian $3.2 million in fees for his service.

E. Holdings:

(1) The Supreme Court affirms the validity of the jurisdictional order limiting the Court of Chancery as the exclusive venue for litigation related to these issues, but reverses the Court of Chancery's contempt order for the filing of an action in Nevada by the company because Shawe cannot be personally responsible for the company's suit where he is not a named plaintiff. *Id.* at 635, 647-48. The Court took up the issue of whether the Court of Chancery specifically found Shawe to have engaged in contemptuous conduct despite Shawe not raising the issue below after determining, pursuant to Supreme Court Rule 8, that the trial court committed plain error requiring review in the interests of justice. *Id.* at 649-650. ("The court never identified a specific action

taken by Shawe personally that violated the Final Order, nor does Pincus point to one in his briefing. Nevertheless, the court found Shawe in contempt . . . . Given the seriousness of a civil contempt sanction, which may be accompanied by large fines and even imprisonment, this result would be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process and would not, therefore, comport with the interests of justice.").

(2) The Supreme Court affirms the discharge order that released the Custodian from future liability. Under 8 *Del. C.* § 226, the Court of Chancery has discretion to manage a custodianship. The Supreme Court held the Chancery's order to release the Custodian did not abuse that discretion. *Id.* at 635-36. First, Defendants argued that the contract at issue governed the terms of the release of the Custodian and thus the Chancery Court could not release the Custodian in a manner inconsistent with those terms. The Supreme Court held that Chancery cannot relinquish its statutory powers in favor of a contractual agreement. *See Id.* at 651 ("A contract–even if court-approved–cannot prospectively constrain a court's existing statutory powers."). Second, Defendants argued that the Chancery Court erred in releasing the Custodian from "any claims against [him] related to his work as Custodian." The Supreme Court disagreed, stating that it is not an abuse of the Chancery Court's statutory discretion to release Custodians from future claims "spawned" from their duties. Of course, this determination is a case by case basis.

(3) The Supreme Court affirms the fee award for the Custodian. Defendants argued the Fees and Expenses awarded to the custodian were excessive. The Chancery Court awarded $3.2 million to the Custodian for his work over year and a half period. The Supreme Court reviewed the permissibility of this award under a *de novo* standard as an award for attorney's fees, and it reviewed the amount under the abuse of discretion standard. The Supreme Court found the award was permissible and not an abuse of discretion.

12. *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 279 A.3d 323 (Del. June 15, 2022) (No. 360, 2021).

A. Type:

Charter Provision/Contract and 8. *Del. C.* § 271

B. Precedential Value:

A company's charter provision can take precedent over 8 *Del. C.* § 271 with respect to the procedure for the disposition of the company's assets.

C. Procedural Posture:

A technology company on the brink of financial collapse entered into an omnibus agreement with multiple creditors whom the company owed millions. Because the company pledged its assets for collateral on multiple loans, the agreement stipulated that the company would assign its assets to another company to avoid foreclosure. However, the controllers of the indebted company filed suit in the Court of Chancery seeking a temporary restraining order ("TRO") to prevent the agreement's execution. The assignee filed multiple counterclaims. The Court of Chancery, *inter alia*, granted the assignee's motion for preliminary injunction to prevent the company from thwarting the agreement. The company moved to modify or stay the injunction, but the court denied the motion. Company appealed. The Supreme Court vacated in part, reversed in part, and remanded.

D. Facts:

The company ("Stream") is controlled by the Rajan family, who collectively own the majority of Stream's voting shares. Stream did not hold annual shareholder meetings or keep company meeting minutes. Stream, owing millions of dollars to multiple creditors, pledged its assets as collateral on various loans. Eventually, Stream defaulted, and its senior creditor ("SLS")

filed suit in Superior Court seeking foreclosure. During its financial difficulties, Stream appointed four outside directors who negotiated with Stream's creditors to broker a resolution. Consequently, Stream executed an omnibus agreement with SLS and two junior creditors who also held a security interest in Stream's assets (respectively, "Hawk" and "Equity Investors"). The agreement provided that Stream would assign its assets to SeeCubic, Inc. ("SeeCubic") in exchange for SLS and Hawk to stay the foreclosure action pending in the Superior Court. However, in an apparent attempt to "creat[e] litigation chaos," the Rajan family, through Stream, filed suit in the Court of Chancery and moved for a TRO seeking to prevent SeeCubic from enforcing the Omnibus Agreement. SeeCubic then filed its counterclaims seeking a TRO against Stream.

This case "address[ed] whether approval of a corporation's Class B stockholders was required to transfer pledged assets to secured creditors in connection with what was, in essence, a privately structured foreclosure transaction." 279 A.3d at 325. Section 271 of the Delaware General Corporation Law deals with the sale, lease or exchange of assets, consideration, and procedure. Under the common law, approval by a corporation's stockholders is needed for the disposition of all or substantially all of its assets, unless the disposition concerns insolvency (*e.g.*, foreclosure actions). The question here is whether Section 271 or the company's Charter Provision controls the issue of stockholder approval.

E. Holdings:

The Supreme Court held that the charter provision at issue was materially different than Section 271. As a result, the Court did not look to Section 271 to interpret the Charter. Instead, because the charter included the term "or other disposition," the charter accounted for the

disposition of assets occurring here and controlled. Thus, the shareholders should have voted to approve the transaction.

The Court did not look beyond the unambiguous, bespoke language in the charter: "The drafters could have simply tracked the statute but did not." *Id.* at 340. "It follows that, there is no need to look to Section 271 as an interpretive guide in construing the language of the Class Vote Provision because the Charter's language does not track Section 271." *Id.* at 342. Moreover, language in a charter is not ambiguous where there is a "plain meaning" supported by "common dictionary definitions." *Id.* at 341. The Court declined to read in an exception to Section 271 that eliminates the need for stockholders to approve a transaction in addition to the board of directors where the company is insolvent: "[T]here is no Delaware common law 'board only' insolvency exception under Section 271. Rather, the enactment of Section 271 and its predecessor superseded any such common law exception, to the extent one existed in Delaware." *Id.* at 337-38.

The Court's holdings were grounded in Delaware's public policy of promoting stability in the Delaware General Corporation Law: "As a matter of policy, unearthing a 'board only' insolvency exception cited only decades ago, and never by any Delaware court, would foster uncertainty and potential inconsistency in a context where predictability is crucial for corporations that have availed themselves of Delaware law. . . . Promoting stability in our DGCL is an remains of paramount importance." *Id.* at 354-55; *see also id.* at 355 ("[E]nforcing the unambiguous Charter provision is consistent with our policy of seeking to promote stability and predictability in our corporate laws, and with recognition that Delaware is a contractarian state.").

13. *Diep on behalf of El Pollo Loco Holdings, Inc. v. Trimaran Pollo Partners, L.L.C.*, 2022 WL 2334396 (Del. June 28, 2022) (No. 313, 2021)

A. Type:

Special Litigation Committee member independence and *Zapata* review.

B. Precedential Value:

Establishes a standard for evaluating independence and disinterestedness of a Special Litigation Committee member: "[T]he court must ask whether the SLC member would be more willing to risk her reputation than the personal or professional relationship with the director subject to investigation." 2022 WL 2334396, at *13.

C. Procedural Posture:

Shareholder of fast food company filed derivative claims against certain members of the company's board ("Defendants") alleging that they concealed negative impact of price increases for products during an earnings call ("concealment claim") and sold stock in the company while in possession of material non-public information ("insider trading claim" or "*Brophy* claim"). The Court of Chancery denied Defendants' motion to dismiss, prompting the company to designate a special litigation committee ("SLC") with exclusive authority to investigate the claims and take any action in the best interests of the company. After a lengthy investigation, the SLC recommended terminating both claims. The Court of Chancery granted the SLC's motion under a "Zapata Review" (from *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981)). Shareholder appealed, alleging there were material issues of fact concerning both the independence of the SLC and the reasonableness of its investigation. The Supreme Court affirmed the Court of Chancery's judgment.

D. Facts:

The company ("El Pollo") is a fast food restaurant chain that conducted an initial public offering in 2014. El Pollo adopted an insider trading policy that restricted insiders from trading the company's stock outside of specified windows of time. Between 2014 and 2015, El Pollo

increased its prices by 3% across the board. Sales decreased more than expected. El Pollo's Chief Financial Officer ("CFO") presented the Chief Executive Officer ("CEO") with a survey showing a decrease in customer satisfaction. The CEO requested the CFO keep the survey a secret. El Pollo recorded a metric called Same Store Sales ("SSS") which measured "the year-to-year change in the number of transaction and the aggregate amount spent per transaction at each store." *Id.* at *2. On a mid-quarter earnings call, management told investors the projected SSS would range from 3-5%, but documents showed management projected an SSS score at the low end of the range. Multiple insiders subsequently sold stock before it decreased further. In total, $130 million of stock was sold. When the quarter ended, the actual SSS was 1.3%, well below the 3-5% projection. Shareholder then filed his complaint in the Court of Chancery.

E. Holdings:

(1) The committee members' "mere familiarity" with derivative claims through their roles on the board of directors and as defendants did not compromise their independence.

(2) Similarly, the committee members' professional and personal relationships with private investment firm's founder did not impact committee's independence.

(3) The committee had reasonable basis to conclude that derivative claims lacked merit. *Zapata*'s second step, whereby the Court uses its discretion to evaluate the reasonableness of a special litigation committee's conclusions, is based on the objectivity and thoroughness of its report, not whether the report resolved all issues of disputed fact in the underlying litigation: "[T]he question is not whether there were disputed issues of material fact about the three merits-based issues raised by Diep. Instead, the question is whether disputed issues of material fact were raised about the scope of the investigation and the reasonableness of the SLC's conclusions." *Id.* at *15. The Court found the SLC's report was reasonable, including because the SLC relied on

"contemporaneous" board communications in drawing its conclusions that the case should be dismissed: "The court of Chancery did not abuse its discretion when it applied *Zapata*'s second step. The record surrounding the SLC's report and its conclusions did not reveal any unusual concerns about the merits of the claims, the committee's process, or matters of law and policy such that the court should have intervened and refused to dismiss the derivative suit as a matter of its own business judgment." *Id.* at *16-17.

(4) Court of Chancery's decision under *Zapata*'s discretionary second step to dismiss was warranted.

14. *NVIDIA Corp. v. City of Westland Police & Fire Ret. Sys.*, 2022 WL 2812718 (Del. July 19, 2022), *as revised* (July 25, 2022) (No. 259, 2021).

A. Type:

Books and Records Demand 8 Del. C. § 220.

B. Precedential Value (2):

(1) Endorsing the Court of Chancery's decision in *In re Facebook, Inc. Section 220 Litigation*, 2019 WL 2320842, at *18 (Del. Ch. May 30, 2019), the Supreme Court here held that "Section 220 plaintiffs may narrow their requests during litigation if they do so in good faith and such narrowing is not prejudicial to the company." *NVIDIA*, 2022 WL 2812718, at *8.

(2) Reaffirming the exception to hearsay evidence for stockholders establishing a credible basis under 8 Del. C. § 220 ("Section 220") that was established in the Supreme Court's prior decision in *Thomas & Betts Corp. v. Leviton Mfg. Co., Inc.*, 681 A.2d 1026 (Del. 1996) and held the exception applies to Section 220 generally and "encompasses more than just the credible basis context." *Id.* at *13.

C. Procedural Posture:

Stockholders of a company sought books and records under *8 Del. C.* § 220. The company agreed to supply certain documents, but refused to supply others, claiming those requests were too broad. The stockholders responded by filing a Section 220 complaint. The Court of Chancery found the stockholders stated a proper purpose for their demand (*i.e.*, to "investigat[e] potential wrongdoing"). *Id.* at *5. The Court of Chancery ordered the Company to produce certain records related to the communications surrounding the demand for computer chips. *Id.* The Company appealed the order to produce books and records. The Supreme Court affirmed in part and reversed in part.

D. Facts:

NVIDIA (the "Company") sold computer chips used for video games. Demand for computer chips increased in 2017 when consumers began using the chips to mine or cryptocurrency. In response, the Company manufactured special cryptocurrency computer chips. Throughout 2017 and 2018, the Company's executives made a series of statements concerning the effect of cryptocurrency mining on the business. *Id.* at *2. The Company's Chief Executive Officer and Chief Financial Officer sold millions of dollars of company stock at the end of 2017. *Id.* at *3. By the end of 2018, the executives admitted that the demand for computer chips it had predicted had not materialized. *Id.* Plaintiffs then served an inspection demand pursuant to 8 *Del. C.* § 220 ("Section 220") to investigate potential wrongdoing related to the statements made about the demand for computer chips. *Id.* at *4. Stockholders suspected that certain executives knowingly made false or misleading statements during earnings calls that inflated the company's stock price, then, those executives then sold their stock at inflated prices.

E. Holdings:

The Supreme Court found the Court of Chancery did not abuse its discretion ordering the production of documents, or determining that stockholders had a proper purpose and credible basis to suspect corporate wrongdoing. The only issue reversed was the Court of Chancery's holding that the stockholders were able to rely on certain hearsay evidence. The Court of Chancery said, to that end, that the stockholders "could show a proper purpose by relying on the Original Demands and interrogatories[.]" *Id.* at *15. The Supreme Court disagreed. However, the Court reaffirmed the low bar for credible basis standard: The credible basis standard is satisfied where the court can "'connect the dots' in order to be able to reasonably infer the possibility of wrongdoing." *Id.* at *16 (quoting Court of Chancery's transcript ruling). "While th[e] evidence [at bar] likely would fall short of that necessary to support an actual claim, we cannot say that it is insufficient to meet the lowest possible burden of proof – a credible basis from which the Court of Chancery can infer there is possible mismanagement that would warrant further investigation." *Id.* at *16; *see also id.* at *16 ("When showing a credible basis for wrongdoing, Section 220 plaintiffs are not confined to a single theory and "need not identify the particular course of action the stockholder will take. . . .") (quoting *AmerisourceBergen Corp. v. Lebanon Cnty. Employees' Ret. Fund*, 243 A.3d 417, at 421 (Del. 2020)).

In the demand letter, the stockholders relied on hearsay statements contained within affidavits to establish the proper purpose requirement under Section 220. Neither party argued this is not hearsay. However, the plaintiffs failed to delivery to the company a list of affiants or the affidavits themselves. Consequently, the company did not have the opportunity to review the affidavits and test whether the stockholder's purpose was proper. The Supreme Court held, *inter alia*, that (1) changes made by stockholders to requests for books and records (stockholders narrowed their requests during litigation) did not render requests improper, (2) hearsay is

admissible in an action to inspect a corporation's books and records when that hearsay is sufficiently reliable, and (3) refusal of stockholders to cooperate with the Company regarding the identification of trial witnesses or affiants precluded stockholders from relying solely on affidavits to establish their stated purpose.

To the first point, stockholders may generally use hearsay in demand letters, because requiring otherwise would force all Section 220 plaintiffs to testify live at trial. This would result in "inefficiency in the process." *Id.* at *11. Section 220 actions are summary proceedings. *Id.* When the requests included in a Section 220 demand change between the time of the demand and trial in a Section 220 proceeding, there is no prejudice to the company where "although the wording [of the requests during litigation] is slightly different, the gist of the request remains the same." *Id.* at *8. Applying that logic to the appeal at issue, the Court held that any "changes to the Stockholders' requests [were appropriate because they] had the effect of narrowing exactly which documents and records might fulfill that demand." *Id.* at *9.

To the second point, Delaware Rules of Evidence apply in "all actions and proceedings in Delaware courts[.]" *Id.* However, a doctrinal exception applies in Section 220 cases (see *Thomas & Betts*, and *Skoglund* cases)[2] which allows "reliable" hearsay in Section 220 demand letters to establish the proper purpose and credible basis standard (In Section 220 actions, a plaintiff must state a proper purpose for making a demand to inspect books and records of the company, which then must be established by showing, by a preponderance of the evidence, a credible basis to suspect a proper purpose for inspection).

[2] *Thomas & Betts Corp. v. Leviton Mfg. Co., Inc.*, 681 A.2d 1026 (Del. 1996); *Skoglund v. Ormand Indus., Inc.*, 372 A.2d 204 (Del. Ch. 1976).

To the last point, "It is established that a company in a Section 220 action has a right to depose the stockholder." *Id.* at *14. Stockholders must be transparent with regard to their plans for witnesses to be called a trial and affiants. *Id.* Hearsay cannot be used to support a Section 220 demand unless the company receives an opportunity to test the its reliability.

15. *In re GGP, Inc. Stockholder Litig.*, 2022 WL 2815820 (Del. July 19, 2022) (No. 202, 2021)

A. Type

Stockholder Suit (Breach of Fiduciary Duty of Disclosure & Quasi-Appraisal Remedy)

B. Precedential Value:

Disclosures that describe the merger consideration or appraisal remedy in a confusing manner are materially misleading and incomplete because they fail to provide stockholders with the information necessary to decide whether to dissent and seek appraisal.

C. Procedural Posture

The Court of Chancery granted a motion to dismiss for failure to state a claim on all counts. Stockholder-plaintiffs appealed. Plaintiffs' complaint alleged six counts, but only two are at issue on appeal. First, plaintiffs alleged that the structure of a merger eviscerated stockholders' appraisal rights and that the individual directors of the target company breached their fiduciary duties of loyalty by failing to accurately disclose material information to stockholders when soliciting votes for a proposed merger. Second, plaintiffs alleged that the acquiring company aided and abetted the target company's directors in designing said disclosure (the Court of Chancery determined the acquirer was not a controller and thus owed no fiduciary duties to the target company or its shareholders). The Court affirmed in part and reversed in part.

