CREATING COMMON LAW IN THE CORPORATE CONTEXT, DELAWARE STYLE

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In this article, I focus on crafting judicial opinions in the area of the Delaware corporate common law and on the factors that shape my decision-making. "Common law" has been defined as "the body of law derived from judicial decisions, rather than from statutes or constitutions."[1] This article addresses some of the principles that I believe are important in crafting judicial decisions.

I focus on five such principles—my five "Ps." For me, these principles serve as useful guardrails and guideposts when crafting opinions. First, there is *Purpose*. What is the purpose of the particular common law? How did it come about? Second, there is *Practicality*. Is the common law functionally serving its purpose? Third, there is *Precedent*. A strong corollary to precedent is *Predictability*, a principle focusing on whether the common law has developed in a logical, iterative fashion to allow people to understand

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1. *Common Law*, BLACK'S LAW DICTIONARY (11th ed. 2019).

adequately where the legal boundaries lie. Fourth, there is *Public Policy*. Are there recognized, long-standing and perhaps even overriding societal values that should be considered in crafting the holding of a case? And finally, there are *Procedural Principles* and *Judicial Perimeters*, including the doctrines of judicial restraint, waiver, standards of review, and jurisdictional boundaries, for example, that can impose limitations on judicial action.

I will illustrate these principles by referring to cases decided primarily by the Delaware Supreme Court within the past two years in the area of corporate law. I commend the Delaware Court of Chancery for the critical role it has played in shaping Delaware's corporate law. Several of the cases highlight how the Court of Chancery has been the incubator for the emergence of several recent key developments in Delaware corporate law. Ultimately, the Delaware Supreme Court, as the final arbiter of Delaware law, decides the specific issues that have been fairly presented.[2] For me, that process involves consideration of the principles I discuss herein.

A. THE PURPOSE OF THE COMMON LAW

My first principle is *purpose*. Oliver Wendell Holmes, Jr., in his book, *The Common Law*, published in 1881, said, "[t]he life of the law has not been logic: it has been experience."[3] He wrote that, "[t]he law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."[4]

The development of the common law has been based upon our experiences over time. Logic has a place in our legal analysis and decision-making, but human experience is a key driver that shapes fundamental notions of what the law should be. The purpose of a particular common law doctrine can be seen as a way of addressing particular kinds of human experiences.

Consider, for example, the basic common law concept that "no [person] shall profit by his [or her] own wrong."[5] This is the animating principle behind the so-called "slayer's rules," common law precepts barring life

2. *See* Del. CONST. art. IV, § 11 (defining the jurisdiction of the Delaware Supreme Court); *see also* RANDY J. HOLLAND, THE DELAWARE STATE CONSTITUTION 173–82 (2d ed., 2017) (discussing generally the jurisdiction of the Delaware Supreme Court).

3. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

4. *Id.*

5. Maneval v. Lutheran Bhd., 281 A.2d 502, 504 (Del. Super. Ct. 1971).

insurance recovery or inheritance from flowing to the decedent's murderer.[6] As the Delaware Court of Chancery explained in *Pogue v. Hybrid Energy, Inc.*,[7] this type of audacity is illustrated by "a murder defendant, who has killed his mother and father, throwing himself on the mercy of the court as an orphan."[8] Barring recovery in such a circumstance is grounded in fundamental notions of what is, and what is not, acceptable human behavior.

Or consider a commonly accepted societal norm that lying is wrong. We can examine how this simple concept (lying is wrong) has appeared in the area of fashioning common law limits on contractual remedies in the corporate arena.

Former Chief Justice Strine's decision (written when he was Chancellor) in *ABRY Partners V, L.P. v. F & W Acquisition LLC*[9] illustrates how our common law has dealt with the following question: To what extent can a contracting party limit its liability for its own intentional misrepresentations?

ABRY addresses the tension between two fundamental principles developed in our common law. The first principle is our simple concept that deliberate lying is wrong, fraud is wrong, and, as a corollary, no person should be able to profit from his or her lying and fraudulent conduct. A countervailing principle is what our Delaware courts have described as a strong American tradition of freedom of contract. Our courts have stressed the importance of having commercial laws that are efficient and clear in order to facilitate commerce.[10]

In *ABRY*, those two principles clashed and resulted in a decision that drew a boundary line between the two and established a clarifying precedent for future cases. There, a private equity firm bought all shares of a publishing company and alleged that the seller (another private equity firm) fraudulently induced it into entering a Stock Purchase Agreement (the "Agreement"). Both the buyer and seller were sophisticated parties.[11]

By its plain, unambiguous terms, the Agreement stated that the Buyer had promised that it was not relying upon representations and warranties not contained in the Agreement's written four corners, and that no such other

6. *Id.*; Giles v. California, 554 U.S. 353, 384–85 (2008) (Breyer, J., joined by Stevens, J., and Kennedy, J., dissenting) (collecting cases).

7. Pogue v. Hybrid Energy, Inc., No. 11563-VCG, 2016 WL 4154253 (Del. Ch. Aug. 5, 2016).

8. *Id.* at *1 n.1.

9. ABRY Partners V, L.P. v. F & W Acquisition LLC, 891 A.2d 1032 (Del. Ch. 2006).

10. *Id.* at 1059–60.

11. The plaintiffs were a group of entities affiliated with a private equity firm named ABRY Partners (the "Buyer"). Buyer bought a portfolio company from an entity owned by another private equity firm, Providence Equity Partners (the "Seller").

representations had been made.[12]

The Agreement also limited the liability of the Seller for any misrepresentation of fact contained in the Agreement to a damages claim not to exceed $20 million (an "Indemnity Claim"). It made an Indemnity Claim the exclusive remedy of the Buyer for misrepresentations and barred a rescission claim of the type asserted in the litigation.

Once Buyer assumed ownership of the company, which had been indirectly owned by the Seller, Buyer began to uncover serious problems.[13] Buyer alleged that it had been defrauded by the Seller, and that the Seller and Company management, working in concert, had schemed together to manipulate the Company's financial statements in order to fraudulently induce the Buyer to purchase the Company at an excessive price.[14]

Notwithstanding the undisputed fact that the Agreement limited Buyer to a money damages claim for misrepresentations in the representations and warranties contained in the Agreement, Buyer sought a different remedy, namely, to rescind the Agreement.

Even though the Buyer had agreed to limit its remedy to a capped money damage award, Buyer argued that Delaware's public policy ought to override its own agreement. Buyer argued that Delaware's public policy should not allow a contracting party to immunize itself from a rescission claim based on false representations of fact contained in the written contract—which representations both sides recognized to be the factual predicate for their decision to contract in the first place. To do so, they argued, "would be to sanction unethical business practices of an abhorrent kind and to create an unwise incentive system for contracting parties that would undermine the overall reliability of promises made in contracts."[15]

Thus, the issue, as framed by the Delaware Court of Chancery, was whether the contract that limited Buyer's remedy to damages for misrepresentations and failure to perform any of the representations, warranties or covenants was broad enough to encompass even *intentional misrepresentations*, i.e., intentional fraud. If it were broad enough to cover intentional fraud, then the second issue was whether the contractual limitation of the remedy to a capped money damage award would be overridden on public policy grounds.

In resolving the dispute, the Court of Chancery first confirmed that the plain terms of the contract, absent an overriding public policy, would indeed limit Buyer to a money damages claim capped at $20 million, and by its

12. *ABRY Partners*, 891 A.2d at 1034–35.
13. *Id*. at 1038.
14. *Id*.
15. *Id*. at 1035.

terms, if enforced, would bar Buyer's claim for rescission.[16] Thus, the court was left with the remaining difficult question of whether public policy should override that contractual limitation of liability. As the court phrased it, the question was "to what extent may a contract exculpate a contracting party from a rescission or damages claim based on a false representation of fact made within the contract itself?"[17]

The Delaware Court of Chancery's opinion in *ABRY* presents an interesting reconciliation of these competing long-standing principles. The court acknowledged the strong tradition in American law that "contracts may not insulate a party from damages or rescission resulting from the party's fraudulent conduct."[18] It noted that the Restatement of Contracts states that "[a] term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy."[19] Indeed, Delaware courts dislike immunizing fraud.[20] For example, in *Webster v. Palm Beach Ocean Realty Co.*,[21] decided in 1927, the Court of Chancery observed that, "[a] perpetrator of fraud cannot close the lips of his innocent victim by getting him blindly to agree in advance not to complain against it."[22]

On the other hand, the court in *ABRY* acknowledged the equally strong American tradition of freedom of contract. Delaware law respects the ability of sophisticated businesses, like Buyer and Seller, to make their own judgments about the risk they should bear, and the due diligence they should undertake. But this concern for commercial efficiency, said the court, does not mean there should be no public policy limitations on the contractual exculpation of misrepresented facts.[23]

In fashioning its resolution of the issue, the court differentiated between intentional lies and unintentional misrepresentations of fact, noting even that there was a behavioral and moral difference between the two.[24] Unless a party consciously conveyed an untruth, "there is no moral imperative to impinge on the ability of rational parties dealing at arms-length to shape their

16. *Id*. at 1052–55.
17. *Id*. at 1059.
18. *Id*. at 1059.
19. *Id.* at 1059 (citing Restatement (Second) of Contracts § 195 (1981)).
20. *Id*. at 1061.
21. Webster v. Palm Beach Ocean Realty Co., 139 A. 457 (Del. Ch. 1927).
22. *Id.* at 460.
23. *ABRY Partners*, 891 A.2d at 1062.
24. *Id*. at 1062 ("[M]oral difference also explains many of the cases in the *fraus omnia corrumpit* strain, which arose when the concept of fraud was more typically construed as involving lying, and thus it is understandable that courts would find it distasteful to enforce contracts excusing liars for responsibility for the harm their lies caused.").

own arrangements," and "courts are ill-suited to set a uniform rule that is more efficient than the specific outcomes negotiated by particular contracting parties to deal with the myriad situations they face."[25]

In drawing this line, the court observed that the Delaware General Assembly has permitted corporate charters to exculpate directors for liability for gross negligence, and it has allowed even the elimination of fiduciary duties altogether in the alternative entity context.[26] Accordingly, the court surmised that in fashioning the common law, the court should give as much leeway to sophisticated business parties in crafting agreements as the General Assembly had afforded to those entities.[27]

To the extent the Agreement limited the Seller's exposure for its own conscious participation in the communication of lies to the Buyer, the court held that limitation to be invalid under the policy of Delaware: "[i]n other words, parties may allocate the risk of factual error freely as to any error where the speaking party did not consciously convey an untruth."[28] However, "[t]he public policy against fraud is a strong and venerable one that is largely founded on the societal consensus that lying is wrong."[29] That brings us right back to the simple proposition and behavioral norm that we started with, namely, lying is wrong. The court reasoned that "it is difficult to identify an economically-sound rationale for permitting a seller to deny the remedy of rescission to a buyer when the seller is proven to have induced the contract's formation or closing by lying about a contractually-represented fact."[30] By contrast, the Buyer would be stuck with its agreement and could not obtain rescission or greater monetary damages (exceeding the $20 million cap) upon any lesser showing.[31] By this balance, the court attempted "to give fair and efficient recognition to the competing public polices served by contractual freedom and by the law of fraud."[32]

These principles, articulated in *ABRY*, were applied in two fairly recent cases decided by the Delaware Supreme Court. First, in *Express Scripts, Inc. v. Bracket Holdings Corp.*,[33] decided in February of 2021, the Delaware

25. *Id*. at 1035.
26. *Id*. at 1063.
27. *Id*. at 1063–64.
28. *Id*. at 1035.
29. *Id*.
30. *Id*. at 1036.
31. *Id*. at 1064. In such a case, the court stated that, "[t]he Buyer knowingly accepted the risk that the Seller would act with inadequate deliberation," and that "[i]t has no moral justification for escaping its own voluntarily-accepted limits on its remedies against the Seller absent proof that the Seller itself acted in a consciously improper manner." *Id.*
32. *Id*. at 1036.
33. Express Scripts, Inc. v. Bracket Holdings Corp., 248 A.3d 824 (Del. 2021).