D. Facts

Prior to the transaction, the acquirer ("Brookfield") owned about 35% of GGP's voting stock and appointed three directors to the nine-member GGP Board. 2022 WL 2815820, at *3. In November 2017, Brookfield made an unsolicited offer to purchase the remaining 65% of GGP shares it did not own. *Id.* After months of negotiation between GGP's five-member Special Committee and Brookfield, the companies agreed Brookfield would acquire GGP for $23.50 per share. *Id.* at *4.

The Special Committee, however, refused to include an appraisal-rights closing condition during negotiations.[3] Instead, the companies agreed to structure the merger consideration in two parts: first, GGP shareholders would receive a "pre-closing dividend" consisting of cash and shares funded by Brookfield; second, GGP shareholders would receive a "per share merger consideration" worth $0.312 per share. *Id.* at *5-6. The pre-closing dividend amounted to 98.5% of the total merger consideration. *Id.* at *6. Plaintiffs alleged that the merger consideration was structured in this manner to limit Brookfield's exposure to appraisal claims. In other words, following the close of the merger, stockholders' appraisal would be limited to the much smaller "per share consideration" worth approximately $0.312, as opposed to the full $23.50.

GGP provided its stockholders with a Proxy ahead of the merger vote. In discussing the structure of the merger consideration, the Court noted that the "exact figures were not ascertainable from the Proxy." *Id.* Further, the Proxy did not make clear whether stockholders would be entitled to appraisal with respect to the entire merger consideration (i.e., $23.50 per share), or merely the "per share merger consideration" (i.e., $0.312 per share). *Id.* at *7-8. The stockholders voted to approve the merger. Soon thereafter, plaintiffs filed suit, alleging, among other things, that the

[3] "Generally speaking, an appraisal-rights closing condition allows the purchaser to terminate the transaction if a specified number of shares demands appraisal." *Id.* at *4.

structure of the merger consideration was designed to "eviscerate GGP stockholders' appraisal rights" and that the director defendants breached their duty of disclosure by failing to provide GGP stockholders "with a fair summary of their appraisal rights and not disclosing all material information" relevant to the transaction or appraisal. *Id.* at *8. Plaintiffs also alleged that Brookfield aided and abetted the design of the misleading disclosure.

E. Holding

The Court affirmed the Court of Chancery's determination that the transaction did not eviscerate stockholders' appraisal rights. However, the Court reversed and remanded the remaining two issues, holding plaintiffs sufficiently pled that: (1) the director defendants breached their duty of disclosure because the Proxy was materially misleading, and (2) Brookfield aided and abetted the director defendants in designing the materially misleading Proxy.

First, the structure of the merger consideration did not violate stockholders' appraisal rights. *Id.* at *10. The Court held, "[D]ividends that are conditioned on the consummation of a merger are treated as merger consideration under Delaware law" and accepting such a dividend "does not result in the abandonment of a stockholder's appraisal right." *Id.* at *10. Relying on *Crawford*, the Court noted that appraisal proceedings "determine the value of the corporation at the time of the merger as if it had not occurred, [and] dividends expressly conditioned on the merger—like all other merger consideration—must be treated as if they had not been paid." *Id.* at *15 (citing *Louisiana Municipal Police Employees Retirement System v. Crawford*, 918 A.2d 1172 (Del. Ch. 2007)). Therefore, the bifurcated merger consideration did not eviscerate the stockholders' appraisal rights because any judicial determination of the fair value of GGP shares would account for the pre-closing dividend.

Second, the Proxy was "confusing and misleading." *Id.* at *19. The Proxy claimed that stockholders' appraisal remedy would be limited to the post-closing "per share consideration;" however, that is contrary to Delaware law, as explained above. Material information is that which creates a "substantial likelihood that a reasonable stockholder would consider it important in deciding how to vote." *Id.* at *17. Here, the Proxy misled stockholders into believing their appraisal remedy would be approximately $0.312, rather than approximately $23.50—an important factor in deciding how to vote. Thus, the Proxy's statements were material "because they deprived stockholders of necessary information about the fair value available in an appraisal proceeding and misled stockholders about the operation of [Delaware's appraisal statute]." *Id.* at *22.

Last, the Court held it is "reasonably conceivable" that Brookfield aided and abetted the disclosure violations "as another method of limiting Brookfield's exposure to appraisal demands." *Id.* at *23. As stated, the Special Committee rejected Brookfield's requests to include an appraisal-rights closing condition, and the parties settled on the structure of the merger consideration soon thereafter. Further, "the Defendants have not identified an alternative justification for the structure they chose." *Id.* In light of these facts, the plaintiffs stated a claim for aiding and abetting.

16. *Baldwin v. New Wood Res. LLC*, 2022 WL 3364169 (Del. Aug. 16, 2022) (No. 303, 2021).

A. Type:

Contract (LLC Agreement & Indemnification)

B. Precedential Value:

Addressing a narrow issue, the court held that an agreement containing a covenant to indemnify a person acting in good faith also contained an implied covenant that required a good faith determination of whether that person was entitled to indemnification.

C. Procedural Posture:

After litigation in federal court and the Delaware Court of Chancery, a limited liability company ("LLC") brought breach of contract action against its manager in Delaware Superior Court, alleging that the manager's failure to repay monies advanced to the manager by LLC for litigation expenses pursuant to LLC agreement's indemnification provision constituted a breach of the LLC agreement. The Superior Court agreed, granting judgment for the LLC. The manager appealed, arguing that the LLC was required to make a good faith determination as to whether the Manager was entitled to indemnification and/or advancement based on the implied reading of the agreement. The Supreme Court reversed and remanded.

D. Facts:

Plaintiff New Wood Resources ("LLC") is a manufacturing company. Defendant is a manager of the LLC ("Manager") who oversaw manufacturing operations. LLC and Manager operated under an LLC agreement that contained an indemnification and advancement provision. Manager was fired from his position, and various actions were filed in response. 2022 WL 3364169, at *4-5. Manager sought advancement of litigation expenses pursuant to the LLC agreement, but the LLC refused. Manager then filed an advancement action in the Court of Chancery. After a series of motions, the Court of Chancery ordered LLC to pay Manager about $870,000 (combining advancement and indemnification payments). *Id.* at *8. The LLC then filed a breach of contract action in Superior Court to claw back the money it paid to Manager. *Id.* at *9. The LLC claimed the Manager did not act in good faith during his tenure as a manager because he

did not act with the company's best interests in mind. *Id.* The Superior Court entered judgment in favor of the LLC, ordering Manager to repay about $541,000 in money advanced to him. *Id.* at *11. The Superior Court rejected the Manager's argument that there was an implied good faith and fair dealing provision in the LLC agreement that required the company to determine in good faith whether advancement is owed to the Manager. *Id.* at *12.

E. Holdings:

The LLC agreement's indemnification and advancement provision required the LLC to make a good faith determination whether the Manager was owed advancement. That determination was implied by the language of the agreement, which entitled the Manager to advancement only where he manager himself was acting in good faith. According to the LLC Agreement, the determination of whether a Person acted in good faith may be made in one of three ways: (1) by the managers; (2) by independent legal counsel; or (3) by a majority of the then-outstanding unitholders. However, the Court addressed the narrow issue of whether the agreement contained an implied covenant of good faith that required the determination of whether a person was entitled to indemnification also be made in good faith.

Relying on the Supreme Court's decision in *Dieckman*, where the Supreme Court found it was reasonably conceivable that "implied in the language of the [limited partnership agreement's] conflict resolution provision was a requirement that the General Partner not act to undermine the protections afforded to unitholders in the safe harbor process," the Court held that "although a good faith requirement is not expressly stated in Section 8.2, it is implicit in Section 8.2's language." *Id.* at *16 (quoting *Dieckman v. Regency GP LP*, 155 A.3d 358, 368 (Del. 2017)); *id.* at *16 ("Just as it would be 'too obvious' to demand the inclusion of an express condition that a general partner not subvert a safe harbor protection through materially misleading disclosures, here

too, it would be 'too obvious' to demand the inclusion of an express condition that the person or persons making a determination as to whether a Person has met the standard of conduct to do so in good faith.").

The Court's ruling was guided by real-world implications: "If indemnification under Section 8.2 of the LLC Agreement could be denied for any reason, even in bad faith, the standard in Section 8.2 – requiring the indemnitee to act in good faith – would be rendered meaningless." *Id.* at *17. The Court took note of the parties decision to include "fullest extent" language in Section 8.2: "[T]he parties bargain for indemnification 'to the fullest extent permitted' so long as the indemnitee acted in good faith and in the best interests of [the LLC]. This 'fullest extent' statement is consistent with Delaware's policy of favoring indemnification and advancement rights. Implying a good faith obligation in Section 8.2 is consistent with the policy embedded in the 'fullest extent' language of the LLC Agreement and gives effect to this statement." *Id.* at *17.

The Supreme Court observed that its holding was consistent with the Court of Chancery's decisions in *Wilmington Leasing v. Parrish Leasing*, where the court relied on a principle of contract construction providing that "if one party is given discretion in determining whether [a] condition in fact has occurred[,] that party must use good faith in making that determination." 1996 WL 560190, at *2 (Del. Ch. Sept. 25, 1996). The Supreme Court also favorably cited to the Court of Chancery's decision in *Sheehan v. AssuredPartners, Inc.*, where the court stated that the implied covenant "protects an agreement's spirit again underhanded tactics that deny a party the fruits of its bargain." 2020 WL 2838575, at *11 (Del. Ch. May 28, 2020).

17. *Griffith v. Stein on behalf of Goldman Sachs Grp., Inc.*, 2022 WL 3365025 (Del. Aug. 16, 2022) (No. 264, 2021)

A. Type:

Scope of Settlement Release

B. Precedential Value (2):

(1) Release for class action at issue offended due process because it was overbroad in that the settlement "release released claims contemplated by the settlement itself that were not alleged in the underlying action or part of its operative facts." 2022 WL 3365025, at *7.

(2) At present, the adequacy of the class representative is not a factor in making this determination. Ct. Ch. R. 23.1 (governing derivative suits and implicitly requiring an adequate representative similar to direct, class-action claims), is silent on adequacy of representatives in context of settlement issues. The Supreme Court, however, recommended the Court of Chancery Rules Committee consider an amendment as to whether there should be an adequacy requirement.

C. Procedural Posture:

Stockholder filed an action in the Court of Chancery against a corporation and its board, both directly and derivatively, alleging that certain executive compensation was grossly excessive and that the board breached its fiduciary duty of loyalty by approving the compensation. Stockholder attempted to settle, but an objector successfully objected. Stockholder successfully settled on its second attempt over the objection of same objector. The Court of Chancery granted the settlement, which included broad release of future claims. Objector appealed. The Supreme Court reversed and remanded.

D. Facts:

Stockholder filed suit against corporation and board of directors asserting direct and derivative claims contending that corporation's non-employee director compensation was grossly excessive and, therefore, board's approval was breach of duty of loyalty. Initially, the Court of Chancery denied a motion to dismiss, which prompted settlement negotiations. After reaching an agreement,

the Court of Chancery agreed with an objector and refused to approve a non-monetary settlements. It awarded fees to the objector. After a second round of settlement negotiations, the Court of Chancery approved a settlement over the second objection by the objector, who argued that the plaintiff was not an adequate representative for the company's interest and the settlement was improper because it released the company from future claims.

E. Holdings:

(1) The settlement release was overbroad and therefore in violation of due process because it purported to release claims for future acts that had yet to occur. The Supreme Court noted that "Defendants are motivated to reach an agreement that provides the broadest possible protection from future disputes." *Id.* at *6. Due to this fact, settlement releases cannot be "limitless;" otherwise, stockholders "could have their claims released without an opportunity to be heard." *Id.* In class actions, class-based settlements must not offend due process to the members of the class (i.e., preclude their potential claims from being heard). *Id.* "In the class action context, the Court of Chancery must scrutinize releases to 'ensure the fiduciary nature of the class action is respected, and that its approval of any class-based settlement does not offend due process." *Id.* at *6 (quoting *In re Celera Corp. Shareholder Litigation*, 59 A.3d 418, 434 (Del. 2012)).

Adopting the Court of Chancery's logic in *UniSuper Ltd. v. News Corp.*, 898 A.2d 344, 347 (Del. Ch. 2006), and consistent with the Supreme Court's decision in *In re Philadelphia Sock Exchange* (relying on *UniSuper*), the Court held that "a release is overbroad if it releases claims based on a set of operative facts that will occur in the future." *Griffith*, 2022 WL 3365025, at *7.

(2) As a matter of first impression, adequacy of plaintiff as representative was not factor to be considered in approval of settlement of derivative claims. The Supreme Court refused to accept objector's argument regarding the adequacy of the representative in the context of the settlement

because the Court of Chancery Rules do not require this consideration when a court approves a settlement. *Id.* at *11.

(3) The Court of Chancery acted within its discretion in its consideration of factors in awarding fees to settlement objector.

Kathryn Garrison is a Deputy Attorney General with the Appeals Unit of the Delaware Department of Justice's Criminal Division. She practices primarily before the Delaware Supreme Court, but also handles criminal postconviction matters in the Delaware Superior Court and the Federal District Court for the District of Delaware. Prior to her employment with the Department of Justice, Kathryn was a partner at Schmittinger & Rodriguez in Dover where, among other things, she practiced criminal defense and held a year-long contract with the Superior Court to represent indigent defendants with whom the Office of the Public Defender had a conflict of interest.

Delaware Criminal Law Developments

Supreme Court Review 2022

Patterson v. State, 276 A.3d 1055 (Del. 2022)

- AFFIRMED – Alleged discovery violation (Super. Ct. Crim. R. 16)
- BACKGROUND:
  - Patterson posted a video on Snapchat of himself and a minor classmate having sex; the video did not show the victim's face; others shared the video and the victim recognized herself in it and reported the posting to police
  - During discovery, the State made available for inspection extractions from Patterson's and the victim's phones; Counsel reviewed the extraction at the police department before trial
  - At trial, the victim had gained about 30 lbs and changed her hair; the court allowed the State to introduce, over defense counsel's objection, an older photo of the victim that had been included in the extraction from the victim's phone
  - Patterson was convicted of invasion of privacy

Patterson v. State cont.

- ARGUMENT: Patterson argued that the State violated Rule 16 by providing a vast number of photos for inspection without telling counsel their significance or identifying which photos would be used at trial
- HOLDING: The Delaware Supreme Court found that the State complied with its discovery obligations under Rule 16
  - “Patterson was given ample opportunity to review the full extraction; Patterson did not ask for more time to review the full extraction before or during trial; and Patterson did not request that the court order the State to provide a copy of the extraction for review by his counsel.”
  - Patterson was aware of the timeline of relevant events and that the central issue in the case was going to be the victim’s identity; so he knew what to explore when reviewing the material

Pollard v. State, 2022 WL 3641662 (Del. Aug. 24, 2022)

- AFFIRMED – 4th Amendment/ Art.1 s. 6 challenge to search of vehicle
- BACKGROUND:
  - Police pulled over a vehicle for a seatbelt violation; Pollard was the front seat passenger
  - Police smelled the odor of marijuana and noticed a "nugget" of marijuana on the center console and "shake," or small pieces, throughout the vehicle
  - They searched the car and found on the passenger side, among other things, oxycodone pills and alprazalom pills; Pollard admitted the items were his; police found 10 grams of marijuana on Pollard, he admitted he did not have a medical marijuana card
  - Pollard was convicted of possession of marijuana, Drug Dealing alprazolam, and illegally possessing oxycodone
- ARGUMENT:
  - Pollard argued that the search of the vehicle was illegal, based on *Juliano v. State*, in which the Court held that the smell of marijuana alone does not give rise to probable cause sufficient to justify a warrantless arrest

Pollard v. State cont.

- HOLDING:
  - The Delaware Supreme Court denied Pollard's claim under Supr. Ct. R. 8 because he did not file a motion to suppress below, but it also reviewed the merits.
  - Under the automobile exception to the warrant requirement, the police may lawfully search a vehicle without a warrant if they have probable cause to believe that the automobile is carrying contraband or evidence of criminal activity.
  - The Court reiterated the holding of *Valentine* that marijuana is still contraband, and found that the totality of the circumstances – the odor, nugget, and remnants of marijuana in the car – "support[ed] a determination that probable cause existed to believe Pollard's car contained contraband or evidence of criminal activity, including consumption of marijuana in a moving vehicle in violation of 16 *Del. C.* § 4764(d).

Castro v. State, 266 A.3d 201 (Del. 2021)

- AFFIRMED – Challenge to Sufficiency of the Evidence and Denial of Motion to Suppress Wiretap Evidence
- BACKGROUND:
  - DSP Drug Investigation ("Operation Old School")
  - The investigation revealed Castro was the person who supplied the enterprises's cocaine in Dover; a middleman, Lamont McCove, would get the cocaine from Castro and sell it to lower-level dealers
  - Castro was arrested and charged with 5 counts of Drug Dealing (heroin) and related charges stemming from 5 separate transactions
  - McCove testified at trial that Castro was continuously involved in the drug operation
  - The Jury convicted him of only 2 counts of Drug Dealing and related conspiracy charges stemming from 2 of the transactions
- ARGUMENT:
  - Castro claimed that the Superior Court erred in denying his motion for judgment of acquittal as to the 2 Drug Dealing and related conspiracy counts because there was no evidence that he possessed anything but money on those dates, and
  - The court erred in denying his motion to suppress the wiretap evidence

Castro v. State cont.