Supreme Court wrestled with this same tension between the public policies concerning freedom of contract and fraud in a case involving Bracket Holding's purchase of Express Scripts.

In August 2013, Bracket and Express Script's subsidiary, United BioSource LLC ("UBC") signed a $187 million securities purchase agreement (the "SPA") whereby UBC agreed to sell three of UBC's businesses to Bracket. Except for claims involving deliberate fraud and certain fundamental representations, Bracket agreed to limit its remedy for breach of the SPA's representations and warranties to an insurance policy (the "R&W Policy") purchased to cover these claims.

After closing, Bracket claimed that Express Scripts and UBC had engaged in fraud by inflating the revenue and working capital of one of the divisions of the acquired companies. Bracket sued Express Scripts and UBC for fraud in the Delaware Superior Court. A jury awarded Bracket over $82 million.

The parties appealed from the jury verdict and judgment. The Delaware Supreme Court found one issue to be dispositive. The SPA provided unambiguously that except in the case of *deliberate* fraud and certain fundamental representations, Bracket could only recover up to the R&W Policy's limits for breaches of the representations and warranties. Over Express Script's objection, however, the Superior Court had instructed the jury that it could find for Bracket not only for *deliberate* fraud, but also for *recklessness*. In reversing, and harkening back to the line drawn in *ABRY*, the Court emphasized that a deliberate state of mind is a different kettle of fish than a reckless one.[34] The Superior Court's erroneous jury instruction was not harmless because it violated a key provision of the SPA and the manner by which the parties had allocated risk in the transaction. The Delaware Supreme Court, therefore, reversed the Superior Court's judgment and remanded the case for a new trial.

34. The Delaware Supreme Court referred to *ABRY Partners*, and the Court of Chancery's recognition that "a strong tradition in American law that holds that contracts may not insulate a party from damages or rescission resulting from the party's fraudulent conduct." *Id.* at 830 (quoting *ABRY Partners*, 891 A.2d at 1059). The Court also acknowledged the other competing policy, namely, the "strong American tradition of freedom of contract," and observed that this tradition is "especially strong in [Delaware], which prides itself on having commercial laws that are efficient." *Id.* (alteration in original) (quoting *ABRY Partners*, 891 A.2d at 1059–60). It reiterated Delaware's "distaste for immunizing fraud," and the need to balance that aversion with "the need for commerce to proceed in a rational and certain way," and concluded that a contracting party cannot, as a matter of public policy, "limit . . . exposure for its own conscious participation in the communication of lies to the Buyer. . . ." *Id.* (quoting *ABRY Partners*, 891 A.2d at 1061, 1064).

In a second recent decision, *RSUI Indemnity Co. v. Murdock*,[35] decided a month later on March 3, 2021, the Delaware Supreme Court considered the tension between, on the one hand, a contractual provision which provided insurance coverage for fraudulent conduct, and competing public policy concerns, on the other. The Delaware Supreme Court determined that allegations of fraud were encompassed within the Director's and Officer's liability policy's terms defining the scope of coverage. The question the Court considered was whether that contractual coverage for fraud should be overridden on public policy grounds. Thus, RSUI's public-policy argument, if accepted, would defeat the parties' contractual expectations.

The specific question addressed in *RSUI* was whether Delaware has a public policy against the insurability of losses occasioned by fraud so strong as to vitiate the parties' freedom of contract. In affirming the Superior Court, the Supreme Court held that the public policy would not override the contract.[36] Just as the Court of Chancery did in *ABRY*, the Supreme Court looked to whether the General Assembly had delineated the bounds of contractual freedom in this area. It found the answer by comparing two subsections of Section 145 of Title 8 in the Delaware General Corporation Law ("DGCL"). Section 145(a) limits a corporation's authority to indemnify its directors and officers for expenses incurred if the person, in his or her underlying conduct, "acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation."[37] But by comparison, Section 145(g) broadly authorizes the purchase of director and officers ("D&O") insurance "against *any* liability" asserted against their directors and officers "whether or not the corporation would have the power to indemnify such person against such liability under this section."[38]

The limitation, found in Section 145(a), on a corporation's authority to indemnify its directors and officers, when read together with Section 145(g)'s authorization to secure insurance against *any* liabilities for which the corporation does not have the power to indemnify, suggested to the Court that the corporation had statutory authority to obtain D&O insurance for liabilities arising from bad-faith conduct.

The Supreme Court noted the comments made at a Delaware Corporation Law symposium in 1977 by one of the drafters of Section 145, that could be read as conflicting with the Court's interpretation of the

35. RSUI Indemnity Co. v. Murdock, 248 A.3d 887 (Del. 2021).
36. *Id.* at 902.
37. DEL. CODE ANN. tit. 8, § 145(a).
38. DEL. CODE ANN. tit. 8, § 145(g).

statute.[39] Nevertheless, the Court concluded that Delaware's public policy, to the extent it is "announced" in Section 145, weighed in favor of the insurability of losses incurred as the result of a breach of the duty of loyalty, including one marred by fraud. Perhaps this illustrates the Court's preference to look to Delaware's General Assembly for public policy determinations in the first instance.

The Delaware Supreme Court observed in *RSUI* that it deferred to the legislature's prerogative in matters of public policy.[40] The Court was careful not to condone fraud. In fact, it reiterated Delaware's strong public policy against fraud. But concluding that certain conduct, including a director's breach of loyalty sounding in fraud, is not uninsurable on public policy grounds, is notably different than placing a stamp of approval on that conduct. Hence, based upon the Court's reading of the statute, the Court rejected RSUI's invitation to void RSUI's contractual obligations on public-policy grounds.[41]

B. Practical Considerations in the Development of the Common Law

Having examined an example of how a common law, grounded in human experience, develops, we can proceed to the second principle which

39. *See* S. Samuel Arsht, *Indemnification Under Section 145 of the Delaware General Corporation Law*, 3 DEL. J. CORP. L. 159, 179–80 (1978); E. Norman Veasey, Jesse A. Finkelstein & C. Stephen Bigler, *Delaware Supports Directors with a Three-Legged Stool of Limited Liability, Indemnification, and Insurance*, 42 BUS. LAW. 399, 418 (1987) ("While the language of section 145(g) contains no explicit limitations on the scope of matters that may be insured against under that subsection, its drafters specifically intended that the available insurance would be limited by public policy considerations *written into D&O policies by insurers*." (emphasis added)); *see also* R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS §4:13[A] (3d ed. 1998) ("Although underwriters generally refuse to insure for, or are statutorily precluded from insuring for, intentional wrongs or underwriting criminal wrongs, D&O insurance coverage for amounts paid in settlement of a claim alleging such wrongs seems to be allowable." (footnote omitted)); Hudson v. State Farm Mut. Ins. Co., 569 A.2d 1168, 1170 (Del. 1990).

40. *RSUI*, 248 A.3d at 904.

41. Certain amendments to the DGCL (effective on February 7, 2022) authorize a corporation to obtain insurance by or through a "captive insurance company." The statute requires that any such policy exclude any coverage for loss from undue personal profit or financial advantage, deliberate criminal or fraudulent act, or knowing violation of law not otherwise indemnifiable under the DGCL. *See* DEL. CODE ANN. tit. 8, §§ 145(c), 145(g). The synopsis states that "[d]espite these exclusions, directors may be covered under a captive insurance policy for certain liabilities that are not exculpable under Section 102(b)(7), including non-exculpated liability stemming from so-called *Caremark* or oversight claims where there is not otherwise a finding that the directors knowingly caused the corporation to violate the law." Del. S.B. 203 synopsis, 151st Gen. Assemb. (2022).

is *practicality*. What happens when the corporate common law no longer addresses in a satisfactory manner the matters it was intended to address?

Although the focus of this article is not on statutory law, there are examples of how the corporate common law has been modified by statute due to difficulties encountered in applying the common law.[42] With regard to appraisal, for example, before the Delaware appraisal statute was enacted (now codified in DEL. CODE ANN. tit. 8, § 262), at common law, "no consolidation or merger of corporations could be effected except with the consent of all stockholders."[43] However, the unanimous consent common law scheme proved to be unworkable due to the difficulty in achieving such consent.[44] The unworkability was addressed by the Delaware General Assembly.[45] It created the appraisal remedy in 1899 to be a limited legislative remedy to compensate stockholders of Delaware corporations for the loss of their common law right to prevent a merger or other consolidation by refusing to consent to it.[46]

There are some recent examples where the Delaware courts have

42. *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 957 (Del. 1985) ("[O]ur corporate law is not static. It must grow and develop in response to, indeed in anticipation of, evolving concepts and needs."). The DGCL is revised and updated continually to address new situations. *See* Manti Holdings, LLC v. Authentix Acquisition Co., Inc., 261 A.3d 1199, 1250 (Del. 2021) (Valihura, J. dissenting) ("Our DGCL is routinely revised and updated through the work of the Corporation Law Council of the Corporation Law Section of the Delaware State Bar Association and the General Assembly."). For an overview of the process by which amendments to the DGCL are affected, see generally Lawrence A. Hamermesh, *Symposium: Litigation Reform Since the PSLRA: A Ten-Year Retrospective*, 106 COLUMBIA L. REV. 1749 (Nov. 2006). Professor Hamermesh observes that:

> The members of the Delaware General Assembly, however, have not taken on any significant role in initiating or drafting changes to the DGCL. Nor are those amendments the product of any legislative staff, or of any lobbyists engaged by individual businesses. Likewise, and in light of the large number of Delaware public corporations, the drafting of the DGCL is not dominated by any one Delaware corporation. Rather, for decades now the function of identifying and crafting legislative initiatives in the field of corporate law has been performed by the Corporation Law Section of the Delaware State Bar Association. In particular, it is the governing body of the Corporation Law Section—its Council—that develops such initiatives.

Id. at 1754–55.

43. *In re* Solera Ins. Coverage Appeals, 240 A.3d 1121, 1133 (Del. 2020) (quoting Schenley Indus., Inc. v. Curtis, 152 A.2d 300, 301 (Del. 1959)).

44. *Id.*

45. *Id.*

46. *Id*. ("[A]ppraisal 'is a limited legislative remedy developed initially as a means to compensate shareholders of Delaware corporations for the loss of their common law right to prevent a merger or consolidation be refusal to consent to such transactions.'" (quoting Ala. By-Prods. Corp. v. Cede & Co., 657 A.2d 254, 258 (Del. 1995)).

changed the corporate common law to address practical problems and new developments. Take, for example, the Supreme Court's decision in *United Food & Commercial Workers v. Zuckerberg*,[47] decided in September 2021, where it adopted the Court of Chancery's refined three-part demand futility test which now applies to all derivative cases.

There, stockholders filed a derivative action challenging a reclassification that was ultimately abandoned. As a result, the litigation was mooted. A pension fund filed a derivative case seeking to recover the approximately $90 million Facebook spent in defending and settling the class action. The fund did not make a litigation demand, choosing instead to argue that demand was futile. The Court of Chancery dismissed the case pursuant to Court of Chancery Rule 23.1, applying a three-part test for demand futility that, in effect, blended the *Aronson*[48] and *Rales* tests.[49]

Under this new test, the court assesses, on a director-by-director basis:

> (a) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand;
> (b) whether the director faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand; and
> (c) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand.[50]

Significantly, the Court of Chancery held that exculpated claims do not excuse demand under the second prong of the *Aronson* test, which focuses on whether a director faces a substantial likelihood of liability.[51] The Delaware Supreme Court affirmed and adopted this new test. Thus, "if the

47. United Food & Com. Workers v. Zuckerberg, 262 A.3d 1034 (Del. 2021).

48. In determining demand futility under the *Aronson* test, the Court of Chancery "must decide whether, under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." Aronson v. Lewis, 473 A.2d 805, 814 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000); *see also* Zuckerberg, 262 A.3d at 1048 (holding the *Aronson* test "applies where the complaint challenges a decision made by the same board that would consider a litigation demand," and the *Rales* test "applies in all other circumstances").

49. The *Rales* test excuses demand if the allegations create a reasonable doubt that a majority of the board in place at the time of the demand "could have properly exercised its independent and disinterested business judgment in responding to a demand." Rales v. Blasband, 634 A.2d 927, 934 (Del. 1993).

50. *Zuckerberg*, 262 A.3d at 1059.

51. *Id.* at 1050.

answer to any of the questions is 'yes' for at least half of the members of the demand board, then demand is excused as futile."[52] It is no longer necessary to determine whether the *Aronson* test or the *Rales* test governs a complaint's demand-futility allegations.[53]

The Delaware Supreme Court considered that the evolving legal landscape over the decades, with the passage of Section 102(b)(7) in 1986 and the *Cornerstone* decision in 2015,[54] had led some to question the meaning of *Aronson*'s second prong, which focuses on whether a challenged transaction was the product of a valid business judgment. Although not unanimous, the weight of Delaware case law, as it had developed over time, "support[ed] holding that exculpated care violations [did] not excuse demand under *Aronson's* second prong."[55] But a few cases went the other way, noting that *Aronson*'s second prong asks about the substantive nature of the challenged transaction and the board's approval thereof—not whether the directors faced a substantial likelihood of liability.[56] On appeal, the plaintiffs in *Zuckerberg* argued that *Aronson's* second prong excuses demand whenever the complaint raises a reasonable doubt that the challenged transaction was a valid exercise of business judgment, regardless of whether the directors faced a substantial likelihood of liability for approving the challenged transaction.[57]

The Supreme Court recognized that "[t]he General Assembly's enactment of Section 102(b)(7) and other developments in corporate law have weakened the connection between rebutting the business judgment standard and exposing directors to a risk that would sterilize their judgment with respect to a litigation demand,"[58] and that "the *Aronson* test has proved difficult to apply in many contexts, such as where there is turnover on a corporation's board."[59] As a result, the Delaware Supreme Court concluded that, "[t]he ground has since shifted [from the time of *Aronson*], and exculpated breach of care claims no longer pose a threat that neutralizes

52. *Id.* at 1059.

53. *Id*. ("The Court need not overrule *Aronson* to adopt this refined test, and cases properly construing *Aronson*, *Rales*, and their progeny remain good law.").

54. *In re* Cornerstone Therapeutics Inc, S'holder Litig., 115 A.3d 1173 (Del. 2015).

55. *Zuckerberg*, 262 A.3d at 1052 (citing Lenois v. Lawal, No. 11963, 2017 WL 5289611, at *12–14 (Del. Ch. Nov. 7, 2017)) (collecting cases).

56. *See, e.g.,* McPadden v. Sidhu, 964 A.2d 1262, 1270–73 (Del. Ch. 2008) (holding that exculpated breach of care claims can excuse demand under the second prong of *Aronson*).

57. *Zuckerberg*, 262 A.3d at 1050–51.

58. *Id.* at 1041.

59. *Id*. Section 102(b)(7) was added in 1986. *See* 65 Del. Laws 544 (1986).

director discretion."[60]

In addition to addressing "workability" issues in the corporate law, there are other recent examples of how Delaware corporate case law has developed in response to unique circumstances, including in response to COVID-19. Of note in this regard is the last case in a recent trilogy of "busted deal" cases—what is becoming known as the "A trilogy"[61]—*Akorn*,[62] *Anthem*,[63] and *AB Stable*.[64] These decisions are factually complex and are not amenable to in-depth discussion here. However, one interesting facet of these cases is the development of the law regarding ordinary course covenants in merger agreements. In the Supreme Court's three-page order affirming the decision in *Akorn*—the first case in the trilogy—it expressly stated that it was not addressing "whether, as the Court of Chancery found, Akorn breached the Ordinary Course Covenant under Section 5.01(a) of the Merger Agreement and that Fresenius was free to terminate the Merger

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60. *Zuckerberg*, 262 A.3d at 1054. Others have expressed disagreement with the Court's assessment of the impact of these developments on *Aronson's* second prong. *See, e.g.*, Lawrence A. Hamermesh, Jack B. Jacobs, & Leo E. Strine, Jr., *Optimizing the World's Leading Corporate Law: A 20-Year Retrospective and Look Ahead* 49 (U. Pa. Carey L. Sch. Inst. for L. & Econ., Working Paper No. 21-29, 2021) ("In sum, no case law or legislative developments after *Aronson* warranted abandoning its important second prong."). The authors suggest that, "[p]roperly applied, *Aronson's* second prong allows a plaintiff to plead facts suggesting that, despite the presence of a majority of independent disinterested directors and the use of facially adequate procedures, there was a fiduciary breach resulting in harm to the company." *Id*. at 52. They added that, "[t]his safety valve exists precisely because of the potential for structural bias where (contrary to the assumption underlying *Rales*) a majority of the demand board approved the business decision under attack in the derivative action." *Id*. (footnote omitted). These authors also emphasize the human behavioral aspects they claim underlie *Aronson's* second prong:

> When a plaintiff made this difficult showing, *Aronson's* intuition was that demand should be excused because it was difficult to presume credibly that a board could sue the interested parties to a transaction the demand board had approved. *Aronson* thus took into account both the reality of how difficult it is to sue a fellow director (structural bias) and that suing someone else over a decision that you also approved is at the very least exceedingly awkward, and involves some degree of hypocrisy.

Id. at 50–51. They propose adding a fourth prong to the three-part test: "excusing demand where the well pled facts indicate that a majority of the directors acted with gross negligence in approving a transaction with a controlling stockholder." *Id*. at 56.

61. Iowa Law, *Guest Lecture: Hon. J. Travis Laster, Vice Chancellor of the Court of Chancery State of Delaware*, YOUTUBE (Feb. 21, 2022), https://youtu.be/QJ0mp1MiKAI [https://perma.cc/J965-6D7D].

62. Akorn, Inc. v. Fresenius Kabi AG, No. 535, 2018, 2018 WL 6427137 (Del. Dec. 7, 2018).

63. Cigna Corp. v. Anthem, Inc., 251 A.3d 1015 (Del. 2021).

64. AB Stable VIII LLC v. MAPS Hotels & Resorts One LLC, 268 A.3d 198 (Del. 2021).

Agreement for that additional reason."[65] Rather, it affirmed on two other grounds.[66]

Later, in 2021, the Supreme Court did address directly the operation of the ordinary course covenant in *AB Stable*.[67] This was the first case addressing a busted deal arising out of the COVID-19 pandemic. A closing delay during the transaction brought an unexpected problem, namely, COVID-19 and the damage that it inflicted on the hospitality industry. In response to the pandemic, and without securing the buyer's consent, the seller made drastic changes to its hotel operations.

On November 30, 2020, the Delaware Court of Chancery issued a post-trial opinion holding that a seller's (Anbang's or "Seller") failure to comply with the ordinary course covenant gave the buyer (Mirae or "Buyer") the right to terminate the Buyer's agreement to purchase—for $5.8 billion—a business owning 15 luxury hotels.[68] Although the Court of Chancery rejected the buyer's argument that economic and business effects related the COVID-19 pandemic constituted a Material Adverse Effect ("MAE") under the agreement, the court found that Seller had breached the sale agreement's

65. *Akorn, Inc.*, 2018 WL 6427137, at *1 n.5.

66. *Id.* at 1. The Delaware Supreme Court held that the factual record adequately supported the Delaware Court of Chancery's determination, based on its application of precedent such as *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14 (Del. Ch. 2001) and *Hexion Specialty Chem., Inc. v. Huntsman Corp.*, 965 A.2d 715 (Del. Ch. 2008), that Akorn had suffered a material adverse effect ("MAE") under Section 6.02 of the merger agreement that excused any obligation on Fresenius's part to close. *Id.* The Court also concluded that the record adequately supported the Court of Chancery's declaration that Fresenius had properly terminated the merger under Section 7.01(c)(i) because Akorn's breach of its regulatory representations and warranties gave rise to an MAE, and Fresenius itself had not engaged in a prior, material breach of a covenant that would have prevented Fresenius from exercising its immediate termination right under the merger agreement. *Id.* For these "specific reasons," the Supreme Court affirmed the Court of Chancery's dismissal of Akorn's claims. *Id.*

67. *AB Stable VIII LLC,* 268 A.3d at 201.

68. AB Stable VIII LLC v. Maps Hotels & Resorts One LLC, No. 2020-0310, 2020 WL 7024929 (Del. Ch. Nov. 30, 2020), *judgment entered*, (Del. Ch. 2021), and *aff'd*, 268 A.3d 198 (Del. 2021). The seller was AB Stable VIII LLC, an indirect subsidiary of Dajia Insurance Group, Ltd. Dajia was a corporation organized under the People's Republic of China and was the successor to Anbang Insurance Group, Ltd.—also a corporation organized under the People's Republic of China. Dajia and Anbang Insurance are referred to as "Anbang." *AB Stable VIII LLC*, 268 A.3d at 201. Anbang, through AB Stable VIII LLC, owned all the member interests in Strategic Hotels & Resorts LLC (the "Company"), a Delaware limited liability company that owns all the member interests in fifteen other LLCs, each of which owns a luxury hotel in the United States. *Id.* MAPS, a subsidiary created by Mirae Asset Financial Group ("Mirae"), was a conglomerate with over $400 billion in assets under management. *Id.*

ordinary course covenant and the title insurance condition.[69]

In its post-trial opinion, the Court of Chancery concluded that Seller had breached the covenant by making "extraordinary changes to its business" that "departed radically from the normal and routine operation of the Hotels and were wholly inconsistent with past practice."[70] The court held that the Seller's acts to close hotels and curtail operations in response to COVID-19 operating conditions breached its contractual obligation to operate the company "only" in the "ordinary course of business consistent with past practice."[71]

In so holding, the Court of Chancery considered what the phrase, "only in the ordinary course of business, consistent with past practice in all material respects," meant.[72] It read the use of the adverb "*only*" in conjunction with the phrase "*consistent with past practice*" to mean that "the parties created a standard that looks exclusively to how the business has operated in the past."[73] It concluded that the ordinary course covenant did not incorporate the MAE exception, and instead, imposed an overarching and absolute obligation. Accordingly, the court found that "the changes the Seller had made 'significantly altered the operation of the business' and 'were wholly inconsistent with past practice,' thereby breaching the Ordinary Course Covenant and allowing the Buyer to terminate the Sale Agreement."[74]

Seller (Anbang) appealed the ordinary course and title insurance

69. The Delaware Supreme Court noted that on appeal, neither party argued that the Delaware Court of Chancery erred in finding that the COVID-19 pandemic fit within the Sale Agreement's MAE carve-out for "natural disasters and calamities." *AB Stable VIII LLC*, 268 A.3d at 215 n.76. Also, because the Seller's failure to comply with the ordinary course covenant was dispositive of the appeal, the Supreme Court did not address whether the Seller also breached the title insurance condition. *Id*. at 201.