- HOLDINGS:
  - The Delaware Supreme Court found that there was sufficient evidence for jurors to have rationally concluded that Castro was guilty of the 2 counts of Drug Dealing and related conspiracy charges beyond a reasonable doubt, because, *inter alia:*
    - Text messages and phone calls established that the buyer was trying to purchase cocaine and met with Castro on those dates
    - The jury was not required to find the buyer's testimony that he had only exchanged money with Castro on those dates credible
  - The Court also found no error in denial of motion to suppress wiretap evidence – all evidence collected pursuant to wiretap order had no relevance to dates of events underlying convictions (the wiretap was granted after those events)
- Traynor, J. Dissenting (as to sufficiency of the evidence portion of decision): Justice Traynor would have found that there was not sufficient evidence to support Castro's Drug Dealing convictions because, *inter alia*, for the dates of those transactions:
  - No cocaine or other physical evidence was recovered
  - No witness observed Castro in possession of cocaine nor did anyone see any hand-to-hand transactions
  - The buyer testified that he had only exchanged money with Castro during those 2 dealings

Howell v. State, 268 A.3d 754 (Del.2021)

- REVERSED AND REMANDED – The trial court committed plain error when it instructed jurors that they could not consider a key witness's cooperation agreement with prosecution in weighing his credibility
- BACKGROUND:
  - Howell's charges were the product of a joint DSP and NCCPD investigation
  - At trial, the State presented evidence linking Howell to drug dealing activity at two homes – one where his mother lived; one where he lived with his brother; Searches of those homes revealed cash, about 110 grams of marijuana, and guns
    - Prior to trial, his mother and brother pled guilty to drug dealing and other charges
  - The State's main witness was Caldwell, who testified that over the past two years, he regularly purchased large quantities of marijuana to sell to others; a search of Caldwell's residence had revealed a large quantity of marijuana and some cash; Caldwell's phone showed regular communication with Howell and contained texts referencing money Caldwell owed Howell; his testimony was instrumental in linking Howell to the drug dealing activity at the two homes
  - Caldwell had signed a cooperation agreement with the State; Howell requested a jury instruction about cooperating witness testimony; the trial court incorrectly instructed the jury that it could not consider the agreement in weighing Caldwell's credibility
  - Howell testified that he had dealt drugs in the past, but did not know his brother had a gun and that he did not deal drugs during the period of time covered by his charges
  - The jury convicted Howell of 2 counts of drug dealing (1 for possession with intent to deliver 4,000 or more grams of marijuana) along with 4 related charges

Howell v. State cont.

- ARGUMENTS: Howell challenged the "cooperative witness" instruction, the sufficiency of the evidence for 2 charges, Caldwell's testimony about drug transactions during the time period not covered by the indictment, and a flaw in the court's obliterated-serial number instruction, and he claimed the jury had an obstructed view of him
- HOLDINGS:
  - The "cooperating witness" instruction was plainly erroneous – the instruction effectively removed Caldwell's status as a cooperating witness from the jury's assessment of his credibility; given Caldwell's importance in connecting Howell to the drug dealing operation, establishing the weight for the drug dealing conviction, and connecting him to a firearm with an obliterated serial number, the erroneous instruction compromised the fairness and integrity of Howell's trial
  - Caldwell's testimony and related text messages about prior drug transactions with Howell did not violate D.R.E. 404(b) because they were material to showing a common plan or scheme, knowledge and intent, the evidence was not too remote because it showed a continuous course of conduct leading up to the offenses, and the proof of the prior sales was plain, clear, and conclusive
  - Any flaw in the obliterated serial number instruction was harmless
  - Howell's challenges to the sufficiency of the evidence were without merit and the court did not abuse its discretion in declining to move Howell's trial to another courtroom

Pierce v. State, 270 A.3d 219 (Del. 2022)

- AFFIRMED – challenge to admission of palmprint evidence and to sufficiency of the evidence
- BACKGROUND:
  - A Wilmington liquor store was robbed twice within a month by the same man
  - Police identified Pierce as the robber from two latent palmprints left on the sales counter during the second robbery
  - Surveillance video showed the robber placing his hands on the sales counter in the same locations where the prints were found
  - Pierce was convicted at trial of two counts of first degree robbery and related charges
- ARGUMENTS:
  - Pierce claimed the trial court erred in admitting the palmprint evidence because the State did not offer witness testimony to authenticate that the palmprints in AFIS were Pierce's
  - He also argued there was insufficient evidence to identify him as the suspect

Pierce v. State cont.

- HOLDINGS:
  - Pierce waived his claim of error relating to the authentication of the palmprints because, not only did he fail to object to their admission, but also, counsel made statements affirmatively agreeing to the admission of the evidence
  - But the Court offered some general guidance – the D.R.E. 901 authentication standard is lenient and "there may be various ways to authenticate a defendant's 'known' prints depending on the circumstances." Testimony of the person who actually took the "known" fingerprints is not required.
  - The evidence, which included, *inter alia*, surveillance video, the salesman's testimony that he believed the same person committed both robberies, information from Pierce's interview, and the palmprint evidence, was sufficient to support the convictions
    - Although the palmprints were found in a public place, accessible by others, evidence concerning the manner and placement of the prints supported that Pierce placed them there while committing the robberies

Miller v. State, 270 A.3d 259 (Del. 2022)

- AFFIRMED – alleged prosecutorial misconduct
- BACKGROUND:
  - While wearing a wolf mask, Miller shot and killed Jeremiah McDonald as he was talking to two women in a cul-de-sac in 2012; the case was cold until 2016 when Miller was arrested and charged
  - While in prison, Miller asserted two alibis during phone conversations to others; the State presented that evidence during trial, but defense counsel objected and asserted the two alibis were for two separate murders
  - The trial court allowed the State to show an unavailable witness's video statement to police under the forfeiture by wrongdoing exception to the hearsay rule
  - Miller opted not to testify after the trial court had the State list the topics that would be admissible if he took the stand
- ARGUMENTS:
  - Miller claimed that the State committed prosecutorial misconduct by:
    - Misrepresenting to the jury that Miller asserted 2 separate alibis for the murder; and
    - Interfering with Miller's constitutional right to testify, and
  - The trial court abused its discretion in allowing the witness's out-of-court statements under the forfeiture by wrongdoing hearsay exception

Miller v. State cont.

- HOLDINGS:
  - It is prosecutorial misconduct for the State to misrepresent evidence at trial, but no misconduct occurred here because the Court could not conclude from the record that the State knew the alibis were for 2 different murders
    - the State said at trial, without objection, that it did not know the alibis were for different murders, and
    - The prison phone calls themselves were rambling and confusing
  - It is misconduct for the State to interfere with a defendant's right to testify, but the Court found no misconduct – "While Miller might have ultimately decided not to testify based in part on the State's information, the State's actions had the effect of giving him more data with which to better understand the ramifications of testifying."
  - The forfeiture by wrongdoing exception (D.R.E. 804(b)(6)) permits a court to admit a statement offered against a party when that party caused, through wrongdoing, the unavailability of the declarant as a witness
  - The Court did not decide whether the trial court correctly applied the exception, because it found any error was harmless – The State presented overwhelming other evidence of Miller's guilt

Wilson v. State, 271 A.3d 733 (Del. 2022)

- AFFIRMED – admissibility of character evidence; admissibility of text messages under business records exception; alleged *Brady* violation
- BACKGROUND:
  - Wilson hired someone to kill Allen Cannon, who had tried to rob him at a high stakes dice game
  - The State presented the testimony of Timothy Keyes, an inmate who said that Wilson had told him he had ordered Cannon's murder. Trial counsel tried to introduce impeachment character evidence that other inmates viewed Keyes as a snitch. The court sustained the State's objection that the evidence was inadmissible hearsay and improper character evidence.
  - The court allowed the State to offer text messages from an unavailable witness's cellphone under the business records exception to the rule against hearsay
  - After trial, the State learned that an AUSA had told Keyes their office would consider his cooperation in recommending a sentence in his federal case

Wilson v. State cont.

- ARGUMENTS:
  - Wilson claimed that the court abused its discretion by refusing to allow testimony about Keyes' reputation as a snitch to impeach him;
  - The court erred in admitting text messages that inferred Wilson was the person responsible for the murder; and,
  - The State violated *Brady* by failing to disclose Keyes' agreement with federal prosecutors to testify in Wilson's trial in exchange for a lighter sentence
- HOLDINGS:
  - Keyes' reputation as a snitch was not admissible because it was not relevant to Keyes' character for truthfulness (*see* D.R.E. 608)
  - The text messages should not have been admissible under the business records hearsay exception, but the error was harmless because the remaining evidence was sufficient to sustain Wilson's conviction
  - Even if the State should have disclosed the Fed's offer to Keyes earlier, there was no *Brady* violation because the evidence was not material to a fair trial – Keyes retracted his prior statements in his testimony and the disclosure would not have put Wilson's case in such a different light as to undermine confidence in the jury's verdict

Bailey v. State, 272 A.3d 1163 (Del. 2022)

- AFFIRMED – admissibility of a juvenile adjudication for impeachment
- BACKGROUND:
  - Bailey and a codefendant shot and killed Jamier Vann-Robinson outside of an after-prom house party in Dover
  - Vann-Robinson was with Dominic Hurley, who took Vann-Robinson to the hospital (but it took him much longer to get there than it should have); Hurley had a juvenile adjudication for carrying a concealed deadly weapon (firearm) from 2017; he was still on probation for it that night
  - Bailey told police he shot Vann-Robinson in self-defense, but Hurley told police and testified that neither he nor Vann-Robinson had a gun that night
  - The court did not allow Bailey to impeach Hurley with his prior CCDW adjudication under D.R.E. 609(d)
  - Bailey was convicted of first degree murder and related charges

Bailey v. State cont.

- HOLDING:
  - Juvenile adjudications are generally inadmissible in a criminal case, unless the evidence would be admissible to challenge an adult's credibility and it is "necessary for a fair determination of the issue of guilt" (D.R.E. 609(d))
  - But where evidence is relevant to show specific bias, i.e., a motive to be untruthful about the facts and circumstances of a specific case, the Confrontation Clause is implicated
  - In such cases, the court must ask whether the evidence is (1) offered to show bias (i.e., the motive to lie in a specific case) and (2) important to the assertion of bias
  - Hurley's CCDW conviction was being offered to show specific bias – that Hurley would have had a motive to lie about whether he had a gun because he was on probation for a gun conviction
  - But the trial court did not err in excluding it because it was not important to the assertion of bias; Bailey had sufficient other means to show that Hurley was motivated to testify falsely about whether he had a gun that night
  - Although the trial court improperly applied the D.R.E. 609(d) test, its finding tracked the appropriate Confrontation clause test

Medley v. State, 2022 WL 2674303 (Del. Jul. 12, 2022)

- AFFIRMED – Appeal from denial of motion to modify sentence (Super. Ct. Crim. R. 35)
- BACKGROUND:
  - Medley pled guilty to burglary 2d degree and was sentenced to 2 and ½ years in prison followed by probation; The court gave him credit for 210 days previously served
  - DOC staff contacted court staff to let them know that Medley should only have received credit for 12 days time-served
  - Medley's counsel emailed the court claiming that Medley was entitled to 576 days of credit time; the court issued an amended order based on that representation
  - DOC staff again told court staff Medley should have only received credit for 13 days; the other time had been served for VOPs in different cases and for new charges
  - The judge signed an amended order reducing Medley's credit time to 13 days and he filed a motion for modification of sentence, which the court denied

Medley v. State cont.

- HOLDINGS:
  - The Superior Court judge did not improperly delegate his judicial authority to modify a sentence to DOC personnel and court administrative staff
  - The docket unambiguously showed that Medley was entitled to only 13 days of credit time and the sentencing judge has no obligation to credit a defendant with more time than he has served on a specific case (11 *Del. C.* § 3901(c))
  - A defendant has a fundamental right to be present at the imposition of a final sentence following a criminal conviction, including a resentencing that amends the sentence. However, there was no plain error when Medley was not present when the amended sentence order was issued because the only change was to his credit time and counsel had not submitted a request with the Superior Court that his motion be heard with Medley present

Ferguson v. State, 2022 WL 3050691 (Del. Aug. 3, 2022)

- AFFIRMED: Challenge to sentencing decision
- BACKGROUND:
  - Ferguson, who worked at a daycare center, was repeatedly smothering infants; she ended up killing one of them; she was 19 at the time
  - Ferguson pled guilty to one count of murder by abuse and 8 counts of child abuse
  - At sentencing, the court noted that Ferguson appeared to have had a normal childhood and stated, "A sentence to a term of years would not fairly express the outrage of any society at the completely senseless killing of one of its infant children by someone entrusted to its care."
  - The court sentenced Ferguson to life in prison
- ARGUMENT: Ferguson argued the judge sentenced her with a closed mind; her sentence violated due process because, she alleged, the judge did not consider her mitigating evidence; and the judge's sole purpose in sentencing her was retribution

Ferguson v. State cont.

- HOLDING:
  - A court has broad discretion in determining what information to rely on when sentencing
  - “A judge sentences with a closed mind when the sentence is based on a preconceived bias without consideration of the nature of the offense or the character of the defendant.”
  - The sentencing court reviewed a voluminous amount of materials from both sides before sentencing Ferguson
  - “While it is clear that the judge was not persuaded by Ferguson’s mitigation evidence, on this record, we cannot conclude that the judge ignored, or failed to consider, the mitigation evidence and argument [Ferguson] offered, or sentenced her with a closed, vindictive, or biased mind.”

Ray v. State, 2022 WL 2398442 (Del. Jul. 1, 2022)

- REVERSED AND REMANDED, IN PART – Trial and appellate counsel was ineffective for failing to object to or raise on appeal incorrect felony murder jury instruction
- BACKGROUND:
  - Ray and a co-defendant shot and killed a drug dealer when their attempt to rob him failed
  - A witness testified that Ray had admitted to her that Ray and his co-defendant had shot the victim after they tried to rob him; she did not report the admission until 2 years later; 1 month before trial, the State dismissed a felony charge against her, but did not disclose that information to the defense
  - The felony murder instruction given to the jury said that a person is guilty if they cause the death of another "in the course of and in furtherance of" the commission of another felony – the General Assembly had changed that language to "while engaged in" years before; the instruction also referred to the co-defendant as an accomplice, but did not define the concept
  - The trial court denied the State's request for an accomplice liability instruction
  - The jury acquitted Ray of intentional murder but convicted him of felony murder
  - After his conviction was affirmed on appeal, Ray filed a postconviction relief motion

Ray v. State cont.

- ARGUMENTS:
  - Ray argued his trial and appellate counsel were ineffective for failing to raise the defective felony murder instruction issue, and
  - The State violated *Brady v. Maryland*, by failing to disclose that the witness's pending felony charge had been dismissed after she gave a statement to police implicating Ray
- HOLDINGS:
  - Trial and appellate counsel's failures to object to the instruction or raise it on appeal were objectively unreasonable
    - A defendant has "the unqualified right to a correct statement of the substance of the law" in the jury instructions
    - The instruction did not accurately state the law and it told the jury it could find Ray guilty of felony murder if it found it was his accomplice who committed the murder
  - Because the jury did not find Ray guilty of intentional murder, the Supreme Court did not have confidence that, "absent the trial court's incomplete invocation of accomplice liability," the jury would have unanimously convicted Ray of felony murder
  - There was no *Brady* violation – the State conceded it had failed to turn over *Brady* material, but there was no prejudice because it was not reasonably probable that, had the evidence been disclosed, the result of Ray's trial would have been different
- Vaughn, J. – concurring in part, dissenting in part – Justice Vaughn would have found that the defendant failed to establish prejudice from the use of the obsolete felony murder instruction

Placheś v. State, 2022 WL 1946377 (Del. June 6, 2022)

- REVERSED AND REMANDED – The basis upon which the Superior Court found Placheś to be in violation of his probation was unclear because it was not set forth on the record; remanded for an evidentiary hearing
- BACKGROUND:
  - Placheś was on probation for third degree rape and related charges; a condition of his probation was that he must report any police contact
  - Placheś had police contact and reported it three days later as a domestic incident between his girlfriend and her sister; the probation officer learned that it had been a domestic incident between Placheś and his girlfriend; no charges were brought
  - The PO alleged Placheś had violated his probation by, *inter alia*, not truthfully reporting the police contact
  - At the VOP hearing, Placheś requested a contest hearing. At the contested hearing, Placheś' attorney agreed to admit to the police contact; the court found Placheś in violation and sentenced him to 7 years in prison

Placheś v. State cont.