70. *AB Stable VIII LLC*, 2020 WL 7024929, at *75–76.

71. *Id.* at *48.

72. *Id. passim*.

73. *Id*. at *71. The Ordinary Course Covenant provided that:

> Except as otherwise contemplated by this Agreement or as set forth in Section 5.1 of the Disclosure Schedules, between the date of this Agreement and the Closing Date, unless the Buyer shall otherwise provide its prior written consent (which consent shall not be unreasonably withheld, conditioned or delayed), the business of the Company and its Subsidiaries shall be conducted only in the ordinary course of business consistent with past practice in all material respects, including using commercially reasonable efforts to maintain commercially reasonable levels of Supplies, F&B, Retail Inventory, Liquor Assets and FF&E consistent with past practice, and in accordance with the Company Management Agreements.

Id. at *65 (quoting Sale Agreement § 5.1).

74. *AB Stable VIII LLC*, 268 A.3d at 208 (quoting *AB Stable VIII LLC*, 2020 WL 7024929, at *75–78.).

rulings.[75] According to the Seller, acting in the ordinary course of business included proportional changes in response to extraordinary circumstances, and that the parties had allocated the risk of a pandemic to the Buyer through the MAE covenant. The Seller argued that to harmonize the two covenants, the Court of Chancery should have recognized that the ordinary course covenant permitted reasonable, industry-standard responses to systemic risks allocated to the Buyer by the MAE provision. Otherwise, the risk allocation in the sale agreement would be altered.

Sitting *en banc*, the Delaware Supreme Court heard oral argument on September 15, 2021, and on December 8, 2021, it issued a decision affirming the Court of Chancery.[76] The Supreme Court agreed with the Court of Chancery that "the requirement that the Seller operate *only* in the ordinary course and consistent with past practice in *all material respects* meant that its compliance [was] measured by its operational history, and not that of the industry in which it operates."[77] In Mirae Asset's agreement with Anbang there was a "consistent with past practice" modifier but there was no "commercially reasonable efforts" qualifier.[78] Further, the lack of a reasonableness qualifier, when commercially reasonable efforts qualifiers were used elsewhere in the agreement, meant the ordinary course covenant was "absolute."[79]

The Delaware Supreme Court further observed that the parties could have, but did not, restrict a breach of the ordinary course covenant to events that would qualify as an MAE.[80] There were MAE qualifiers in other provisions.[81] The parties also chose different materiality standards for the two provisions which showed that the parties intended the provisions to act independently. Further, the Court observed that the provisions have different purposes:

> An ordinary course covenant is "included to reassure the Buyer that the target company has not materially changed its business or business practices during the pendency of the transaction." A MAE provision, by contrast, allocates the risk of changes in the target company's valuation. Buyers want to know both that the business is operated in the same way and that the business is worth about the same amount. How a business operates between signing and closing is a fundamental concern distinct from the company's

75. *Id.* at 209.
76. *Id.* at 200.
77. *Id.* at 212.
78. *Id.*
79. *Id.*
80. *Id.* at 216.
81. *Id.*

> valuation. And while the MAE provision shifts systemic risks like the pandemic and its effect on valuation to the Buyer, the Ordinary Course Covenant, consistent with its purpose, ensured that the Seller could not materially alter its course of business without the Buyer's notice and consent.[82]

The Delaware Supreme Court observed that the sale agreement anticipated that changes to the business might be needed, and that the Seller "was simply required to seek consent before making the changes, and if consent was unreasonably denied, the Seller could have challenged the Buyer's unreasonable denial of consent."[83] However, it was undisputed that the Seller never obtained consent before making drastic changes to the business operations and did not cure when given the opportunity by the Buyer. Thus, the Supreme Court reinforced that "[c]ompliance with a notice requirement is not an empty formality."[84]

The Delaware Supreme Court's decision in *Brookfield Asset Management, Inc. v. Rosson*,[85] decided in September of 2021, is a third example of the Court's examination of the practical aspects and functionality of the case law. *Brookfield* involved an interlocutory appeal from a decision of the Court of Chancery holding that the appellees/cross-appellants, former stockholders of TerraForm Power, Inc. (the "Plaintiffs"), had direct standing to challenge TerraForm's 2018 private placement of common stock to Brookfield Asset Management, Inc. and its affiliates ("Brookfield"), a controlling stockholder, for allegedly inadequate consideration. The trial court held that Plaintiffs did not state direct claims under *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*,[86] but did state direct claims predicated on a factual paradigm "strikingly similar" to that of *Gentile v. Rossette*,[87] and that *Gentile* was controlling.[88] *Brookfield* contended that *Gentile* was inconsistent with *Tooley* and that the Delaware Supreme Court's decision in *Gentile* had created confusion in the law and, therefore, ought to be overruled.

The Delaware Supreme Court emphasized that overruling a precedent

82. *Id.* at 216–17 (citations omitted).
83. *Id.* at 217.
84. *Id.* at 218 (quoting *AB Stable VIII LLC*, 2020 WL 7024929, at *82).
85. Brookfield Asset Mgmt., Inc. v. Rosson, 261 A.3d 1251 (Del. 2021).
86. Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031 (Del. 2004).
87. Gentile v. Rossette, 906 A.2d 91 (Del. 2006), *overruled by Brookfield Asset Mgmt., Inc.*, 261 A.3d at 1280.
88. In fact, the Delaware Court of Chancery observed that "[t]he facts alleged in the Complaint [in *Brookfield*] fit *Gentile's* transactional paradigm to a T." *In re* TerraForm Power, Inc. S'holders Litig., No. 2019-0757, 2020 WL 6375859, at *12 (Del. Ch. Oct. 30, 2020), *rev'd sub nom. Brookfield Mgmt., Inc.*, 261 A.3d 1251.

should only occur after a full and fair presentation by the parties and searching inquiry by the Supreme Court.[89] But after such engagement, the Court did exactly that. In reversing the judgment below and overruling *Gentile*, it made clear that the Court of Chancery did not err. Rather, the Vice Chancellor had correctly applied the law as it existed, recognizing that the claims were exclusively derivative under *Tooley*, but that the Court of Chancery was bound by *Gentile*.

By way of brief background, in *Tooley*, the Delaware Supreme Court had undertaken to create a simple test of straightforward application to distinguish direct claims from derivative claims. Under the *Tooley* test, the determination of whether a stockholder's claim is direct or derivative "must turn *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?"[90]

Two years after deciding *Tooley*, the Delaware Supreme Court decided *Gentile*.[91] *Gentile* involved a controlling stockholder and transactions that allegedly resulted in an improper transfer of both economic value and voting power from the minority stockholders to the controlling stockholder. There, a corporation's CEO and controlling stockholder forgave a portion of the company's $3 million debt to him in exchange for additional equity.

The share issuance increased the CEO's equity position from 61.19% to 93.49%. The minority stockholders suffered a corresponding decrease in their interest from 38.81% to 6.51%. The trial court dismissed the ensuing stockholders' litigation after concluding that the claims were exclusively derivative and that the plaintiff stockholders' standing had been extinguished following the merger.[92]

The Delaware Supreme Court reversed the Court of Chancery in *Gentile* and allowed the plaintiffs to proceed with direct claims.[93] The Court reasoned that there were two independent aspects of the plaintiffs' claims namely, the overpayment claim and the minority's significant loss of cash value and voting power. These claims constituted "a species of corporate overpayment claim" that was "both derivative and direct in character."[94] The

89. *Brookfield Asset Mgmt., Inc.*, 261 A.3d at 1255; *see also* Evans v. State, 872 A.2d 539, 542 (Del. 2005) (observing that "[a]lthough *en Banc* opinions are not withdrawn frequently, it does happen occasionally."); *id.* at 542 n.7 (collecting cases).

90. *Tooley*, 845 A.2d at 1033.

91. Gentile v. Rossette, No. 20213, 2005 WL 2810683, at *2 (Del. Ch. Oct. 20, 2005), *rev'd*, 906 A.2d 91 (Del. 2006).

92. *Id.* at *9.

93. *Gentile*, 906 A.2d at 103.

94. *Id.* at 99.

Supreme Court explained that in order "[t]o analyze the character of the claim at issue, it is critical to recognize that it has two aspects."[95] The first aspect was that the corporation was caused to overpay for an asset or other benefit that it received in exchange (namely, the forgiveness of debt). The second aspect was that the minority stockholders lost a significant portion of the cash value and the voting power of their minority stock interest. According to the Court, "[t]hose separate harms resulted from the same transaction, yet they are independent of each other."[96]

The Court of Chancery in *Brookfield*, in struggling to reconcile *Gentile* with *Tooley*, observed that the current law was, as a matter of doctrine, unsatisfying.[97] But it concluded that it was "not free to decide cases in a way that deviates from binding Supreme Court precedent."[98] After dismissing the case, the Court of Chancery recommended, in light of case law questioning the continued vitality of *Gentile* at the trial court level, and in light of criticism of *Gentile* by the Supreme Court itself, the matter, even though interlocutory, should be available for review by the Supreme Court in the interests of justice.[99] The Supreme Court agreed and accepted the interlocutory appeal.

On appeal, Brookfield argued to the Delaware Supreme Court that "the Plaintiffs' claims [were] exclusively derivative under *Tooley* and that the Supreme Court's decision in *Gentile* [had] deviated from, and [was] doctrinally inconsistent with, the 'simple analysis' set forth in *Tooley*."[100] Second, Brookfield asserted that, because *Gentile* contradicted and undermined long-standing case law, complicated real-world commercial transactions, and was superfluous given existing legal remedies, *stare decisis* was inapplicable, and, thus, *Gentile* should be overruled.

The Delaware Supreme Court agreed with Brookfield that certain aspects of *Gentile* were in tension with *Tooley*.[101] It detailed how the law had

95. *Id.*

96. *Id.*

97. *In re TerraForm Power*, 2020 WL 6375859, at *15, *rev'd sub nom. Brookfield Mgmt., Inc.*, 261 A.3d 1251 (regarding the Court's decision in *El Paso*, the Vice Chancellor remarked that, "limiting *Gentile* to controller situations, rather than expanding it to conflicted board non-controller dilution cases, or overruling it entirely, [was], as a matter of doctrine, unsatisfying"). This "unsatisfying" tension in the law is explained *infra* in the remainder of this Section B.

98. *Brookfield Asset Mgmt.*, 261 A.3d at 1261 (quoting *In re TerraForm Power*, 2020 WL 6375859, at *16).