- HOLDING:
  - The record did not provide an adequate basis for the revocation of probation, nor a basis to find that Placheś knowingly and voluntarily waived his right to a contested VOP hearing
  - Placheś' admission to having police contact was competent evidence connecting him to the scene of an alleged domestic dispute, but the PO's unsworn statements that were based on inadmissible hearsay did not amount to competent evidence that Placheś had lied about the contact or committed a crime
  - Although defense counsel stated on the record that Placheś was in agreement to admit police contact, that statement was not enough to show that he was voluntarily and intentionally waiving his right to a contested hearing, because police conduct, in and of itself, is not a violation of probation
- Vaughn, J., dissenting:
  - Justice Vaughn would have affirmed because he would have found that when defense counsel said Placheś was admitting to the police contact, she understood that to mean he was admitting to the substance of the violation, i.e., that he falsely reported the police contact; Placheś also admitted at sentencing that the police contact was the result of a domestic incident involving himself and his girlfriend

Ryan P. Newell

PARTNER

rnewell@ycst.com
Wilmington P: 302.571.6715

Ryan Newell is a litigator who represents clients faced with a variety of business law issues. Even though his clients are confronted with litigation, Ryan keeps their business concerns and priorities in mind.

Ryan has represented parties in corporate and commercial litigation in the Delaware Court of Chancery, the Delaware Superior Court, the Delaware Supreme Court, and the District of Delaware. He has also represented parties as Delaware counsel in intellectual property litigation in the District of Delaware.

While the bulk of his practice is focused on these types of commercial litigations, Ryan has experience representing government entities and parties in trust litigations. In particular, he was part of a team that successfully defended the State of Delaware before the United States Supreme Court in an original jurisdiction action brought by New Jersey that challenged Delaware's sovereignty over the Delaware River within its historic Twelve Mile Circle.

Ryan is also frequently appointed by the Court of Chancery and Superior Court to serve as a special discovery master or discovery facilitator in high stakes litigations. He is a Delaware Superior Court certified mediator and has completed The Sedona Conference's eDiscovery Negotiation Training program, a prestigious invitation only program.

Ryan is ranked among Delaware's leading Chancery practitioners according to *Chambers USA: Guide to America's Leading Lawyers for Business*. Sources praise Ryan for his "productive and cordial demeanor." In addition to *Chambers USA*, Ryan has been honored by *Super Lawyers*® and *The Best Lawyers in America*® and he has been voted by his peers as one of the state's "Top Lawyers" as identified in *Delaware Today* magazine. Ryan has received an AV® Preeminent™ Peer Review certification, which is Martindale-Hubbell's highest rating for lawyers.

Ryan was elected as a Fellow of Litigation Counsel of America, an honorary society for trial attorneys. He is part of The Fellows of the American Bar Foundation, a global honorary society comprised of attorneys, judges, law faculty and legal scholars whose careers demonstrate an outstanding dedication to the legal profession.

Ryan attended the Dickinson School of Law of the Pennsylvania State University on a Dean's Scholarship. He was the Casenote Editor for the Penn State Law Review and served as a law clerk to the Honorable Kevin A. Hess in the Cumberland County (Pennsylvania) Court of Common Pleas. As an undergraduate, Ryan graduated

from the University of Notre Dame and its Mendoza College of Business, and he is the past president of the Notre Dame Club of Delaware.

Bar Admissions

- Delaware, 2005
- Pennsylvania, 2008
- New Jersey, 2008

Clerkships

- Law Clerk to The Honorable Kevin A. Hess, Cumberland County, Pennsylvania Court of Common Pleas, 2004

Distinctions

- Litigation Counsel of America, Fellow
- American Bar Foundation, Fellow
- AV® Preeminent™ Peer Review Rating by Martindale-Hubbell
- *The Best Lawyers in America*®, recognized since 2017
- *Delaware Today* Top Lawyers, 2015 – 2017 and 2018 – current
- *Chambers USA: Guide to America's Leading Lawyers for Business*, 2016, 2017, 2020 -- current
- Irish Echo: 40 Under 40 Honoree, 2015
- Irish Legal 100, 2021
- Delaware *Super Lawyers*®, recognized since 2014
- Delaware *Super Lawyers*® – Rising Star, 2013
- Delaware State Bar Association's New Lawyers Distinguished Service Award, 2010

Cases

Corporate and Commercial Litigation

FdG Logistics LLC v. A&R Logistics Holdings Inc., C.A. No. 9706-CB

In re Kinder Morgan Energy Partners L.P. Capex Litig., C.A. No. 9318-VCL

Policemen's Annuity & Benefit Fund of Chicago Illinois, et al. v. DV Realty Advisors LLC, C.A. No. 7204-VCN

In re Morton's Rest. Group Inc. S'holders Litig., C.A. No. 7122-CS

Plymouth County Ret. Ass'n v. Brookfield Asset Mgmt. Inc., et al., C.A. No. 6062-VCP

YOUNG CONAWAY

Great-West Investors LP v. Thomas H. Lee Partners, L.P., C.A. No. 5508-VCN

Rohm and Haas Co. v. Dow Chem., C.A. No. 4309-CC

Bentley Sys., Inc., et al. v. Cobalt BSI Holding, LLC, et al., C.A. No. 4294-VCS

GE Funding Holdings, Inc. v. FGIC Corp., C.A. No. 4012-VCG

In re: Citigroup Inc. S'holder Derivative Litig., C.A. No. 3338-CC

In re: Transkaryotic Therapies, Inc., C.A. No. 2776-CC

Forsythe, et al. v. ESC Fund Mgmt. Co. (U.S.), Inc., et al., C.A. No. 1091-VCL

American Int'l Group Inc. Consol. Derivative Litig., C.A. No. 769

Wilmington Trust, Nat'l Ass'n v. Soundview Elite Ltd., et al., C.A. No. N13C-06-156 EMD CCLD

Shred-it Int'l, Inc., et al. v. ELOF Hansson USA Inc., C.A. No. N12C-06-087 JRJ CCLD

Bentley Sys., Inc. v. Wolf Creek Nuclear Operating Corp., N12C-06-088 JRS CCLD

Huffington v. TC Group, LLC, et al., C.A. No. N11C-01-030 JRJ CCLD

Charge Injection Techs. Inc. v. E.I. DuPont de Nemours & Co., C.A. No. 07C-12-134 JRJ

MJMM, Inc. v. TranDotCom Solutions, LLC, C.A. No. 14-526-GMS

Intellectual Property Litigation

Hospira, Inc. v. Amneal Pharm. LLC, C.A. No. 15-697-RGA

Andover Healthcare, Inc. v. 3M Co., C.A. No. 13-843-LPS

CallWave Commc'ns LLC v. T-Mobile USA Inc., et al., C.A. No. 12-1703-RGA

Comcast IP Holdings I LLC v. Sprint Commc'ns Co. LP, et al., C.A. No. 12-205-RGA

Sprint Commc'ns Co. L.P. v. Comcast Cable Commc'ns LLC, et al., C.A. No.12-1013-RGA

Special Master and Other Court Appointments

Partner Investments, L.P. v. Theranos Inc., C.A. No. 12816-VCL

AB Stable VIII LLC v. Maps Hotel, et al., C.A. No. 2020-0310-JTL

Tiffany & Co. v. LVMH Moët Hennessy-Louis Vuitton SE, et al., C.A. No. 2020-0876-JRS

Channel MedSystems, Inc. vs Boston Scientific Corp., C.A. No. 2018-0673-AGB

YOUNG CONAWAY

Barba v. Boston Scientific Corp., et al., N11C-08-050 MMJ

Miscellaneous Litigations

State of New Jersey v. State of Delaware, 552 U.S. 597 (2008)

Nichols v. City of Rehoboth Beach, et al., C.A. No. 15-602-GMS (D. Del.) and Case No. 15-3979 (3d Cir.)

In re the New Maurice J. Moyer Acad. Inc., C.A. No. 10398-CB (Del. Ch.)*Alderman, et al. v. Clean Earth, Inc., et al.,* Nos. 568-570, 2007 (Del.)

Publications

June 1, 2021
The Intersection of European Data Privacy and Domestic Discovery
The Journal, DSBA June 2021

June 9, 2020
Naughty or Nice? Instead of Coal, I Got ... ESI?!***

October 1, 2019
A Low-Tech Solution to High-Tech Discovery
DSBA Bar Journal

July 1, 2019
District of Delaware Update

July 1, 2017
E-Discovery: It's Like Déjà Vu All Over Again
DSBA Bar Journal

January 1, 2016
New Year's E-Discovery Resolution: Minimize Discovery Disputes Through E-Neutrals
DSBA Bar Journal

January 1, 2014
E-Discovery Promised Land: The Use of E-Neutrals To Aid The Court, Counsel, And Parties
Delaware Law Review

YOUNG CONAWAY

DSBA Supreme Court Review 2022

Ryan P. Newell

Civil Appellate Decision Review

FRIDAY, NOVEMBER 4, 2022

9:00 a.m. – 12:15 p.m.

DEFAMATION

YOUNG CONAWAY

Page v. Oath, No. 79, 2021 (January 19, 2022)

➢ **Facts:**

- Appellant was a Russian affairs advisor for Former President Donald Trump's campaign and Appellee was a technology company owning several news publications.
- In September 2016, an article (the "Isikoff Article") was published in Yahoo! News, describing "intelligence reports" from "a well-placed Western intelligence source" that discussed Appellant's supposed meetings with high-ranking Russian businessmen and officials, which were sent to U.S. intelligence agencies.
- Christopher Steele, former intelligence operative and Confidential Human Source for the FBI, created the report (the "Dossier") and delivered it to FBI agents with whom he had a former relationship with as a source.
- The FBI previously opened up an investigation into whether individuals associated with the Donald J. Trump for President Campaign were coordinating with the Russian government's efforts to interfere in the 2016 U.S. presidential election, and the FBI eventually used the Isikoff Article and Dossier to obtain a FISA warrant on Appellant.
- The details of the Isikoff Article and references to the investigation into Appellant were reported in ten other articles published on Appellee's subsidiary websites.

YOUNG CONAWAY

Page v. Oath, No. 79, 2021 (January 19, 2022)

➢ **Holding/Relevant Analysis:**

- The Court affirmed the Superior Court's dismissal of Appellant's amended complaint, holding that as a public figure, Appellant failed to state a claim for defamation.
- The Isikoff Article was at minimum substantially true because it described a federal investigation into a report about Appellant and made clear that the allegations in the report were unsubstantiated and under investigation.
- Because the Isikoff Article was at least substantially true, Appellant, as a public figure, failed to plead that the individuals responsible for the publication of the remaining articles acted with actual malice as required by *New York Times v. Sullivan*, 376 U.S. 254, 287 (1964).
- Dissent: Appellant's allegations passed Delaware's lenient "reasonable conceivability" pleading threshold.
  - Appellant's "allegations that the Article falsely characterized its sources who "reported on" these meetings (which Defendants now tacitly agree never occurred) easily pass Delaware's lenient 'reasonable conceivability' pleading threshold."
  - Appellant's allegations that the author of the Isikoff Article had reason to doubt the veracity of the Dossier and failed to substantiate any evidence supporting the Dossier sufficiently stated a claim that the Isikoff Article was published with actual malice, as numerous articles that previously reported on the Dossier have been corrected or amended.

YOUNG CONAWAY

Cousins v. Goodier, No. 272, 2021 (August 16, 2022)

- **Facts:**

- Plaintiff, a Pennsylvania resident and partner at a Delaware law firm, filed a *pro se* complaint against a Pennsylvania school district in a Pennsylvania state court (the "Unionville Lawsuit") seeking to reinstate the school district's mascot named the "Indians."
- After Plaintiff filed suit, Defendant sent an email to Plaintiff's employer regarding Plaintiff's suit, describing the suit as "shockingly racist and tone deaf" and expressing frustration that "[o]ur tax dollars and administrative resources will be plunged into countering some shockingly racist statements by Mr. Cousins about protecting his white, Christian heritage."
- Defendant's email included a link to a news article titled "Lawsuit filed Against Unionville over mascot issue."
- As a result of the Plaintiff's firm receiving Defendant's email and news article, Plaintiff was forced to resign from the firm and was unable to find suitable employment thereafter.

YOUNG CONAWAY

Cousins v. Goodier, No. 272, 2021 (August 16, 2022)

- **Holding/Relevant Analysis:**

- The Court affirmed the Superior Court's dismissal of Plaintiff's defamation claim, holding that Defendant's email was speech that addressed a matter of public concern and that Defendant's statements could not be proven true or false and did not imply that they were supported by undisclosed defamatory facts.
- Defendant's email was protected under the First Amendment because it expressed that the lawsuit was "shockingly racist and tone deaf" and bemoaned the waste of public resources required to defend the Unionville Lawsuit, indicating that the subject matter of the email related to a matter of political, social, or other concern to the community.
- The statements in Defendant's email could not be reasonably read to state or imply provably false and defamatory facts about Plaintiff because ordinary readers would understand the use of the word "racist" and the reference to plaintiff's "white, Christian heritage" as expressing subjective interpretation of the tone and objectives of the Unionville lawsuit.

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Stranger Owned Life Insurance ("STOLI")

Lavastone Cap. LLC v. Est. of Berland, No. 75, 2021 (Nov. 16, 2021)

- **Facts:**

- Lavastone Capital LLC ("Lavastone") entered into an agreement with Coventry First LLC ("Coventry") to purchase life insurance policies that were sold on the secondary market, including the policy for Beverly E. Berland, which was originally issued by Lincoln Financial.
- Simba acted as a broker in the transactions and secured a non-recourse loan for Berland through Coventry for purposes of creating a loan package which in turn created a trust, where the borrower on the loan was a sub-trust executed on behalf of one of the trustees, Wilmington Trust Company. The life insurance policy was then sold on the secondary market so that the client would not need to put any money upfront. At the same time, Berland executed a "special irrevocable durable power of attorney," which allowed Coventry to originate and service the life insurance policy on behalf of Berland, while Berland then applied for a Lincoln life insurance policy through Simba. The policy was ultimately sold to Four Seasons Financial Group, which was acting as the buyer for Lavastone.
- In 2018, after Berland's death, her estate filed a complaint against Lavastone to recover the death benefits under 18 Del C. § 2704(b) in the District Court for the District of Delaware.
- The District Court certified three questions of law to the Court:
  - (i) if an insurance contract is void *ab initio* under 18 Del C. § 2704(b), are any resulting death-benefit payment made "under any contract" under the statute;
  - (ii) whether 18 Del. C. § 2704(a) and (c)(5) prevent an insured or her Trust to procure or effect a policy on her life via a non-recourse loan when the contestability period has passed, the policy has been transferred, or a beneficial interest in the insured life is created when the insured never intended to provide the insurance protection beyond the contestability period; and
  - (iii) whether an estate can profit under 18 Del C. § 2704(b) if the insurance policy is in violation of the statute and it was obtained by fraud on the part of the decedent who profited from the prior sale of the policy?

Lavastone Cap. LLC v. Est. of Berland, No. 75, 2021 (Nov. 16, 2021)

- **Holding/Relevant Analysis:**

- In addressing question one, the Court stated it had to reconcile its prior holding in *Price Dawe*, which held that a life insurance contract that "lacks an insurable interest at inception" is "*void ab initio* because it violates Delaware's clear public policy against wagering." The Court determined that a "contract" as stated in § 2704 does not need to be an enforceable contract in the legal sense. Rather, it could be the document itself that identifies the beneficiary and other payees. Thus the Court determined that the payment under the policy that is void *ab initio* is "under [a] contract" under §2704(b).
- To answer the second question, the Court recognized that *Price Dawe* emphasized two considerations to determine whether there was an insurable interest: (i) if the insured "obtained the policy in good faith and for a lawful insurance purpose," and (ii) the source of the premium's funding. Thus, the Court answered that § 2704 does not forbid an insured to procure or effect on a policy on his or her own loan in these circumstances so long as the insured did not obtain the policy "without actually paying the premiums" and it was obtained for a lawful purpose.
- In answering the third question, the Court first acknowledged that the District Court asked the Court to assume the insured committed fraud. The Court noted that Lavastone could not establish that it was a victim of fraud under the facts, and therefore it did not make sense for Lavastone to be granted a remedy on the basis of misstatements that could not even afford a remedy to the insured, "the actual victim of the misstatements."

YOUNG CONAWAY

Wells Fargo Bank, N.A. v. Est. of Malkin, No. 172, 2021 (May 26, 2022)

- **Facts:**

- In 2005, Phyllis Malkin was approached by Larry Bryan, an insurance broker through Simba, who pitched an insurance plan where the client would not need to put any money upfront. Instead, the client received a non-recourse loan to finance the transaction and make all payments. The loan was then sold on the secondary market, with the only collateral on the loan being the life insurance policy itself. Simba then worked with Coventry Capital I LLC ("Coventry") to get the policy approved by American General Life Insurance Company ("AIG").
- When the debt on the policy became due, Coventry informed Malkin's Trust that it would foreclose on the AIG policy unless Malkin paid off the loan. The Trust agreed to relinquish the policy to Coventry instead of paying off the debt. The policy was eventually purchased by Berkshire Hathway Life Insurance Company of Nebraska ("Berkshire") and Wells Fargo. When Malkin died, AIG paid the policy to Wells Fargo. Malkin's estate sued Wells Fargo and Berkshire to recover the benefits.
- The 11th Circuit found this to be a STOLI Scheme, but it certified two questions before the Delaware Supreme Court: (i) whether a downstream investor to a STOLI policy could assert defenses under the Delaware Uniform Commercial Code and (ii) whether a downstream investor can sue to recover any premiums paid.