99. *Id.*

100. *Id.*

101. Notably, the Delaware Supreme Court in *Gentile* had also recognized that allowing direct standing to assert a corporate dilution/overpayment claim was a deviation from the

become confused and difficult for courts to apply and for corporate practitioners to navigate.[102] Further, it observed that courts had begun to construe *Gentile* more expansively to extend to non-controller issuances involving participating insiders. In *Carsanaro v. Bloodhound Technologies, Inc.*,[103] for example, the Delaware Court of Chancery held that *Gentile* also applied to self-interested stock issuances effectuated by a board lacking a disinterested and independent majority. The Court of Chancery reasoned that "the core insight of dual injury applies to non-controller issuances in which insiders participate."[104]

Similarly, in *In re Nine Sys. Corp. S'holders. Litig.*,[105] the Court of Chancery had found direct standing with respect to a dilutive recapitalization transaction in which the directors and their affiliated funds participated. The court commented that "it makes little sense to hold a controlling stockholder to account to the minority for improper expropriation after a merger but to deny standing for stockholders to challenge a similar expropriation by a board of directors after a merger."[106] The court asked why Delaware law should hold controlling stockholders to a higher standard than the board of directors when, after all, the board has exclusive authority to manage the business and affairs of the corporation, which includes the power to issue stock.[107]

Even prior to *Brookfield*, recognizing this dissonance in the case law, the Delaware Supreme Court had begun to curtail this expanded application of *Gentile* when it reversed the Court of Chancery in *El Paso* in 2016.[108] The challenged transaction in *El Paso* did not fall squarely under the *Gentile* paradigm as the entity involved was a limited partnership and the alleged harm involved economic dilution where the limited partner conceded that he had proved only expropriation of economic value, and not any dilution of voting rights. Understandably, the defendants in *El Paso* did not argue on

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norm. *Gentile*, 906 A.2d at 99 ("Normally, claims of corporate overpayment are treated as causing harm solely to the corporation and, thus, are regarded as derivative.").

102. *Brookfield Asset Mgmt.*, 261 A.3d at 1276 ("The difficulty courts have had in applying *Gentile* in a logically consistent way, along with *Gentile*'s erosion of *Tooley*'s simple analysis convinces us that *Gentile* should be overruled.").

103. Carsanaro v. Bloodhound Techs., Inc., 65 A.3d 618 (Del. Ch. 2013).

104. *Id.* at 658. The Delaware Court of Chancery stated further that "[t]he expropriation principle operates only when defendant fiduciaries (i) had the ability to use the levers of corporate control to benefit themselves and (ii) took advantage of the opportunity." *Id*. at 658–59.

105. *In re* Nine Sys. Corp. S'holders. Litig., No. 3940, 2014 WL 4383127, at *26 (Del. Ch. Sept. 4, 2014), *aff'd sub nom*. Fuchs v. Wren Holdings, LLC, 129 A.3d 882 (Del. 2015).

106. *Id.* at *28.

107. *Id*.

108. El Paso Pipeline GP Co. v. Brinckerhoff, 152 A.3d 1248 (Del. 2016).

appeal that *Gentile* should be overruled. As a result, the Delaware Supreme Court was not asked—and did not reconsider—*Gentile* at that time.

However, in *El Paso*, the Delaware Supreme Court expressly "decline[d] the invitation to further expand the universe of claims that can be asserted 'dually' to hold here that the extraction of solely economic value from the minority by a controlling stockholder constitutes direct injury."[109] Thus, it made clear that *Gentile* should be read narrowly because any other interpretation would swallow the general rule that equity dilution claims are solely derivative and cast doubt on the *Tooley* framework.

In his concurrence in *El Paso*, Chief Justice Strine agreed that the facts presented did "not require us to consider *Gentile's* ongoing viability in the corporate law context," and that it was "[s]ufficient for today" that "we refuse to extend *Gentile* further, to a situation where a limited partnership was already firmly under the control of the general partner and where the transaction under attack had no effect whatsoever on limited partner voting rights."[110] But he more directly questioned *Gentile's* continued viability as sound law, writing that *Gentile* was a confusing decision, which "muddies the clarity of our law in an important context," and that it "cannot be reconciled with the strong weight of our precedent. . . ."[111]

It was not until the *Brookfield* case that the issue of *Gentile*'s continued viability was squarely presented to the Delaware Supreme Court.[112] The understandable difficulty that courts, mostly the Court of Chancery, had in applying *Gentile* in a logically consistent way, along with *Gentile's* erosion of *Tooley's* simple analysis, convinced the Delaware Supreme Court that *Gentile* should be overruled. And so it was. The Supreme Court's overruling of *Gentile* leads logically to a discussion of *stare decisis* and the third set of principles, namely, *precedent* and *predictability*.

C. PRECEDENT AND PREDICTABILITY AS FACTORS IN THE DEVELOPMENT OF THE COMMON LAW

The discussion of *ABRY*, *RSUI*, and *Express Scripts* illustrates how the Delaware courts attempt to achieve consistency in our common law by adhering to and building upon prior cases and precedents. The common law develops in iterative fashion on a case-by-case basis based upon a discrete set of facts in each case. The holdings in prior cases provide the foundation for a court's analysis as well as a basis for practitioners to advise clients on

109. *Id.* at 1264.
110. *Id.* at 1266 (Strine, C.J., concurring).
111. *Id.* at 1265–66 (Strine, C.J., concurring).
112. *Brookfield Asset Mgmt.*, 261 A.3d at 1276.

how to proceed within the bounds of the law. Delaware courts frequently have commented on the importance of predictability in the corporate context.[113] The Court took these reliance concerns into account in *Brookfield* in overruling *Gentile*.

As explained in *Brookfield*, "[w]hen re-examining a question of law in a prior case, the essential danger is that parties have acted in reliance on the answer that this Court previously gave."[114] There is no hard and fast rule for when a decision is or is not immutable, because the nature of reliance interests at play and the importance of improving doctrinal law are highly context-specific inquiries.

Nevertheless, as explained in *Brookfield*, decisions by Delaware and federal courts offer some guideposts by which to measure and weigh these reliance interests. One consideration is the nature of any reliance interests on the decision. Reliance interests flow from a number of sources.[115] Because parties have a right to have confidence that long-established rules will be retained, the "antiquity" of the precedent is accorded importance, with due consideration for whether the challenged precedent was itself a departure.[116] The area of law the precedent addresses is likewise a consideration, since some subjects are more apt to induce reliance than others.

The Court reasoned in *Brookfield* that:

> Clarity and administrability also relate to reliance interests, since reliance can only be created by a ruling which is amenable to consistent, stable, and thus predictable application. Thus, a traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision, or because the decision poses

113. *See, e.g.*, *RSUI*, 248 A.3d at 898; Stream TV Networks, Inc. v. SeeCubic, Inc., 279 A.3d 323, 354 n.177 (noting that, in aid of promoting stability in the statutory arena, Article IX of the Delaware Constitution requires a supermajority vote to amend the DGCL). Article IX, section 1 of the Delaware Constitution provides that "[n]o general incorporation law, nor any special act of incorporation, shall be enacted without the concurrence of two-thirds of all the members elected to each House of the General Assembly." Del. Const. art. IX, § 1.

114. *Brookfield Asset Mgmt.*, 261 A.3d at 1278.

115. *Id.* at 1278 n.144 ("For example, the General Assembly, in its lawmaking capacity, necessarily relies upon this Court's pronouncements of what the law already is. Thus, 'prior statute-interpreting rulings gain approving harmony from ensuing legislative silence.'" (internal citation omitted)).

116. *Id.* at 1278–79 (citing Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 231 (1995) ("[I]f the precedent under consideration itself departed from the Court's jurisprudence, returning to the 'intrinsically sounder' doctrine established in prior cases may 'better serv[e] the values of *stare decisis* than would following the more recently decided cases inconsistent with the decisions that came before it.'")).

> a direct obstacle to the realization of important objectives embodied in other laws.[117]

The Court also recognized that precedent should not be overturned by narrow majorities and very recent precedent should not lightly be overturned when the only change is the composition of the court.[118] That is because society must be able to "presume that bedrock principles are founded in the law rather than in the proclivities of individuals."[119] The Court said that, "[o]verruling precedent is never a small matter."[120] Further, "[m]ere disagreement with the reasoning and outcome of a prior case, even *strong* disagreement, cannot be adequate justification for departing from precedent or *stare decisis* would have no meaning."[121]

Finally, the Delaware Supreme Court summarized its reasoning in overruling *Gentile* as follows:

> This Court decided *Gentile* fifteen years ago. This is old enough, we think, that we can properly say that the practical and analytical difficulties courts have encountered in applying it reflect fundamental unworkability and not growing pains, but not so old as to carry the weight of "antiquity." Moreover, that gap in time has given us the perspective to see that *Gentile* is more of a departure from the then-recent *Tooley* than the continuation we perceived it to be at the time. Any reliance is further muted by *El Paso*, from which parties could rightly anticipate that *Gentile*'s continued viability was in doubt. Finally, in overturning it today we speak unanimously, with the concomitant aid to certainty that provides. Having given all due consideration to the weight of precedent, the circumstances persuade us that we should overrule the *Gentile* exception to our *Tooley* test for derivative and direct standing. Accordingly, *Gentile* should be, and hereby is, overruled.[122]

This was not the first occasion the Delaware Supreme Court reversed one of its own decisions. In *Brinckerhoff v. Enbridge Energy Co., Inc.*[123] the Court addressed a point in a prior opinion that had caused confusion and we clarified the pleading standard applicable to a general partner's breach of a

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117. *Brookfield Asset Mgmt.*, 261 A.3d at 1279 (footnote omitted) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989)).

118. *Id.*

119. *Id.* at 1279–80 (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986)).

120. *Id.* at 1280 (quoting Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015)).

121. *Id.* (citing *Adarand Constructors*, 515 U.S. at 234 ("[R]eliance on a case that has recently departed from precedent is likely to be minimal. . . .")).

122. *Brookfield Asset Mgmt.*, 261 A.3d at 1280.

123. Brinckerhoff v. Enbridge Energy Co., Inc., 159 A.3d 242, 247 (Del. 2017) (en banc).

master limited partnership agreement. In reversing the Court of Chancery in part, it stated that "[t]he Court of Chancery cannot be faulted for faithfully applying our earlier decision in *Brinckerhoff III*, and its rigorous pleading standard for bad faith. But we now change course from our earlier decision and adhere to the more traditional definition of bad faith utilized in Delaware entity law."[124] In so holding, the Court reverted to a more traditional definition of bad faith than the one a prior Court had employed in *Brinckerhoff III* (which more resembled the standard for pleading waste).[125]

Another example is the Delaware Supreme Court's decision in *Genuine Parts Co. v. Cepec*,[126] where it held that foreign corporations are not subject to general jurisdiction in Delaware simply because they have registered to do business and have a registered agent for service of process in Delaware pursuant to DEL. CODE ANN. tit. 8, §§ 371, 376. The Court's holding overruled, in part, its landmark decision in *Sternberg v. O'Neil*[127] decided in 1988. In *Sternberg*, the Delaware Supreme Court held that foreign corporations could be subject to personal jurisdiction in Delaware notwithstanding the absence of the claim's connection to Delaware, on the grounds that foreign corporations have consented to jurisdiction by registering to do business in Delaware.[128] The impetus for overruling *Sternberg* was the further development of the law by the United States

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124. *Id.*

125. Brinckerhoff v. Enbridge Energy Co., Inc. (Brinckerhoff III), 67 A.3d 369, 373 (Del. 2013), *abrogated by Brinckerhoff*, 159 A.3d 242.

126. Genuine Parts Co. v. Cepec, 137 A.3d 123 (Del. 2016) (en banc). The United States Supreme Court granted a writ of certiorari to determine whether the same sort of consent-by-registration scheme is constitutional in *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 546 (Pa. 2021), *cert. granted*, No. 21-1168, 2022 WL 1205835 (U.S. Apr. 25, 2022). To date, courts have often disagreed on the constitutionality of such schemes. *See* Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1037, 1037 n.3 (2021) (Gorsuch, J., concurring) ("It is unclear what remains of the old 'consent' theory after *International Shoe*'s criticism. Some courts read *International Shoe* and the cases that follow as effectively foreclosing it, while others insist it remains viable." (comparing *Lanham v. BNSF R. Co.*, 939 N.W.2d 363, 368–71 (Neb. 2020), with *Rodriguez v. Ford Motor Co.*, 458 P.3d 569, 575–76 (N.M. Ct. App. 2018)); Cooper Tire & Rubber Co. v. McCall, 863 S.E.2d 81, 83 (Ga. 2021) (holding that because *Pennsylvania Fire Ins. Co. v. Gold Issue Min. & Mill. Co.*, 243 U.S. 93 (1917) has not been explicitly overruled, Georgia's consent-by-registration approach to general jurisdiction remains constitutional); Kevin D. Benish, Note, *Pennoyer's Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler AG v. Bauman*, 90 N.Y.U. L. REV. 1609, 1611–12 (2015) (noting the Federal Circuit split on the constitutionality of consent-by-registration schemes).

127. *Sternberg v. O'Neil*, 550 A.2d 1105 (Del. 1988) (en banc), *abrogated by Genuine Parts Co.*, 137 A.3d 123.

128. *Id.* at 1107–08.

Supreme Court,[129] and in particular, the United States Supreme Court's decisions in *Goodyear Dunlop Tires Operations*, *S.A. v. Brown,*[130] and *Daimler AG v. Bauman*.[131] *Goodyear* and *Daimler* clarified the due process limitations on a state court's power to exercise general jurisdiction over foreign corporations.[132]

For example, in *Goodyear*, the United States Supreme Court held that state courts "may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."[133] In *Daimler*, the United States Supreme Court emphasized the requirement that the corporation be "essentially at home" in the forum state and held that conducting business within a state, even to a "sizable" degree, does not make a foreign corporation "essentially at home."[134] Citing *Goodyear* and *Daimler*, the Delaware Supreme Court held in *Cepec* that Delaware's registration statutes provide a means for service of process and do not confer general jurisdiction.[135] Our Court warned that:

> An incentive scheme where every state can claim general jurisdiction over every business that does any business within its borders for any claim would reduce the certainty of the law and subject businesses to capricious litigation treatment as a cost of operating on a national scale or entering any state's market.[136]

In *RSUI*, the Delaware Supreme Court also discussed the importance of consistency and predictability.[137] The Court reviewed the Superior Court's determination that the insurance policy, which insured a Delaware corporation and its directors and officers, but which was negotiated and

129. *See generally* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018) (discussing the relationship between State high courts and the United States Supreme Court in developing constitutional law and how these courts may develop law in response to one another).

130. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011).

131. Daimler AG v. Bauman, 571 U.S. 117 (2014).

132. *See Norfolk S. Ry. Co.*, 266 A.3d at 548 ("[T]he High Court's decisions in *Goodyear* and *Daimler*, however, have narrowed the concept of a state court's constitutionally permissible exercise of general personal jurisdiction over a foreign corporation, thereby altering the governing analysis."). The Pennsylvania Supreme Court cited the Delaware Supreme Court's decision in *Cepec* with approval. *See id.* at 571.

133. *Goodyear*, 564 U.S. at 919 (quoting *Int'l Shoe Co. v. Wash., Off. of Unemployment Comp. & Placement*, 326 U.S. 310, 317 (1945)).

134. *Daimler AG*, 571 U.S. at 138–41.

135. *Genuine Parts Co.,* 137 A.3d at 127.

136. *Id.* at 127–28.

137. *RSUI*, 248 A.3d at 897–98.

issued in California, was governed by Delaware law. It agreed that it was governed by Delaware law and affirmed the Superior Court's decision.

The individual insureds in *RSUI* argued that Delaware had a substantial interest in its law being applied to interpret D&O policies of Delaware corporations because under DEL. CODE ANN. tit. 8, § 145(g), Delaware law permits its Delaware corporations to purchase insurance to protect its directors and officers against any liabilities whether or not the corporation has the power to indemnify the director or officer for such liability. They argued further that applying Delaware law would lead to certainty, predictability, and uniformity of result.[138]

The Delaware Supreme Court agreed and held that when the insured risk is the directors' and officers' honesty and fidelity to the corporation and its stockholders, and the choice of law is between the company's headquarters and the state of incorporation, the state of incorporation has the most significant interest.[139] This reasoning illustrates how the Delaware courts try to achieve predictability in the law so that its citizens can more reliably and efficiently undertake commercial activities.[140]

Most recently, the Delaware Supreme Court's concern for maintaining predictability in Delaware law was illustrated in *Stream TV Networks, Inc. v. SeeCubic, Inc.*[141] The Delaware Court of Chancery had held that there was a common law exception to the statutory requirement of stockholder approval, set forth in DEL. CODE ANN. tit. 8, § 271, which addresses a corporation's sale, lease or exchange of all or substantially all of its property and assets.[142] This exception would allow directors of an insolvent (or "failing") corporation to transfer all the assets of the company without stockholder approval.[143] For evidence of the exception, the Vice Chancellor primarily relied upon several treatises and a Court of Chancery opinion from 1915 citing two of these treatises for a related proposition.[144] Section 271 and its statutory predecessor, section 64a, did not supersede this common law exception either, the Court of Chancery reasoned, because there was no indication that the General Assembly intended to restrict the authority of directors at common law.[145]

138. *Id.* at 898.
139. *Id.* at 901.
140. *See also, e.g.*, *ABRY Partners*, 891 A.2d at 1048 ("Parties operating in interstate and international commerce seek, by a choice of law provision, certainty as to the rules that govern their relationship.").
141. *Stream TV Networks*, 279 A.3d 323.
142. *Id.* at 331–34; *see* DEL. CODE ANN. tit. 8, § 271.
143. *Stream TV Networks*, 279 A.3d at 332.
144. *Id.* at 331, 343–47.
145. *Id.* at 331.

Stream TV Networks, appellant and plaintiff below, argued on appeal that DEL. CODE ANN. tit. 8, § 271 superseded any common law insolvency exception.[146] Moreover, it argued "that the ruling, as a matter of public policy, would upset Delaware's contractarian focus and the predictable application of Section 271."[147] The Delaware Supreme Court agreed, stating that "Section 271 was intended to occupy the field and that no such insolvency exception survives, assuming *arguendo*, that it existed in the first place."[148] Still, the Court went on to note:

> 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. "Our General Assembly has [] recognized the need to maintain balance, efficiency, fairness, and predictability in protecting the legitimate interests of all stakeholders, and to ensure that the laws do not impose unnecessary costs on Delaware entities." Promoting stability in our DGCL is and remains of paramount importance.[149]

The Court observed that "[s]tability and predictability are not advanced by reading Section 271 to embody a common law exception that was never the basis of a single holding by any Delaware court nor by other courts, according to the parties, for decades."[150] The Court clarified that there is no insolvency exception today, emphasizing the Court's "policy of seeking to promote stability and predictability in our corporate laws, and with recognition that Delaware is a contractarian state."[151]

The Court's respect for its own precedents and principles of *stare decisis* contribute to the Court's stability during times when its composition changes. The Court's internal operating rules seek to promote stability and consistency by requiring decisions by a panel of three justices to be unanimous.[152] If there is a split vote, the case must be heard by an *en banc* panel of five justices. Further, the Court's prior opinions can only be reversed

146. *Id.* at 336.
147. *Id.*
148. *Id.* at 353.
149. *Id.* at 353 (alteration in original) (footnote omitted).
150. *Id.* at 354.
151. *Id.* at 355 (footnote omitted).
152. See the Delaware Supreme Court's Internal Operating Procedures ("IOP") section IX (panel hearings), and section X (*en banc* hearings). DELAWARE SUPREME COURT OPERATING PROCEDURES (2018), https://courts.delaware.gov/forms/download.aspx?id=117538 [https://perma.cc/C9EE-5884].

by an *en banc* panel.[153] Until fairly recently, the Justices of the Delaware Supreme Court historically rarely issued separate opinions, even on controversial issues. In fact, the vast majority of the Court's decisions during the past six decades were unanimous.[154] The justices' tendency to issue unanimous opinions was referred to, at one point, as Delaware's "unanimity norm."[155]

However, during the past several years, Delaware Supreme Court justices have issued separate opinions (mostly dissents) more frequently. In 2015, justices of the Court issued twelve separate opinions.[156] In 2016, there were thirteen separate opinions.[157] In 2017, there were six separate

153. *Id.* at § X(4).

154. DELAWARE SUPREME COURT: GOLDEN ANNIVERSARY 1951-2001, at 41 (Randy J. Holland & Helen L. Winslow eds., 2001) ("Over the fifty-year history of the separate Delaware Supreme Court, its nineteen justices have written separately on the average in only about three percent of the reported cases each year.").

155. *Id.* at 40.

156. Flonnory v. State, 109 A.3d 1060 (Del. 2015) (Strine, C.J., dissenting); Sykes v. State, 147 A.3d 201 (Del. 2015) (Strine, C.J., dissenting); First Health Settlement Class v. Chartis Specialty Ins. Co., 111 A.3d 993 (Del. 2015) (Strine, C.J., joined by Bouchard, C., dissenting); Corvel Corp. v. Homeland Ins. Co., 112 A.3d 863 (Del. 2015) (Strine, C.J., joined by Bouchard, C., dissenting); Bell Helicopter Textron, Inc. v. Arteaga, 113 A.3d 1045 (Del. 2015) (Vaughn, J., dissenting); LG Elecs., Inc. v. InterDigital Commc'ns, Inc., 114 A.3d 1246 (Del. 2015) (Valihura, J., dissenting); Hecksher v. Fairwinds Baptist Church, Inc., 115 A.3d 1187 (Del. 2015) (Vaughn, J., dissenting); *In re* Favata, 119 A.3d 1283 (Del. 2015) (Vaughn, J., concurring in part, dissenting in part); Murphy & Landon, P.A. v. Pernic, 121 A.3d 1215 (Del. 2015) (Vaughn, J., dissenting); E. Sav. Bank, FSB v. Cach, LLC, 124 A.3d 585 (Del. 2015) (Seitz, J., dissenting); Starling v. State, 130 A.3d 316 (Del. 2015) (Vaughn, J., concurring); Siga Techs., Inc. v. PharmAthene, Inc., 132 A.3d 1108 (Del. 2015) (Valihura, J., concurring in part, dissenting in part).