YOUNG CONAWAY

Wells Fargo Bank, N.A. v. Est. of Malkin, No. 172, 2021 (May 26, 2022)

- **Holding/Relevant Analysis:**

- First, the Court determined that § 2704(b) does not preclude recovery for downstream investors. The Court first examined whether § 2704(b) precluded common law claims. Because § 2704(b) did not explicitly supersede common law claims, "occupy the field" so as to supersede common law claims, or conflict with common law claims, it did not preclude recovery. The Court then turned to the first question and determined that §§ 8-502 and 8-115 do not provide a defense in a § 2704(b) action. The Court held that a defendant cannot assert an 8-502 defense because 8-502 requires an "adverse claim," which § 8-102(a)(1) defines as having a "property interest in a financial asset and that it is a violation of the rights of the claimant to for another person to hold, transfer or deal with the financial asset." Furthermore, the policy is void *ab initio*, and securitization of a STOLI policy does not invalidate its voidness. Similarly, § 8-115 also requires there be an "adverse claim," which is not possible as previously explained for § 2704(b) action.
- Finally, the Court turned to the second issue and determined that defendants in an action could recover premiums paid to maintain the policy so long as they are brought under a "viable legal theory." As the Court explained, § 2704(b) does not explicitly foreclose any counterclaims.

YOUNG CONAWAY

Geronta Funding v. Brighthouse Life Ins. Co., No. 380, 2021 (Aug. 25, 2022)

- **Facts:**

- On July 11, 2007, the Mansour Seck Irrevocable Life Insurance Trust (the "Seck Trust") applied for a life insurance policy on a fictitious individual referred to as Mansour Seck ("Seck"). Algren Associates, Inc. ("Algren") conducted an interview with an individual claiming to be Seck, and obtained medical information.
- The Seck Trust's trustee executed a trust certificate to the benefit of an individual named Michael Seck, who later turned out to be Pape Seck ("Pape"). Seck's policy was bought and sold several times, including from Brighthouse, Met Life's successor, to Geronta Funding.
- It was later discovered that Seck did not exist, and Pape was arrested and prosecuted for fraudulent insurance schemes. Brighthouse then filed suit seeking a judicial declaration that the policy was void *ab initio* and that it was entitled to keep the premiums paid on the policy. Geronta answered, acknowledging the policy as void *ab initio* but claiming that it was entitled to reimbursement on the premiums paid besides those paid by the original owner of the policy.
- The Superior Court held that Geronta was only entitled to premiums it paid to Brighthouse after it had informed Brighthouse that the policy was void. The Court reached this conclusion by applying § 198 of the Restatement, which states that a party is entitled to restitution if it "was excusably ignorant under Section 198(a) or not *in pari delicto* with the other party under Section 198(b)." The Superior Court determined that Geronta was not entitled to restitution under § 198(a) because it was not excusably ignorant, nor was it entitled to restitution under a theory of *in pari delicto* with Brighthouse under § 198(b). On appeal, the Delaware Supreme Court asked: "[w]hat is the appropriate approach when analyzing whether to return premiums paid on an insurance policy that is void *ab initio* as against public policy for lack of an insurable interest?"

YOUNG CONAWAY

Geronta Funding v. Brighthouse Life Ins. Co., No. 380, 2021 (Aug. 25, 2022)

- **Holding/Relevant Analysis:**

- On this matter of first impression, the Court recognized that other courts have adopted one of three tests to determine whether premiums on a void *ab initio* insurance policy lack an insurable interest: "(1) rescission of the policy and the automatic return of the premiums, (2) restitution under a fault-based analysis grounded in considerations specific to insurance policies declared void *ab initio* for lack of an insurable interest, and (3) restitution under the Restatement (Second) of Contracts."
- The Court adopted a fault-based approach under the Restatement of Contracts to determine whether premiums should be returned for a policy void for lack of an insurable interest. The Court adopted this test because it was in line with the majority of other jurisdictions and because it was more consistent with public policy in discouraging such insurance policies.
- The Court broke the fault-based approach into the following steps: "(1) there would be a disproportionate forfeiture if the premiums are not returned; (2) the claimant is excusably ignorant; (3) the parties are not equally at fault; (4) the party seeking restitution did not engage in serious misconduct and withdrew before the invalid nature of the policy becomes effective; or (5) the party seeking restitution did not engage in serious misconduct, and restitution would put an end to the situation that is contrary to the public interest."
- The Court also said lower courts should also consider the following questions: "whether the party knew the policy was void at purchase or later learned the policy was void; whether the party had knowledge of facts tending to suggest that the policy is void; whether the party procured the illegal policy; whether the party failed to notice red flags; and whether the investor's expertise in the industry should have caused him to know or suspect that there was a substantial risk that the policy it purchased was void."
- Applying the test to this case, the Delaware Supreme Court determined that the Superior Court failed to address whether Brighthouse was on inquiry notice of the fact that the policy was void. While the Delaware Supreme Court acknowledged that there were facts that could support a finding that Brighthouse was on inquiry notice, the Court remanded to review the factual record and apply the new test.

YOUNG CONAWAY

CIVIL PROCEDURE

YOUNG CONAWAY

Noranda Aluminum Holding Corp. v. XL Ins. Am., Inc., No. 443, 2020 (Dec. 16, 2021)

➢ **Facts:**

- Noranda, operator of an aluminum smelter in Missouri, won a judgment in Superior Court in 2019 for $28 million from 13 different insures (the "Insurers").
- The Superior Court awarded Noranda costs, including post-judgment interest rate of 6 percent pursuant to *6 Del. C.* § 2301(a), which defines the "legal" interest rate as 5 percent plus the Federal Reserve discount rate.
- The Superior Court, held for the Insurers, that the applicable discount rate was the rate in effect at the time the liability arose, which was 1 percent.
- Noranda appealed, claiming Section 2301(a) requires applying the Federal Reserve discount rate in effect on the date of judgment, which was 2.5 percent, thus entitling it to 7.5 percent in total post-judgment interest.

YOUNG CONAWAY

Noranda Aluminum Holding Corp. v. XL Ins. Am., Inc., No. 443, 2020 (Dec. 16, 2021)

➢ **Holding/Relevant Analysis:**

- The Court held for Noranda, that *6 Del. C.* § 2301(a) requires applying the Federal Reserve discount rate in effect on the date of judgment, reversing the Superior Court and remanding to award Noranda post-judgment interest of 7.5 percent.
- The Court, in interpreting Section 2301(a), concluded that the statutory language is unambiguous and the plain meaning of the statute supported Noranda's position, as it explicitly states that the post-judgment interest accrues at the legal rate "from the date of judgment."
- Further, the Court rejected the Insurers' *stare decisis* argument, where they pointed to several Superior Court decisions applying the same pre-and post-judgment interest rates, specifically *TranSched Sys. Ltd. v. Versyss Transit Solutions, LLC,* 2012 WL 1415466 (Del. Super. Ct. Mar. 29, 2012) and *Rollins Environ. Servs., Inc. v. WSMW Indus., Inc.,* 426 A.2d 1363 (Del. 1980), holding that the Delaware General Assembly, in passing Section 2301 "explicitly undercut these cases."
  - "The 2012 addition to Section 2301(a) explicitly requires that post-judgment interest accrue at the legal rate 'from the date of judgment'--this is, in the words of sentence two, 'the time from which [post-judgment] interest is due.'"
- In sum: "A litigant who is subject to a judgment at law—which often comprises elements, such as costs and fees, that are not components of the underlying liability—is not responsible for post-judgment interest until judgment is entered. The appropriate rate of interest is the legal rate in effect on that date. This is the clear command of 6 *Del. C.* § 2301(a)'s mandate that such judgments "shall, from the date of the judgment, bear post-judgment interest of 5% over the Federal Reserve discount rate[.]"

YOUNG CONAWAY

Droz v. Hennessy Indus., LLC, No. 211, 2021 (March 28, 2022)

- **Facts:**

- Plaintiff Shelley Droz ("Mrs. Droz") alleged that her husband, Eric Droz ("Mr. Droz"), was exposed to asbestos dust while using an arc grinder manufactured by defendant Hennessy Industries ("Hennessy") to grind asbestos-containing brake shoes.
- During 1971 to 1973, Mr. Droz used Hennessy's arc grinder to grind brake shoes produced by three manufacturers: Bendix, Wagner, and Raybestos. All three companies produced brake shoes that contained asbestos during the relevant period.
- Mr. Droz was diagnosed with mesothelioma in 2018 and filed suit against Hennessy in the Superior Court of Delaware, alleging that Hennessy was aware that its arc grinder would produce asbestos dust and had a duty to warn Mr. Droz about the possibility of exposure to asbestos dust under Washington State law.
- Mr. Droz died in 2020 while litigation was pending, and Mrs. Droz was substituted as executor of his estate.
- Hennessy moved for summary judgment arguing that Mrs. Droz failed to provide sufficient evidence to prove that any of the brake shoes Mr. Droz worked with using its arc grinder contained asbestos. The Superior Court agreed with Hennessy and granted the motion for summary judgment.

YOUNG CONAWAY

Droz v. Hennessy Indus., LLC, No. 211, 2021 (March 28, 2022)

- **Holding/Relevant Analysis:**

- The Court held that the Superior Court correctly allocated the burden for summary judgment under *Stigliano v. Westinghouse,* but reversed the grant of summary judgment because Mrs. Droz has satisfied her burden to survive the motion for summary judgment.
- The framework in *Stigliano* is the applicable standard for a motion for summary judgment in asbestos exposure cases when the defendant produced both asbestos-containing and asbestos-free products, and product identification is disputed.
- *Stigaliano* is consistent with Rule 56 because under *Stigliano,* the defendant still bears the initial burden of proving that it has manufactured both asbestos-containing and asbestos-free products. The burden then shifts to the plaintiff to provide "direct or circumstantial evidence" to prove exposure to asbestos-containing products, but the plaintiff need not produce evidence of "exclusive use" of asbestos products.
- Although Hennessy's arc grinder itself did not contain asbestos, the Supreme Court stated that the Superior Court was correct in applying *Stigliano* because this case does require identification of asbestos-containing brake shoes that were used with the arc grinder.
- However, the Delaware Supreme Court reversed the Superior Court's grant of summary judgment and held that Mrs. Droz has satisfied her burden under *Stigliano* because Mrs. Droz has provided sufficient evidence to show that at least two of the manufactures of the brake shoes Mr. Droz worked with only produced asbestos-containing products during the relevant period.

YOUNG CONAWAY

FAMILY COURT

Wilcox v. LaClaire, No. 11, 2021 (October 18, 2021)

➢ **Facts:**

- Appeal from a Family Court order denying a Petition for Parental Visitation filed by Appellant-Father (the "Father").
- Father was arrested and incarcerated in September 2015 and once Father told Appellee-Mother (the "Mother") that he was facing up to 20 years in prison, Mother stopped all contact between Father and child.
- Since January 2017, Father was prohibited from having any contact with child by Family Court order.
- In February 2020, Father filed a *pro se* Petition for Parental Visitation, seeking to establish contact with child only by letters, phone and cards and not by in-person visitation.
- At the hearing for the Petition, only Mother, Father, and Stepfather testified, with Mother's testimony indicating that child was thriving and doing well in school and that she did not think it was in child's best interests to have contact with Father.

Wilcox v. LaClaire, No. 11, 2021 (October 18, 2021)

- **Holding/Relevant Analysis:**
- The Court reversed the Family Court's denial of Father's Petition for Parental Visitation. Mother did not satisfy her burden under 13 *Del. C.* § 727 to show Father's requested contact would significantly impair child's emotional development or endanger his physical health.
- Mother's testimony focused on child's normal development and happy, well-adjusted existence, which did not indicate that contact with Father would cause significant impairment to child's emotional development.
- There was no expert testimony, which the Court indicated would have been helpful to "identify how contact with his Father would affect" child and "whether the limited contact requested would likely significantly impair child's emotional development."
- Family Court's findings appeared to interject an element of fault on Father for the post-2015 lack of contact, a factor that the Court previously said should not be held against him.

YOUNG CONAWAY

GOVERNMENT

YOUNG CONAWAY

Capriglione v. State, No. 138, 2021 (Del. Oct. 1, 2021)

➢ **Facts:**

- On April 5, 2021, Michael Capriglione was elected to a two-year term as the Commissioner of the Town of Newport.
- On April 14, 2021, the Delaware Attorney General petitioned for a writ of *quo warranto* in the Superior Court, arguing Capriglione was prohibited from serving as Commissioner because he was convicted of misdemeanor official misconduct for actions he took as Newport's police chief in 2018 (i.e., covering up an accident he caused in the police department parking lot).
- The Delaware Attorney General argued that the conviction was a disqualifying "infamous crime" under Art. II, § 21 of the Delaware Constitution.
- Section 21 provides: "No person who shall be convicted of embezzlement of the public money, bribery, perjury **or other infamous crime,** shall be eligible to a seat in either House of the General Assembly, or capable of holding any office of trust, honor or profit under this State."

YOUNG CONAWAY

Capriglione v. State, No. 138, 2021 (Del. Oct. 1, 2021)

➢ **Holding/Relevant Analysis:**

- The Court's Constitutional Question Roadmap: (1) Textual and Contextual Analysis (2) Historical Understanding: Delaware Constitutional Debates of 1897; (3) if not dispositive, consideration of Delaware case law.
- (1) Textual and Contextual Analysis: Art. VI, § 2 specifically includes the term "misdemeanor" to support impeachment removal, while Art. II, § 21 does not; all three enumerated offenses in Section 21 carried a multi-year jail sentence in 1897 or was a felony.
- (2) Historical Understanding: the Delegates to the Delaware Constitutional Convention of 1897 discussed "infamous crime" in connection with Art. XV, § 6 (criminal conviction), distinguishing it from "misbehavior in office" and specifically listed two common-law felonies as examples of infamous crimes (larceny and robbery).
- (3) Delaware Case Law: Although DE Courts never explicitly announced it as a rule, since 1970, case law has uniformly indicated that only felonies can be considered "infamous crimes" under Section 21.
- The Court made explicit what was already implicit in its law: "We therefore hold that only felonies can be considered 'infamous' under Article II, Section 21 of the Delaware Constitution."

YOUNG CONAWAY

Judicial Watch v. Univ. of Del., No. 32, 2021 (Dec. 6, 2021)

➢ **Facts:**

- On June 6, 2012, then-Vice President Joseph R. Biden, Jr. donated his Senatorial papers-more than 1,850 boxes of archival records and 415 gigabytes of electronic records-to the University of Delaware Library pursuant to a gift agreement whereby the University of Delaware could make the papers public after they had been properly processed and archived.
- On April 30, 2020, the non-profits Judicial Watch, Inc. and The Daily Caller News Foundation submitted requests under Delaware's Freedom of Information Act ("FOIA"), 29 Del. C. §§ 10001-10007, to access the papers and any records relating to the papers.
- The University of Delaware denied both requests using unsworn representations from its counsel because, in its view, the papers did not meet the definition of "public records" in the FOIA statute and because the full Board of Trustees did not discuss the papers.
- The two non-profits appealed, and the Office of the Attorney General of the State of Delaware, as well as the Superior Court, both separately agreed with the University of Delaware.
- Before the Supreme Court, the non-profits argued that the Superior Court improperly relied on unsworn representations from the University of Delaware's counsel in a finding that the University met its burden.

YOUNG CONAWAY

Judicial Watch v. Univ. of Del., No. 32, 2021 (Dec. 6, 2021)

➢ **Holding/Relevant Analysis:**

- Due to specific statutory exemptions for public universities, the University of Delaware is only subject to FOIA when it has documents that relate to its expenditure of public funds or when it holds meetings of the full Board of Trustees.
- (1) "Public Record" Definition and full Board of Trustee Meetings
  - A document is a public record under Section 10002(l) when the content of the document itself relates to the expenditure of public funds.
    - The Court rejected the non-profits' argument that if the University uses public funds in relation to the document, the document involves public funds.
  - Only meetings of the full Board of Trustees are subject to FOIA; a public body can hold an executive session under the FOIA statute but must still disclose the vote to hold an executive session, as well as the purpose of the executive session and minutes of such a session.
- (2) FOIA Burden
  - The burden of proof is on the public body subject to a FOIA request to justify its denial of the requests.
  - To meet its burden under the FOIA statute, the public body must: "indicate the reasons" for a denial of a FOIA request but "shall not be required to provide an index, or any other compilation, as to each record or part of a record denied." Section 10003(h)(2).
  - The Supreme Court held that unless it is clear on the face of the request that the demanded records are not subject to FOIA, the statute's language "indicate the reasons" requires the public body to make a statement under oath, such as a sworn affidavit, describing the efforts it took to identify the documents.
  - Under these facts, because the University's factual assertions regarding its denial of FOIA records were not made under oath and did not describe the efforts taken to identify any responsive documents, it did not meet FOIA's burden of proof and the Supreme Court remanded the case to the Superior Court.