157. Morales v. State, 133 A.3d 527 (Del. 2016) (Strine, C.J., concurring); McCaffrey v. City of Wilmington, 133 A.3d 536 (Del. 2016) (Strine, C.J., concurring in part, dissenting in part); *Genuine Parts Co.*, 137 A.3d 123 (Vaughn, J., dissenting), CDX Holdings, Inc. v. Fox, 141 A.3d 1037 (Del. 2016) (Valihura, J., dissenting); Enrique v. State Farm Mut. Auto. Ins. Co., 142 A.3d 506 (Del. 2016) (Strine, C.J., joined by Danberg, Judge, dissenting); West v. State, 143 A.3d 712 (Del. 2016) (Valihura, J., concurring); Rauf v. State, 145 A.3d 430 (Del. 2016) (Strine, C.J., joined by Holland and Seitz, J., concurring, Holland, J., joined by Strine, C.J. and Seitz, J., concurring, Valihura, J., concurring in part, dissenting in part, Vaughn, J., dissenting); Bon Ayre Land LLC v. Bon Ayre Cmty. Ass'n, 149 A.3d 227 (Del. 2016) (Vaughn, J., dissenting); State v. Flowers, 150 A.3d 276 (Del. 2016) (Vaughn, J., concurring); Sandys v. Pincus, 152 A.3d 124 (Del. 2016) (Valihura, J., dissenting).

opinions.[158] In 2018, there were seven separate opinions.[159] In 2019, there were seven.[160] In 2020, there were ten separate opinions.[161] In 2021, there were nine separate opinions.[162] Thus far in 2022, there have been nine

158. City of Birmingham Ret. & Relief Sys. v. Good, 177 A.3d 47 (Del. 2017) (Strine, C.J., dissenting); Bridgeville Rifle & Pistol Club, Ltd. v. Small, 176 A.3d 632 (Del. 2017) (Strine, C.J., joined by Seitz, J., dissenting); Shrewsbury v. Bank of N.Y. Mellon, 160 A.3d 471 (Del. 2017) (Strine, C.J., dissenting); Williams Cos. v. Energy Transfer Equity, L.P., 159 A.3d 264 (Del. 2017) (Strine, C.J., dissenting); Shawe v. Elting, 157 A.3d 152 (Del. 2017) (Valihura, J., dissenting); Phillips v. State, 154 A.3d 1146 (Del. 2017) (Strine, C.J., concurring).

159. Bathla v. 913 Mkt., LLC, 200 A.3d 754 (Del. 2018) (Vaughn, J., dissenting); Flood v. Synutra Int'l, Inc., 195 A.3d 754 (Del. 2018) (Valihura, J., dissenting); Sherman v. Del. Dep't. of Pub. Safety, 190 A.3d 148 (Del. 2018) (Valihura, J., joined by Vaughn, J., dissenting, Vaughn, J., joined by Valihura, J., dissenting); Eagle Force Holdings, LLC v. Campbell, 187 A.3d 1209 (Del. 2018) (Strine, C.J., joined by Vaughn, J., concurring in part, dissenting in part, Vaughn, J., joined by Strine, C.J., concurring in part, dissenting in part); Pavik v. George & Lynch, Inc., 183 A.3d 1258 (Del. 2018) (Strine, C.J., joined by Seitz, J., dissenting); Aranda v. Philip Morris USA, Inc., 183 A.3d 1245 (Del. 2018) (Vaughn, J., concurring); State v. Hazelton, 178 A.3d 1145 (Del. 2018) (Traynor, J., dissenting).

160. State v. Murray, 213 A.3d 571 (Del. 2019) (Traynor, J., dissenting); City of Lewes v. Nepa, 212 A.3d 270 (Del. 2019) (Vaughn, J., concurring); Greenfield as Next Friend for Ford v. Miles, 211 A.3d 1087 (Del. 2019) (Strine, C.J., concurring in part, dissenting in part); Irwin v. Shelby, 210 A.3d 705 (Del. 2019) (Strine, C.J., joined by Traynor, J., dissenting); State v. Robinson, 209 A.3d 25 (Del. 2019) (Strine, C.J., joined by Traynor, J., concurring in part, dissenting in part); Urquhart v. State, 203 A.3d 719 (Del. 2019) (Vaughn, J., dissenting); Parker v. State, 201 A.3d 1181 (Del. 2019) (Vaughn, J., dissenting).

161. Gulf LNG Energy, LLC v. ENI USA Gas Mktg. LLC, 242 A.3d 575 (Del. 2020) (Vaughn, J., dissenting), *cert. denied*, 142 S. Ct. 76 (2021); Murfey v. WHC Ventures, LLC, 236 A.3d 337 (Del. 2020) (Traynor, J., joined by Montgomery-Reeves, J., dissenting); City of Fort Myers Gen. Emps.' Pension Fund v. Haley, 235 A.3d 702 (Del. 2020) (Vaughn, J., dissenting); Borealis Power Holdings v. Hunt Strategic Util. Inv., 233 A.3d 1 (Del. 2020) (Vaughn, J., joined by Montgomery-Reeves, J., concurring); Wiggins v. State, 227 A.3d 1062 (Del. 2020) (Vaughn, J., dissenting); *In re* Asbestos Litig., 228 A.3d 676 (Del. 2020) (Vaughn, J., joined by Valihura, J., dissenting); Garrison v. Downing, 226 A.3d 195 (Del. 2020) (Seitz, C.J., joined by Montgomery-Reeves, J. dissenting); Calm v. State, 226 A.3d 186 (Del. 2020) (Vaughn, J., concurring in part, dissenting in part); Del. Dep't of Nat. Res. & Env't Control v. McGinnis Auto & Mobile Home Salvage, LLC, 225 A.3d 1251 (Del. 2020) (Valihura, J., joined by Vaughn, J., dissenting); ISN Software Corp. v. Richards, Layton & Finger, P.A., 226 A.3d 727 (Del. 2020) (Vaughn, J., dissenting).

162. Chaverri v. Dole Food Co., 245 A.3d 927 (Del. 2021) (Valihura, J., dissenting); LCT Cap., LLC v. NGL Energy Partners, 249 A.3d 77 (Del. 2021) (Vaughn, J., dissenting in part); Purnell v. State, 254 A.3d 1053 (Del. 2021) (Vaughn, J., dissenting); Taylor v. State, 260 A.3d 602 (Del. 2021) (Vaughn, J., concurring); Juliano v. State, 260 A.3d 619 (Del. 2021) (Vaughn, J., dissenting), *Manti Holdings*, 261 A.3d 1199 (Valihura, J., dissenting); Capriglione v. State, No. 138, 2021 WL 4538685 (Del. Oct. 1, 2021) (Vaughn, J., concurring); Castro v. State, 266 A.3d 201 (Del. 2021) (Traynor, J., dissenting); Judicial Watch, Inc. v. Univ. of Del., 267 A.3d 996 (Del. 2021) (Vaughn, J., dissenting).

separate opinions.[163]

One might ask what a separate opinion may signify? Separate opinions might signal possible instability or shifts in the law.[164] Separate opinions might have the effect of narrowing the majority holding in that, concerns raised in a dissent, for example, could raise caution flags perhaps about relying on the holding in a broad and general way and in applying it in factual situations that differ materially from those presented.

Or separate opinions might simply reflect a lack of full consensus on an

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163. ACE Am. Ins. Co. v. Rite Aid Corp., 270 A.3d 239 (Del. 2022) (Vaughn, J., dissenting); Page v. Oath Inc., 270 A.3d 833 (Del. 2022) (Valihura, J., dissenting), *cert. denied*, 142 S. Ct. 2717 (2022); Cox Commc'ns, Inc. v. T-Mobile US, Inc., 273 A.3d 752 (Del.) (Valihura, J., joined by Montgomery-Reeves, J., concurring in part, dissenting in part), *reargument denied* (Del. 2022); N. Am. Leasing, Inc. v. NASDI Holdings, 276 A.3d 463 (Del. 2022) (Traynor, J., joined by Seitz, C.J., dissenting); Plaches v. State, 278 A.3d 661, (Del. 2022) (Vaughn, J., dissenting); Diep v. Trimaran Pollo Partners, 280 A.3d 133 (Del. 2022) (Valihura, J., dissenting), Ray v. State, 280 A.3d 627 (Del. 2022) (Vaughn, J., concurring in part, dissenting in part); NVIDIA Corp. v. City of Westland Police and Fire Ret. Sys., 282 A.3d 1 (Del. 2022) (Traynor, J. concurring); *In re* GGP, Inc. S'holder Litig., 282 A.3d 37 (Del. 2022) (Montgomery-Reeves, J., joined by Vaughn, J., concurring in part, dissenting in part).

164. *See e.g.*, *El Paso Pipeline GP Co.*, 152 A.3d 1248. A separate opinion may also narrow the scope of majority opinions. *See, e.g.*, Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1942, 1964 (2019) ("More generally, *Melendez-Diaz* exemplifies lower courts' willingness to view 'fifth vote' concurrences as limitations on the scope of majority opinions." (citing Thomas B. Bennett, Barry Friedman, Andrew D. Martin & Susan Navarro Smelcer, *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817, 820 (2018) (discussing "pivotal concurrences," which "undercut[] the majority's rule in the case."))); Igor Kirman, Note, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinion*s, 95 COLUM. L. REV. 2083 (1995) (arguing concurrences joining in the majority opinion that may be attempting to narrow the majority rationale should not be given precedential weight). Concurrences may also encourage shifts in the law. *See* Bennett et al., *supra*, at 869 ("Concurrences point out possible directions for *immediate* legal movement, encouraging lawyers and litigants to focus their efforts in those directions."). Meanwhile, dissenting opinions may serve a variety of purposes. *See, e.g.*, Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3–4, 6–8 (2010) (noting that in her experience "there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation," that occasionally a dissent is "so persuasive that it attracts the votes necessary to become the opinion of the Court," that sometimes a dissent "aims to attract immediate public attention and, thereby, to propel legislative change," and that the possibility of dissents may make unanimous decisions more powerful). Chief Justice Charles Evans Hughes famously remarked: "[a] dissent in a Court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed." Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 144 (1990). In agreement, Justice Ginsberg endorses Justice Antonin Scalia's remark that the greatest dissents "augment rather than diminish the prestige of the Court." *The Role of Dissenting Opinions*, *supra*, at 5.

issue without posing a threat to the stability of a given legal principle. The separate opinion in the Delaware Supreme Court's recent decision in *Cox Communications, Inc. v. T-Mobile US, Inc.*[165] is, perhaps, an example of this. There, the *en banc* Court divided over how to interpret a provision in a settlement agreement between corporate entities. In a 3-2 split decision, the Majority declared the provision to be an unambiguous Type II preliminary agreement that merely obligated the parties to negotiate open items in good faith. The Vice Chancellor also had found the provision to be unambiguous, but concluded that it meant something different. The separate concurring and dissenting opinion maintained that both readings were reasonable and as a result, the provision was ambiguous.[166]

Although the separate opinion acknowledged that the law is well-established that parties' disagreement over the meaning of a provision does not render it ambiguous, it cited to case law suggesting that when members of a panel disagree, there is more than one reasonable reading. Of note in *Cox*, of the six judicial officers who examined the provision, three Justices saw it one way and three (the other two Justices and the Vice Chancellor below) saw another reasonable reading. One might legitimately question, under these circumstances, the strength of the argument that there is only one reasonable way to read the provision.[167]

D. THE INFLUENCE OF PUBLIC POLICY IN THE DEVELOPMENT OF THE COMMON LAW

My fourth principle concerns how *public policy* considerations shape the development of the common law in the corporate context. In addition to the discussion of *ABRY*, *Express Scripts*, and *RSUI* above, the Delaware Supreme Court's recent opinion in *Manti Holdings, LLC v. Authentix Acquisition Co.*,[168] illustrates this point. There, the Delaware Supreme Court wrestled with several significant public policy issues potentially affecting the direction and fundamental features of Delaware corporate law.

In *Manti*, in 2017, a third-party entity acquired Authentix Acquisition Co. Inc. ("Authentix"). The cash from the merger was distributed to the stockholders pursuant to a waterfall provision.[169] The Authentix common

165. *Cox Commc'ns, Inc.*, 273 A.3d 752.

166. *Id.* at 771–72, 772 n.20 (Valihura, J., joined by Montgomery-Reeves, J., concurring in part, dissenting in part).

167. *See, e.g.*, *id*. at 772 n.20 (collecting cases stating that disagreement among panel members suggest that ambiguity exists).

168. *Manti Holdings*, 261 A.3d 1199 (Del. 2021).