YOUNG CONAWAY

Request for an Opinion of the Justices, No. 19, 2022 (March 1, 2022)

- **Facts:**

- In Delaware, a public official can be removed by: (a) certain criminal convictions; (b) impeachment; or (c) a bill of address.
- The Delaware State Senate requested the opinion of the Supreme Court on the construction of Article III, Section 13 of the Delaware Constitution, concerning the Governor's ability to remove officers for reasonable cause if the General Assembly presents a bill of address.
- § 13. Removal of officers by Governor; procedure.
  - Section 13. The Governor may for any reasonable cause remove any officer, except the Lieutenant-Governor and members of the General Assembly, upon the address of two-thirds of all the members elected to each House of the General Assembly. Whenever the General Assembly shall so address the Governor, the cause of removal shall be entered on the journals of each House. The person against whom the General Assembly may be about to proceed shall receive notice thereof, accompanied with the cause alleged for his or her removal, at least ten days before the day on which either House of the General Assembly shall act thereon.

YOUNG CONAWAY

Request for an Opinion of the Justices, No. 19, 2022 (March 1, 2022)

- **Holding/Relevant Analysis:**

- Three constitutional methods to remove a public officer: (1) Criminal Conviction (Article XV, Section 6); (2) Conviction and Impeachment (Article VI, Section 2); (3) Bill of Address (Article III, Section 13).
- The Bill of Address provision does not mention "conviction" and was intended to cast a wider net than the other two methods of removal, including criminal conduct that has not yet resulted in a conviction, general misbehavior, or incapacity of any kind.
- While casting a wide net, a Bill of Address is confined by its reasonable cause language, which requires, after a hearing and opportunity for response by the accused, the legislative body to make a specific finding of reasonable cause to support the removal.
  - The Court held that while underlying conduct causing an indictment could support a finding of reasonable cause, the mere fact of an indictment is not, standing alone, reasonable cause.
- "The Governor's authority to remove a public official upon a bill of address does not include the authority to take a lesser action such as suspension."
- General Assembly can decide how the hearing will proceed, other than the minimum requirement of the public officer's notice of the charges and the right to be heard.
  - Can have one hearing—in either House of the General Assembly which has provided the ten-day notice—or a joint hearing before both Houses.
  - Accused public official will have all the procedural protections of a trial-the right to be represented by counsel, the right to offer evidence, the right to call witnesses, and the opportunity to testify if so chosen.
- No mechanism for a direct appeal of the Governor's decision to remove an official upon a bill of address.

YOUNG CONAWAY

Croda v. New Castle Cnty., No. 349, 2021 (July 22, 2022)

- **Facts:**
- "Under New Castle County's Unified Development Code, heavy industrial uses were permitted as of right on land zoned for heavy industry ...."
- On April 30, 2019, New Castle County Council introduced Ordinance 19-046, entitled: "To Amend New Castle County Code Chapter 40," which among other things, sought to require property owners with high industrial zoned property to now obtain a special permit from the County before expanding the heavy industrial use of their property.
- On July 27, 2019, the County published the Ordinance title in *The News Journal*, and information regarding upcoming public hearings. After a public hearing, on August 27, 2019, New Castle County Council adopted Ordinance 19-046, and published another notice announcing the adoption in *The News Journal* on August 31, 2019.
- Croda International plc, a British specialty chemicals company, owns and operates the Atlas Point chemical plant in New Castle County, Delaware, and filed a complaint on August 17, 2020, arguing that the Ordinance was invalid because the title was misleading and failed to put Croda on public notice of the rule change, violating its due process rights.
- The Court of Chancery held:
  - (1) Croda's state claims were time-barred under 10 *Del. C.* § 8126 which sets a 60-day deadline to challenge an ordinance after publication of its adoption.
    - "No action, suit or proceeding in any court ... in which the legality of any ordinance, code, regulation or map, relating to zoning, or any amendment thereto ... is challenged, whether by direct or collateral attack or otherwise, shall be brought after the expiration of 60 days from the date of publication in a newspaper of general circulation in the county or municipality in which such adoption occurred, of notice of the adoption of such ordinance, code, regulation, map or amendment."
  - (2) Croda's due process claims failed because Croda did not show it had a vested property right.

YOUNG CONAWAY

Croda v. New Castle Cnty., No. 349, 2021 (July 22, 2022)

- **Holding/Relevant Analysis:**
- (1) Section 8126 is a statute of repose, which is jurisdictional and cannot be waived. When it runs, it extinguishes the remedy and right to bring any claim within the statute.
  - Even if there were defects in the notice/titling, it would not toll the 60-day period because a statute of repose does not have exceptions for procedural irregularities.
  - "Although a statute of repose can produce harsh results, in the land use context it ensures 'prompt resolution of land use challenges[ ]' because '[u]ncertainty about the validity of a zoning decision is disruptive to the community as well as the developer.'"
  - On August 31, 2019, the County published the notice of adoption of the Ordinance and Croda did not file suit until August 17, 2020; therefore, Croda's suit was time-barred
- (2) The Court did not reach whether Croda had a protected property interest in the existing zone classification because it held that procedural due process protections do not apply to legislation of general applicability.
  - The Ordinance was not specifically aimed at Croda or its property but rather, applies to all high industrial zoned property in New Castle County.

YOUNG CONAWAY

Jack Lingo Asset Management, LLC v. Board of Adjustment of City of Rehoboth Beach, No. 292, 2021 (July 19, 2022)

➢ **Facts:**

- Jack Lingo Asset Management (the "Company") owns and occupies the property at 240 Rehoboth Avenue in Rehoboth Beach, Delaware, where the second story only covers a portion of the first, leaving a flat roof over the rest of the ground floor.
- The Company wanted to convert the second floor from residential to office and sought permission from the City of Rehoboth Beach to build an unroofed, railed walkway extending from the second floor over the flat roof leading down to Christian Street, the street behind the property.
- The City denied the application because it determined the railings surrounding the proposed walkway would expand the Gross Floor Area of the property under the Zoning Code which would require the Company to provide an additional parking spot, which it had no room to do.
- The Company appealed and the Board of Adjustment of the City of Rehoboth Beach and the Superior Court affirmed the denial.

YOUNG CONAWAY

Jack Lingo Asset Management, LLC v. Board of Adjustment of City of Rehoboth Beach, No. 292, 2021 (July 19, 2022)

➢ **Holding/Relevant Analysis:**

- When considering a question of statutory interpretation in the zoning context, the Court does not consider extrinsic evidence because when an ambiguity is present, "the interpretation that favors the landowner controls."
- Section 270-04 of the Zoning Code defined Gross Floor Area as: "The sum of the gross horizontal areas of the several floors of a building measured from the exterior face of the exterior walls or from the center line of a wall separating two attached buildings, including basements but not including any space where the floor-to-ceiling height is less than six feet, six inches."
  - The Zoning Code defined "wall" as "[t]he vertical exterior surface of a building" and defined "building" as "[a] structure, usually roofed, walled and built for permanent use, as for a dwelling or for commercial purposes."
  - The term "exterior walls" is not defined. The Company argued the term referred to walls of a building that connect the floor to the ceiling and have at least one side facing outside the building, and therefore, did not include a deck or walkway railing.
- The Court reversed the Board's decision and held the Company offered a common-sense natural reading of the term "exterior walls," being that it refers to the outer surfaces of a building that connect floors to ceilings and would not include a walkway railing.
  - The Court failed to see how a walkway railing could be classified as "exterior walls" of a "building" because it is not the type that is usually roofed and was not meant to serve as a gathering place or for commercial purposes.

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

MISCELLANEOUS

Sheppard v. Allen Family Foods, No. 346, 2021 (June 23, 2022)

➢ **Facts:**

- In April 2011, Appellant slipped and fell on Appellee-Employer's (the "Employer") cafeteria floor, injuring her neck, low back, left arm, and left leg.
- Appellant filed a Petition to Determine Additional Compensation Due alleging she suffered permanent impairment as a result of the accident and, in July 2014, the Industrial Accident Board (the "IAB") ruled that she had proved her injuries resulted in a permanent impairment.
- In 2016, Employer challenged certain treatment and medications prescribed by Appellant's doctor by pursuing utilization review in which the utilization reviewer found that certain opioid medications prescribed to Appellant were not compliant with Delaware guidelines (later affirmed by the IAB).
- Employer continued to pay for Appellant's treatment through September 2019 and in December 2019, it filed a Petition for Review with the IAB seeking to terminate the compensability of Appellant's narcotic medication and injection treatment.
- At the hearing, Employer and Appellant each presented one witness by deposition: Employer's witness testified that Appellant's treatment was (1) not casually related to the work injury based on reviewing her medical records and personal examinations and (2) non-compliant due to her lying about her marijuana use, while Appellant's witness testified that she was not aware of Appellant's illegal marijuana use for many years but that Appellant was benefiting from her treatment with narcotic pain medicine.
- The IAB ruled that Employer met its burden of proof regarding the Appellant's treatment and that Employer's witness testimony was more persuasive than Appellant's witness testimony.

Sheppard v. Allen Family Foods, No. 346, 2021 (June 23, 2022)

➢ **Holding/Relevant Analysis:**

- The Court affirmed the Superior Court's decision affirming the IAB decision, holding that the ruling properly addressed the merits of the case and was supported by substantial evidence.
- Employer's witness testimony was not submitted to reverse the IAB's prior determination that Appellant sustained a permanent injury or retroactively terminate Appellant's treatment or disability benefits, but instead to evaluate the need for ongoing treatment to the work injury.
- Employer did not waive its ability to challenge causation in its Petition because it previously pursued utilization review because utilization review is available for the prompt resolution of uses relating to treatment compliance and is utilized when causation is not at issue.
- Appellant's continued payment for treatment did not translate into a waiver of causation with respect to Employer's December 2019 Petition.
- The IAB's decision was supported by substantial evidence because, as fact finder, the IAB determined that Employer's witness testified as a medical expert, disputed the causal relationship of Appellant's ongoing treatment to the accident, and did so after reviewing her available records and personal examination, indicating that its conclusions were more credible than a nurse practitioner who was unaware of Appellant's illegal marijuana use as treatment.

YOUNG CONAWAY

First Solar, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, No. 217, 2021(Mar. 16, 2022)

➢ **Facts:**

- First Solar, manufacturer of solar panels, faced two lawsuits. The first (the "*Smilovitz* Action"), was a class action brought by stockholders alleging violations of federal securities laws for making false or misleading public disclosures.
- The second (the "*Maverick* Action") was brought in 2015 by stockholders who had opted out of the *Smilovitz* Action, alleging the same federal securities law violations.
- National Union and XL Specialty (the "Insurers") provided the coverage for the *Smilovitz* Action, whereby the policies excluded coverage for "Related Claims," defined as claims "alleging, arising out of, based upon or attributable to any facts or Wrongful Acts that are the same as or related to those that were ... alleged in a Claim made against an Insured."
- First Solar settled the *Smilovitz* Action in 2020 for $350 million which the Insurers covered, but the Insurers refused to cover the subsequent $19 million settlement of the *Maverick* Action.
- First Solar filed suit in Superior Court for breach of contract, and the Superior Court held that coverage for the *Maverick* Action was excluded as a "Related Claim" under the policies because it was "fundamentally identical" to the *Smilovitz* Action.

YOUNG CONAWAY

First Solar, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, No. 217, 2021(Mar. 16, 2022)

- **Holding/Relevant Analysis:**

- The Court affirmed the Superior Court's ruling, holding that the *Maverick* Action was excluded from coverage under the Policy as a "Related Claim" to the *Smilovitz* Action.
- However, in doing so, the Court noted that the Superior Court erred by applying the "fundamentally identical" standard, which was never adopted by the Delaware Supreme Court, rather than determining whether the claims were "Related Claims" according to the plain language of the insurance policy.
  - The scope of an insurance policy's coverage is prescribed by the policy language. Absent ambiguity, it is interpreted according to its plain, ordinary meeting.
- The Court then compared the two actions, concluding that the *Maverick* Action was a "Related Claim" because both actions alleged violations of the same federal securities laws, were based on the same misconduct by First Solar, had the same defendants, and relied on much of the same evidence.
  - "Although the Actions are not identical in their claims or evidence, absolute identity is not required."

YOUNG CONAWAY

GEICO General Insurance Company v. Green, No. 107, 166, 2021 (April 8, 2022)

- **Facts:**

- Green, a policyholder of Personal Injury Protection ("PIP") through GEICO, was injured in a car accident in Delaware.
- After GEICO denied several of her claims, Green filed a class action suit against GEICO alleging breach of the PIP contract, bad faith breach of contract, and sought a declaratory judgment from the Superior Court that GEICO's automated rules for determining coverage violated Delaware's Personal Injury Protection Statute, 21 *Del. C.* § 2118.
- The Superior Court granted summary judgment in favor of GEICO on the counts of breach of contract and bad faith breach, but granted the Claimants' declaratory judgment. Both sides challenged the ruling on appeal.

YOUNG CONAWAY

GEICO General Insurance Company v. Green, No. 107, 166, 2021 (April 8, 2022)

- **Holding/Relevant Analysis:**
- The Court affirmed in part and reversed in part, but sided with GEICO on all three issues on appeal.
- First, the Court held that GEICO did not breach the PIP contract because the Claimants failed to show that GEICO refused to pay "reasonable and necessary expenses," or that GEICO's rules for calculating claims operated as a "sublimit cap."
- Further, the Court held that the Claimants were unable to show that GEICO's automated system had denied claims "without any reasonable justification," to rise to the level of bad faith.
  - "Section 2118 requires insurers to pay reasonable and necessary medical expenses, but Section 2118 does not dictate how insurers must determine the reasonableness and necessity of claims."
  - GEICO relied on medical studies, a review of the claimant's medical records, and other relevant facts.
- Lastly, the Court held that the Superior Court erred in granting the declaratory judgment, because a Claimant cannot challenge an insurer's PIP claim process without first proving that its medical expenses were reasonable and necessary, which the Claimants did not do.
  - "[T]he validity of a PIP claim alleging an insurer's violation of Section 2118(a)(2) hinges on whether the expenses at issue are reasonable and necessary and, absent such a showing, that plaintiff cannot prevail."

YOUNG CONAWAY

Ryan P. Newell, Partner
Young Conaway Stargatt & Taylor, LLP
Rodney Square, 1000 North King Street
Wilmington, DE 19801
P: 302.571.6715 | F: 302.576.3284
RNewell@ycst.com | www.youngconaway.com

YOUNG CONAWAY

United States Supreme Court Cases and Upcoming Cases

Alan E. Garfield, Esquire
Distinguished Professor
Widener University Delaware Law School

Professor Alan Garfield

Alan E. Garfield is a distinguished professor at Delaware Law School. He received his Bachelor of Arts, *magna cum laude*, from Brandeis University, and his Juris Doctorate from UCLA School of Law, where he was a member of the UCLA Law Review and the Order of the Coif. Prior to joining the Delaware Law faculty, Professor Garfield worked for three years in the litigation department of Weil, Gotshal & Manges in New York City. He is licensed to practice in California and New York.

Professor Garfield has been honored for his teaching and scholarship. He received the Outstanding Faculty Award on three occasions and the Douglas E. Ray Excellence in Faculty Scholarship Award on two. Professor Garfield was selected to be the H. Albert Young Fellow in Constitutional Law from 2005 to 2007, and, in 2018, was named a distinguished professor. Professor Garfield has been a visiting professor at American University's Washington College of Law and Bryn Mawr College and is currently an adjunct professor at Drexel University School of Law.

Professor Garfield writes and teaches in the areas of Constitutional Law, Copyright, and Contracts. His scholarship has appeared in numerous journals including the Columbia Law Review Sidebar, the Cornell Law Review, and the Washington University Law Review. He has also published op-eds in the *Philadelphia Inquirer*, the Wilmington *News Journal*, *PennLive*, and NBC News THINK. Professor Garfield published a column on the Supreme Court in *The News Journal* from 2009 to 2019. The column, *Bench Press*, received the Delaware Press Association's first place award for a personal-opinion column in seven different years, and received a first-place award in a national competition in both 2012 and 2019. Professor Garfield has been quoted in *The Washington Post*, *The Los Angeles Times*, *The Philadelphia Inquirer*, *The News Journal*, *Fortune*, Frontline, and CBS News, and has been interviewed or appeared on WHYY, WDEL, Make No Law Podcast, and CSPAN.

Professor Garfield is the founder and coordinator of "The First State Celebrates Constitution Day," a project run in collaboration with *The News Journal* editors since 2006. He also co-founded and is the current administrator for the Delaware Law School Patent Pro Bono Program, which pairs low-income inventors with volunteer attorneys who help the inventors file patent applications.

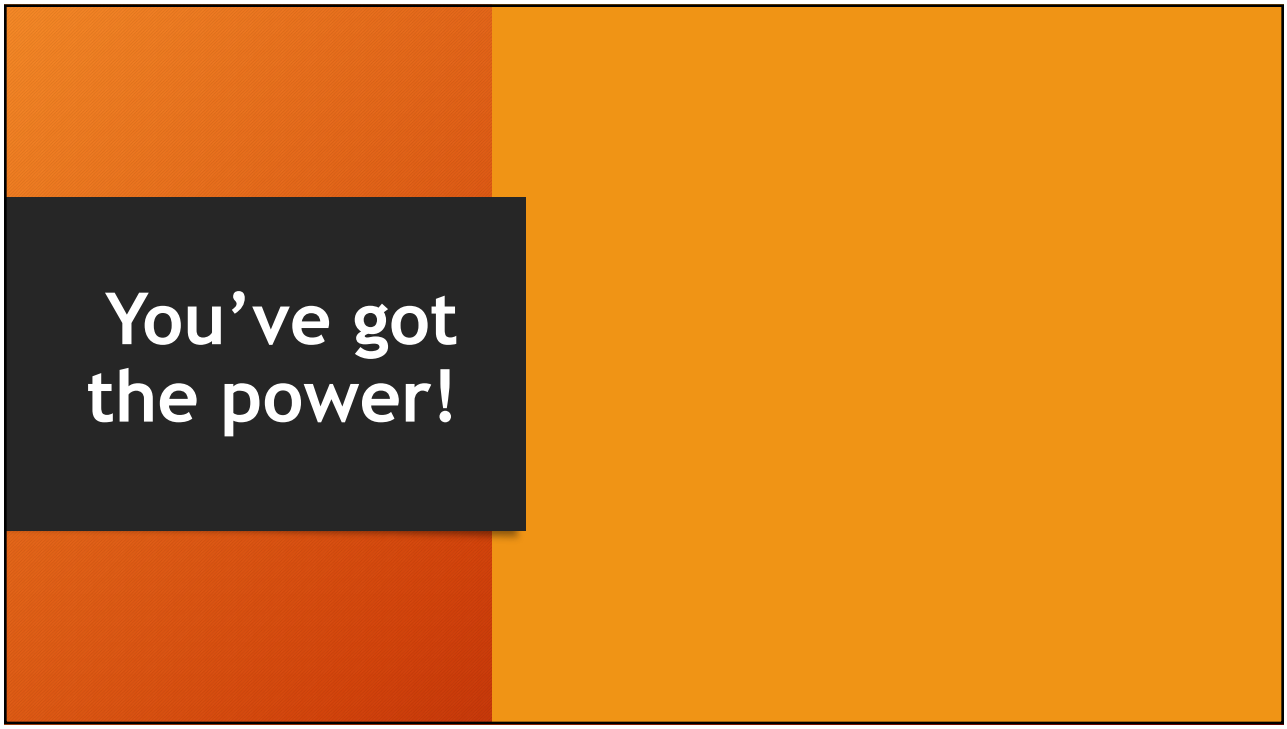
Professor Garfield is a past chair of the Association of American Law Schools Section on Mass Communication Law. He has served on the Board of Directors of the Delaware ACLU since 2006 and was the Board President from 2015-2017.

Delaware State Bar Association

Supreme Court Review 2022

Professor Alan Garfield


You go here


You've got the power!


Who do you think you are?

The Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia…

JUST WHO DO WE THINK WE ARE?

Judicial review is a "deviant institution in American democracy"

How do you justify overturning laws enacted by the people's elected representatives?

I'm just a neutral umpire calling balls and strikes?

Originalism on the rise

The only good Constitution is a dead Constitution.

I clerked for Justice Scalia more than 20 years ago, but the lessons I learned still resonate. His judicial philosophy is mine too: A judge must apply the law as written.

ABORTION

The Constitution makes no express reference to a right to obtain an abortion.

That's true.
But what about these provisions?

- **Ninth Amendment**
  "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other rights retained by the people."

- **Fourteenth Amendment**
  "No State shall enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Substantive Due Process

"Nor shall any State deprive any person of life, liberty, or property, without due process of law."

- Fourteenth Amendment

Substantive Due Process

"Nor shall any State deprive any person of life, **liberty**, or property, without due process of law."

- Fourteenth Amendment

Substantive due process is a contradiction in terms -- sort of like "green pastel redness."

Is it appropriate to imply rights into the Constitution?

Rights not mentioned in the Constitution

- Right to use contraceptives
- Right to procreate
- Right to marry
- Right to the custody of your child
- Right to engage in private consensual sex

The Constitution makes no express reference to a right to obtain an abortion… **Those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text.**

When should we find an implied right?

We must guard against the natural human tendency to [impose] **our own ardent views** about the liberty Americans should enjoy. Instead, **guided by history and tradition**…we must ask what the Fourteenth Amendment means by the term "liberty."

What did Alito find?

- "In the **1732** case…, the judge said of the charge of abortion…that he had 'never met with a case so barbarous and unnatural.'"
- "By **1868**, when the Fourteenth Amendment was adopted, three-quarters of the States…had enacted statutes making abortion a crime…"

Guided by history and tradition…, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.

Is history and tradition a good method for deciding which rights to imply?

What if the historical traditions are . . .

BAD?!

The status of women during the historical era Alito thought was relevant

"Throughout much of the 19th century the position of women in our society was…comparable to that of blacks under pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children."

Frontiero v. Richardson (1973)

Do justices cherry pick history that support the outcome they prefer?

Did common law protect a women's right to abort before quickening?

Roe v. Wade

"It is undisputed that at common law, abortion performed before 'quickening' was not an indictable offense."

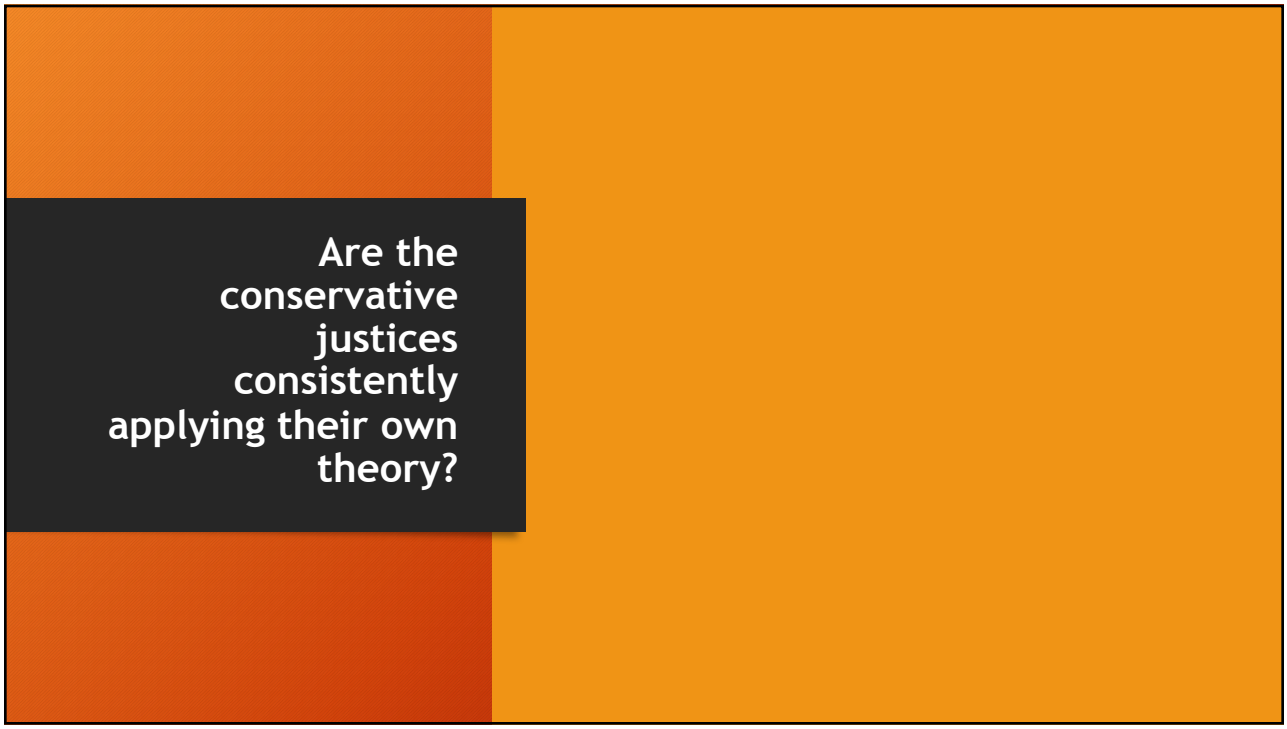
Alito Opinion

"Although a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was permissible at common law – much less that abortion was a legal right."

Ben Franklin's 1760 edition of **The American Instructor** included **"Poor Planter's Physician"** with an abortion recipe

For this Misfortune, you must purge with Highland Flagg, (commonly called Bellyach Root) a Week before you expect to be out of Order; and repeat the same two Days after; the next Morning drink a Quarter of Pint of Pennyroyal Water, or Decoction, with 12 Drops of Spirits of Harts-horn, and as much again at Night, when you go to Bed. Continue this 9 Days running; and after resting 3 Days, go on with it for 9 more.

https://slate.com/news-and-politics/2022/05/ben-franklin-american-instructor-textbook-abortion-recipe.html


Are the conservative justices consistently applying their own theory?

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way.

Would it have been better to use a living Constitution approach?

The generations that wrote and ratified the Bill of Rights and the 14th Amendment did not presume to know the extent of freedom in all of its dimensions and so they entrusted to ***future generations*** a charter protecting the right of all persons to enjoy liberty ***as we learn its meaning***.

If the Constitution is alive, what restrains the justices?

We can do whatever we want!

Some things you don't get to vote on

Our cases recognize the right of the individual to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear a child. These matters, involving the most intimate and personal choices a person may make in a lifetime, are central to the liberty protected by the 14th Amendment.

Which justices have the better approach?

It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. The permissibility of abortion is to be resolved like most important questions in our democracy: ***by citizens trying to persuade one another and then voting.***

Today, the Court says that from the very moment of fertilization, a woman has no right to speak of. A state can force her to bring a pregnancy to term, even at the steepest personal and familial cost.

What are the implications for other implied rights?

RELAX! Other rights are not in danger

We emphasize that our decision concerns the constitutional right to abortion and no other right.

BE AFRAID! It's open season on other rights!

In future cases, we should reconsider all of this Court's substantive due process precedents, including Griswold, Lawrence, and Obergefell.

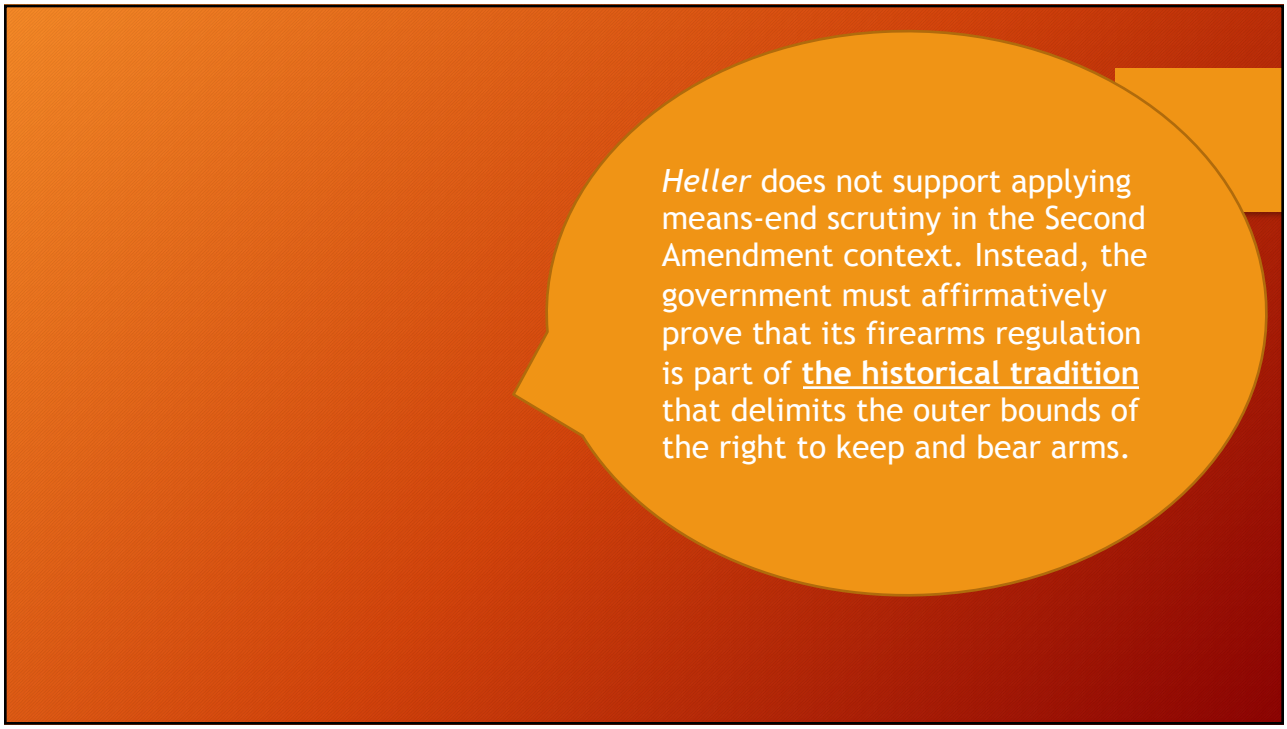
Notably missing from Thomas' list

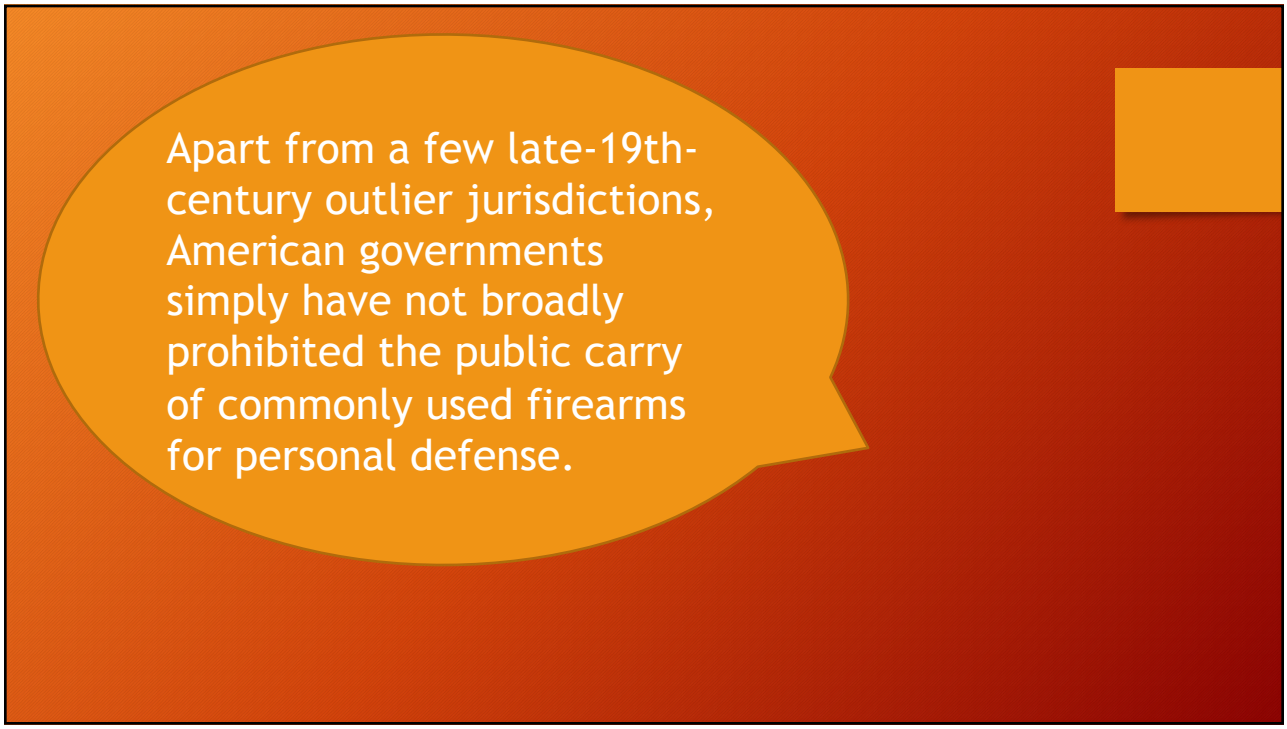
Potential future abortion related issues: Is a fetus a "person" under the Constitution?

- **Jane Doe v. McKee (current cert. petition)**
  - "Do unborn human beings, at any gestational age, have any rights under the United States Constitution?"

Other looming abortion issues

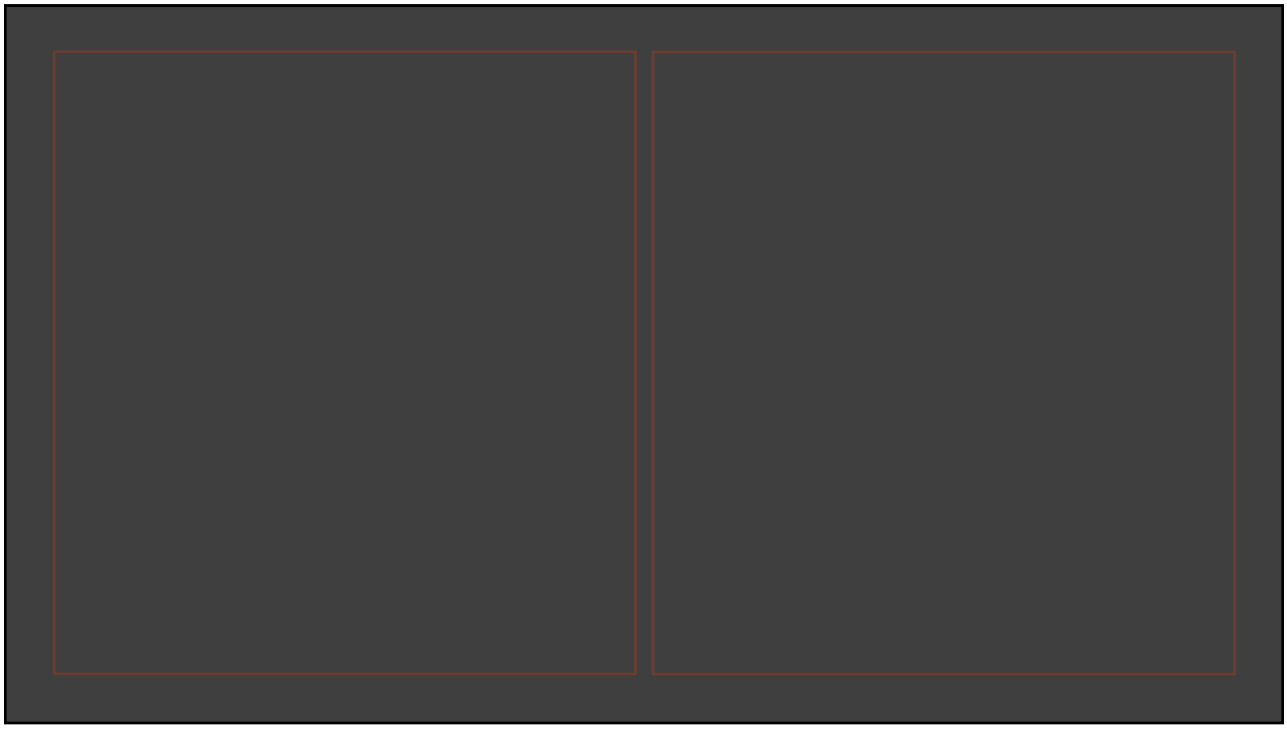
- **Emergency Medical Treatment and Labor Act ("EMTALA"):** What does a doctor do when EMTALA says must give abortion to stabilize patient and state law prohibits abortions?
- **Right to travel:** Can states punish women, or those who help women, travel to another state for an abortion?


Heller does not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of **the historical tradition** that delimits the outer bounds of the right to keep and bear arms.


Apart from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense.

How does the Court justify striking down New York's law without first considering how it actually works on the ground and what purposes it serves? The Court does so by purporting to rely nearly exclusively on history.

How can we expect laws and cases that are over a century old to dictate the legality of regulations targeting "ghost guns"? Or modern laws requiring all gun shops to offer smart guns?



Which justices have the better approach?

We are aware of the problem of gun violence in this country. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table.

The primary difference between the Court's view and mine is that I believe the Second Amendment allows States to take account of the serious problems posed by gun violence.

The impact of the Court's opinion on lower courts

Thomas' test has already wreaked havoc in the lower courts. One judge has struck down a Texas law that prohibits 18 to 20-year-olds from carrying a handgun outside the home. People under 21 are significantly more likely to commit gun homicides—but in Bruen, Thomas announced that courts may never consider the real-world, life-saving impact of gun safety laws when gauging their constitutionality. A different Texas judge invalidated a federal law barring individuals from purchasing a handgun while they're under indictment, even for a violent felony offense. Just last week, another judge struck down New York's ban on concealed carry in airports, train stations, domestic violence shelters, summer camps, the subway, and other "sensitive locations."

https://slate.com/news-and-politics/2022/10/supreme-court-ghost-guns-serial-number-clarence-thomas.html

United States v. Price

(S. D. W. Va. Oct. 12, 2022)

"Until recently, federal courts...conducted a means-end analysis to determine whether the state's interest in [a firearm's law] was sufficient to overcome whatever burden the law placed on one's Second Amendment right. In *Bruen*, however, the Supreme Court of the United States determined that lower courts had been incorrect…Rather than balancing any government interest, no matter how important…, the Supreme Court reaffirmed what it said in *Heller*: 'Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.' **Because the Second Amendment was adopted in 1791, only those regulations that would have been considered constitutional then can be constitutional now."**

CHURCH AND STATE

Mr. Kennedy sent a letter to school officials informing them that, because of his sincerely-held religious beliefs, he felt compelled to offer a post-game personal prayer of thanks at midfield.

Rashomon on the Football Field

Alito

- "The only prayer Mr. Kennedy sought to continue was the kind he had started out doing at the beginning of his tenure – the prayer he gave alone."

Sotomayor

- "Before the homecoming game, Kennedy made multiple media appearances to publicize his plans to pray at the 50-year line, leading to an article in the Seattle News and a local television broadcast about the upcoming game."

[The Establishment Clause does not] compel the government to purge from the public sphere anything that an objective observer could reasonably infer endorses or partakes of the religious.

The Court elevates an individual's interest in personal religious exercise, in the exact time and place of the individual's choosing, over society's interest in protecting the separation between church and state.

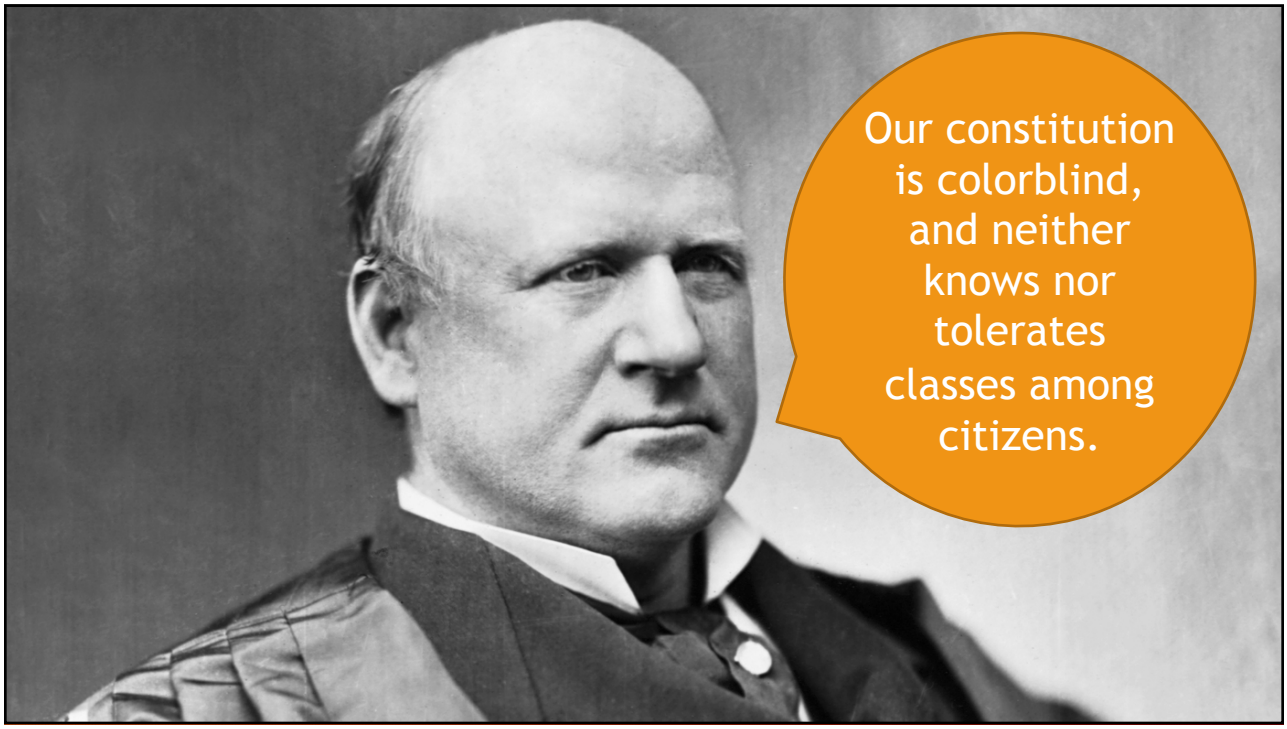
2022-2023 Supreme Court Term

Affirmative Action

UC DAVIS SCHOOL OF MEDICINE

MICHIGAN LAW
UNIVERSITY OF MICHIGAN

Promoting Student Body Diversity



Brief of Students for Fair Admissions

Affirmative Action Opponents are the True Heirs of Brown

- "As Justice Harlan recognized in *Plessy*, 'Our constitution is color-blind, and neither knows nor tolerates classes among citizens. His dissent was ultimately vindicated in *Brown*, where this Court denied 'any authority to use race as a factor in affording educational opportunities. Because *Brown* is right, *Grutter* is wrong."

Government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice.

The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

Brief of Harvard University
Affirmative Action Supporters are the True Heirs of Brown

- "*Bakke*, *Grutter*, and *Fisher* uphold *Brown* in every way. Like *Brown*, those decisions relied on the overriding importance of education. Like *Brown*, those decisions focused on the 'intangible' dimensions of education. And, like *Brown*, the Court's decisions in *Bakke*, *Grutter*, and *Fisher* prohibit racial classifications that decide admissions solely on the basis of race."

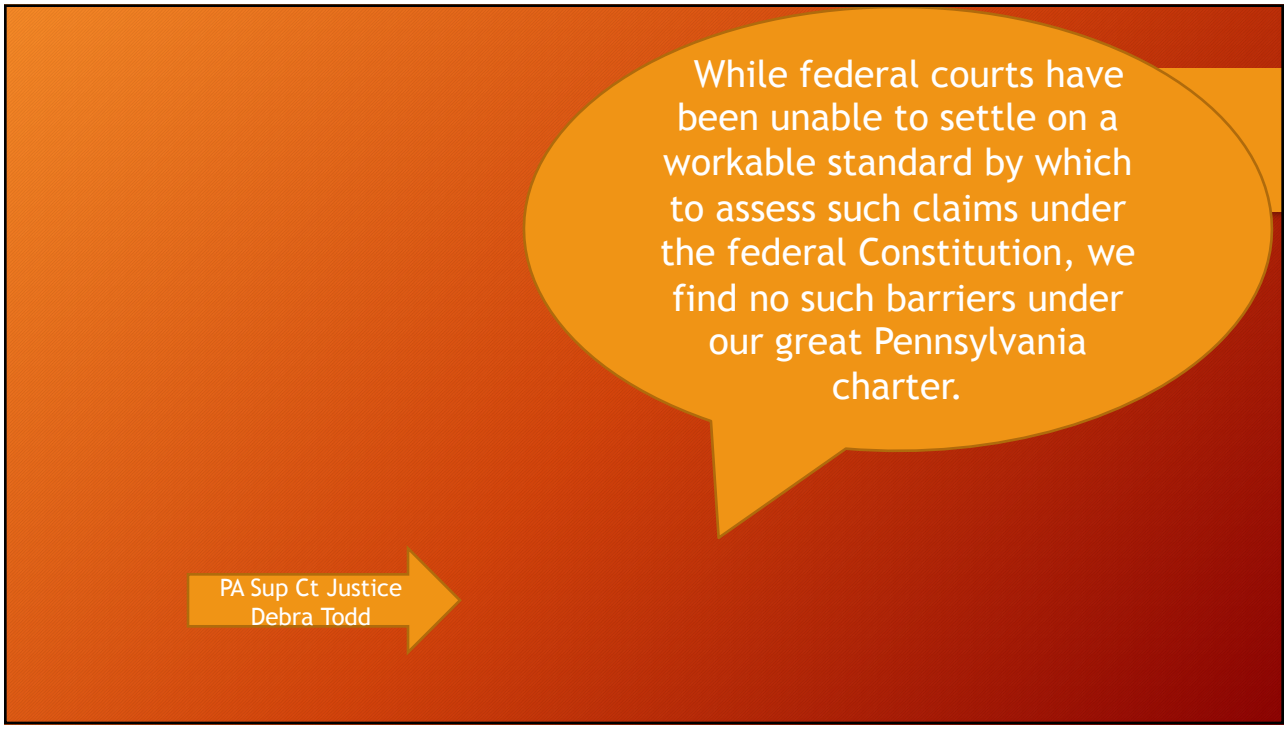
The consistency that the Court espouses would disregard the difference between a "No Trepassing" sign and a welcome mat.

I don't think we can assume that just because race is taken into account that that…creates an equal protection problem, because I understood that we looked at the history and traditions of the Constitution…, and when I drilled down to that level of analysis, it became clear to me that the framers themselves adopted the equal protection clause, the Fourteenth Amendment, the Fifteenth Amendment, in a race conscious way.

Election Law

Partisan Gerrymandering

We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.


While federal courts have been unable to settle on a workable standard by which to assess such claims under the federal Constitution, we find no such barriers under our great Pennsylvania charter.
PA Sup Ct Justice Debra Todd

Elections Clause
U.S. Const. Art. I, § 4, cl. 1

- "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State **by the Legislature** thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

Brief of North Carolina Legislature

- "The Framers were aware of electoral districting problems and considered what to do about them. They settled on assigning the issue to the state legislatures, expressly checked by Congress. Their approach **did not assign any role** in this policymaking process to state judges, and the decisions by the courts below cannot stand."

Brennan Center for Justice on potential impact of independent state legislature theory

The theory would throw elections into chaos, nullifying hundreds of election rules put in place through ballot initiatives, state constitutions, and administrative regulations . . . State lawmakers would be able to adopt vote suppression legislation without any checks or balances from state courts or even gubernatorial veto.

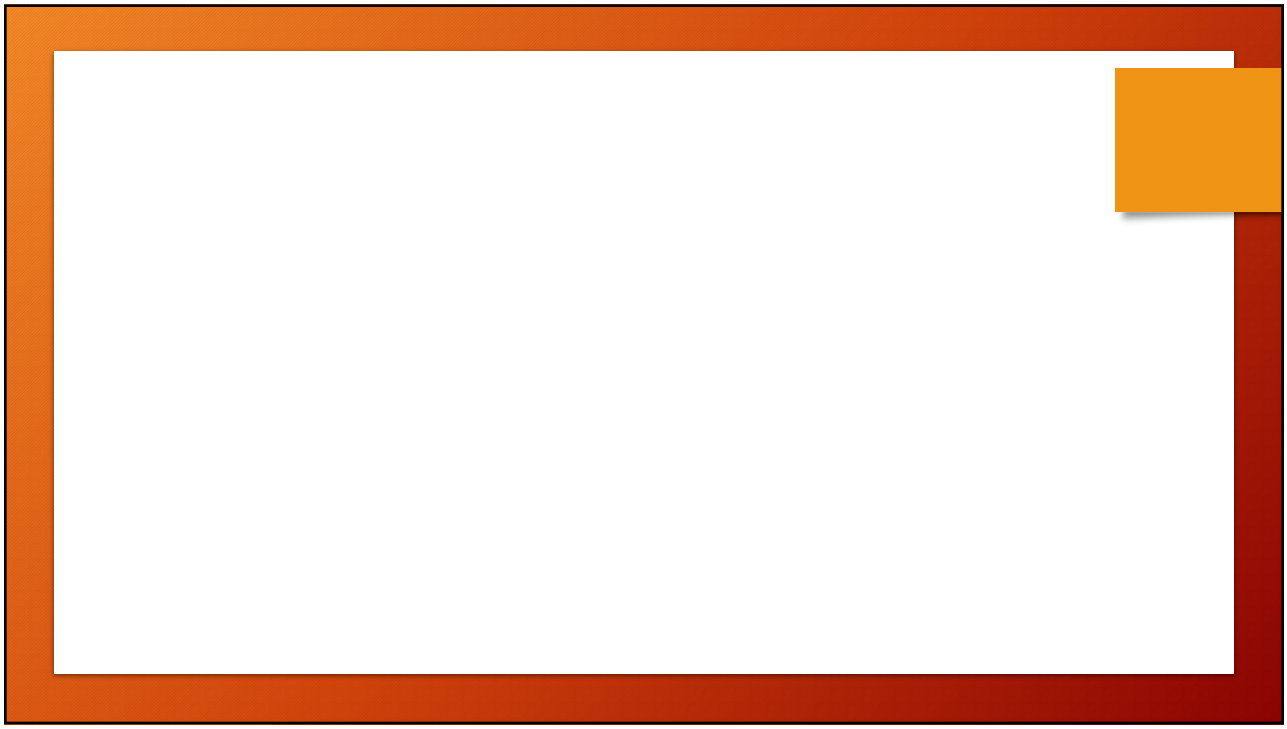
Not scared enough?
Consider this provision in the Constitution

- **Article II, § 1, cl. 2**
  - Each State shall appoint, in such Manner as **the Legislature thereof may direct**, a Number of Electors . . .

Brennan Center for Justice
The Nightmare Scenario

The nightmare scenario is that a legislature, displeased with how an election official on the ground has interpreted her state's election laws, would invoke the theory as a pretext to refuse to certify the results of a presidential election and instead select its own slate of electors. . . [A]ccording to former federal judge J. Michael Luttig — a distinguished conservative jurist — the theory is a part of the "Republican blueprint to steal the 2024 election."

Gay and Lesbian Rights



EQUALITY

LIBERTY

Graphic Artist's Argument

- It is bedrock law that the First Amendment protects an artist's right to choose what to say and when to remain silent. Yet Colorado has turned those principles upside down, such that artists must now speak government-sanctioned messages, stop speaking their own preferred message, or leave the market in which they hope to participate.

Copyright and Fair Use

Warhol Foundation's Argument

- The fair use doctrine has always served as a safeguard to ensure that copyright does not unduly "stifle" creativity. For that doctrine to fulfill its historic purpose, it must ensure that works conveying genuinely new and distinctive ideas are not suppressed by copyright created monopolies.