169. *Id*. at 1203.

stockholders received little to no consideration. A group of common stockholders filed a petition for appraisal in the Court of Chancery under Section 262 of the DGCL. Authentix moved to dismiss the petition, arguing that the petitioners had waived their appraisal rights under a stockholders agreement that bound the corporation and all of its stockholders. The Court of Chancery granted the motion to dismiss, holding that the petitioners had agreed to a clear provision requiring that they "refrain" from exercising their appraisal rights with respect to the merger (the "Refrain Obligation").

On appeal, Petitioners argued that because the General Assembly provided that stockholders "shall" have the right to demand judicial appraisal, Section 262 prohibits common stockholders from agreeing to an *ex ante* waiver of their appraisal rights.[170] Further, they argued that allowing Authentix to enforce the Refrain Obligation would dilute the corporate "brand" and allow corporations to use stockholders agreements to change all other provisions of the DGCL.[171] As the Majority framed it, the "crux" of the argument was that "[a]ppraisal rights are core characteristics of the corporate entity that provide basic protections to investors; as such they cannot be waived—at least *ex ante*—under a bilateral agreement."[172]

In rejecting these arguments, the Majority stated that it was "unconvinced that appraisal claims play a sufficiently important role in regulating the balance of power between corporate constituencies to forbid sophisticated and informed stockholders from freely agreeing to an *ex ante* waiver of their appraisal rights under a stockholders agreement in exchange for consideration."[173] The Court affirmed in a 4-1 decision.

The Dissent expressed concern with using stockholder agreements to effect *ex ante* waivers of appraisal rights for common stockholders.[174] The scope of some stockholder agreements now includes (putative) restrictions or waivers of inspection rights, appraisal rights and fiduciary duties of directors.[175] The Dissent observed that:

> Stockholder agreements may offer venture capital funded start-ups flexibility versus complying with the formalities of charters and

170. *Id.* at 1218.
171. *Id*. at 1221.
172. *Id*. at 1223.
173. *Id.* at 1224.
174. *Id.* at 1241.
175. *See* Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 915, 917 n.15 (2021) ("Both appraisal waivers and inspection rights waivers are part of the most recent versions of the National Venture Capital Association's model documents."). As Professor Fisch notes, the NVCA model documents also purport to waive the right to assert post-merger claims for breaches of fiduciary duties. *Id*.

> bylaws. And unlike charters, they are not public documents filed with the Secretary of State. But restriction or elimination of important stockholder rights such as inspection, appraisal, election rights and fiduciary duties may minimize accountability of the Board and upset the delicate balance of power that the General Assembly and courts have attempted to maintain among a Delaware corporation's constituencies.[176]

It observed that "[t]he ordinary place of private ordering provisions that alter this balance is in the charter or bylaws," and that "[p]rinciples of corporate democracy support this preference,"[177] and that, some commentators have pointed out the dangers of "stealth governance" and have argued that "using shareholder agreements for corporate governance . . . sacrifices critical corporate law values."[178]

The Dissent also questioned whether an *ex ante* waiver of appraisal rights for common stockholders was presently permissible, and observed that it is generally accepted that there are at least *some* provisions of the DGCL that are mandatory.[179] The Majority agreed.[180] But moving from that starting point, there is considerable debate as to *which* provisions are mandatory, and resolution of that issue is undoubtedly a difficult task. The Dissent noted the lack of "a clear analytical framework to discern where the dividing line is."[181] It offered the view "that certain key statutory provisions that establish the balance of powers and checks and balances between and among stockholders, directors and officers, may qualify as mandatory, particularly

176. *Manti Holdings*, 261 A.3d at 1241–42.

177. *Id*. at 1242.

178. Fisch, *supra* note 175, at 916; *see id.* at 914 (arguing that "stealth governance is inappropriate for corporations and instead advocates a uniform structural approach to corporate law that would limit private ordering to the charter and bylaws"). As Professor Fisch notes, shareholder agreements purporting to derogate critical rights afforded to shareholders under the DGCL are apparently common among startup companies that have not gone public. *Id*. at 916–17. Precisely because they are not part of the incorporating documents filed with the Secretary of State, the public can become aware of them only when they are litigated. *Id.*

179. *See*, *e.g.*, Edward P. Welch & Robert S. Saunders, *Freedom and Its Limits in the Delaware General Corporation Law*, 33 DEL. J. CORP. L. 845 (2008) (arguing that there are a few statutory provisions that cannot be limited in a certificate of incorporation and identifying, among them, rights of stockholders to periodically elect directors, to inspect books and records, and directors' duty of loyalty); *see also* Rainbow Nav., Inc. v. Pan Ocean Nav., Inc., 535 A.2d 1357, 1359 (Del. 1987) (holding that Section 220 creates mandatory inspection rights that "can only be taken away by statutory enactment").

180. *Manti Holdings*, 261 A.3d at 1204 ("As a matter of public policy, there are certain fundamental features of a corporation that are essential to that entity's identity and cannot be waived.").

181. *Id*. at 1245.

when the General Assembly uses mandatory language in the provisions."[182]

That certain mandatory provisions in the DGCL are not waivable by contract is also suggested by comparing the DGCL with Delaware's alternative entity statutes.[183] Despite the broad freedom of contract afforded to Delaware corporations, unlike the alternative entity statutes, the DGCL does *not* contain a provision endorsing freedom of contract to "maximum effect." The Dissent suggested that this difference in the statutory structure reflected the General Assembly's intent to create different "brands" among the entity types and signals that Delaware corporations have at least a few features imposed by the DGCL that cannot be modified.[184]

On the other hand, Delaware has a public policy that favors freedom of contract and private ordering.[185] Public policy determinations are quintessentially a legislative judgment.[186] This is particularly so when the

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182. *Id.*

183. *Id.* at 1246.

184. *See, e.g.*, CML V, LLC v. Bax, 28 A.3d 1037, 1043 (Del. 2011) (stating that "[u]ltimately, LLCs and corporations are different; investors can choose to invest in an LLC, which offers one bundle of rights, or in a corporation, which offers an entirely separate bundle of rights," and that "in the LLC context specifically, the General Assembly has espoused its clear intent to allow interested parties to define the contours of their relationships with each other to the maximum extent possible"). A further comparison of these statutory schemes may hint at what some of these immutable features are. For example, the DRULPA and LLC Act authorize provisions that managers or partners will not owe fiduciary duties of loyalty to members or partners. *See* DEL. CODE ANN. tit. 6, §§ 18-1101(d), 17-1101e. The statutes expressly authorize restriction on inspection rights. *See* DEL. CODE ANN. tit. 6, §§ 18-305(g), 17-305(f).

185. *See* Salzberg v. Sciabacucchi, 227 A.3d 102, 116 (Del. 2020) ("[T]he DGCL allows immense freedom for businesses to adopt the most appropriate terms for the organization, finance, and governance of their enterprise."); Libeau v. Fox, 880 A.2d 1049, 1056–57 (Del. Ch. 2005) (observing that "[w]hen parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract," and that "[s]uch public policy interests are not to be lightly found, as the wealth-creating and peace-inducing effects of civil contracts are undercut if citizens cannot rely on the law to enforce their voluntarily-undertaken mutual obligation"), *aff'd in pertinent part*, 892 A.2d 1068 (Del. 2006); *see also* Fleming v. U.S. Postal Serv. AMF O'Hare, 27 F.3d 259, 261 (7th Cir. 1994) ("[A] premise of a free-market system is that both sides of the market, buyers as well as sellers, tend to gain from freedom of contract.").

186. *See* Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem'l Hosp., Inc., 36 A.3d 336, 346 (Del. 2012) ("[B]ecause we do not sit as a superlegislature, we will not address a variety of public policy arguments that should properly be considered by the General Assembly." (footnote omitted)); Cheswold Volunteer Fire Co. v. Lamberson Const. Co., 489 A.2d 413, 418 (Del. 1984) ("When reviewing economic legislation, we do not sit as a superlegislature to judge the wisdom or desirability [sic] of legislative policy

determination to be made hinges on the comparative weighing of polices in tension with one another.

Although the Dissent's view that appraisal rights are mandatory did not prevail, the Majority's holding is narrowly circumscribed: "Accordingly, we hold that Section 262 does not prohibit sophisticated and informed stockholders, who were represented by counsel and had bargaining power, from voluntarily agreeing to waive their appraisal rights in exchange for valuable consideration."[187] The Majority further narrowed its holding by stating:

> The Petitioners warn that this holding will have broad and negative implications, effectively rendering all provisions of the DGCL permissive and endorsing waivers of other stockholder rights that may be fundamental to the corporate form. Allowing Authentix to enforce this Refrain Obligation against these Petitioners does not mean that all *ex ante* waivers of appraisal rights are enforceable or that the waiver of any other stockholder right would be enforceable. To the contrary, there are other contexts where an *ex ante* waiver of appraisal rights would be unenforceable for public policy reasons.
>
> Similarly, there may be other stockholder rights that are so fundamental to the corporate form that they cannot be waived *ex ante*, such as certain rights designed to police corporate misconduct or to preserve the ability of stockholders to participate in corporate governance. *Allowing Authentix to enforce the Refrain Obligation against the Petitioners does not mean that ex ante waiver of all other stockholder rights would be enforceable*.[188]

Which provisions are ultimately deemed to fall into the category of "mandatory" rights will have to await further development of our corporate common law.

E. Procedural Principles and Judicial Perimeters: Shaping the Common Law

The last set of principles consist of *procedural principles* and *judicial*

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determinations . . . ." (quoting New Orleans v. Dukes, 427 U.S. 297 (1976))); *see also* Sheehan v. Oblates of St. Francis de Sales, 15 A.3d 1247, 1259 (Del. 2011) ("It is beyond the province of courts to question the policy or wisdom of an otherwise valid law. Rather, we must take and apply the law as we find it, leaving any desirable changes to the General Assembly.").

187. *Manti Holdings*, 261 A.3d at 1204.

188. *Id.* at 1226 (emphasis added) (footnote omitted).

perimeters. There are many examples of how procedural principles can shape the common law, I will focus on just a few.

First, "judicial restraint" is the family of doctrines cabining a court's use of the judicial power.[189] The judicial role is to decide specific, actual cases.[190] Even more precisely, the Delaware Supreme Court decides only those aspects of the case over which it has jurisdiction and those issues which have been fairly presented in the proceedings below. These tight limits, restricting the court's ability to act, are all aspects of "judicial restraint," an umbrella term for a varied panoply of doctrines revolving around the principle that a court should exercise its power as modestly as can be done consistent with the rights of the parties at bar.[191]

The doctrine of waiver also acts to limit our review.[192] Delaware

189. *See, e.g.,* Levitt v. Bouvier, 287 A.2d 671, 673 (Del. 1972) (regarding factual findings made by a trial court, "[i]f there is sufficient evidence to support the findings of the trial judge, this Court, in the exercise of judicial restraint, must affirm"); Downs v. Jacobs, 272 A.2d 706, 708 (Del. 1970) ("[I]t is the settled policy of this Court that a constitutional question will not be decided unless its determination is essential to the disposition of the case."); Ellison v. State, 410 A.2d 519, 525 n.7 (Del. Super. 1979) ("Traditional notions of judicial restraint normally require the Court to consider only the facts before it in rendering its decisions."), *aff'd*, 437 A.2d 1127 (Del. 1981).

190. *See Evans*, 872 A.2d at 548 ("The judicial function is to interpret the law and apply its remedies and penalties in particular cases."); *see also* Baker v. Carr, 369 U.S. 186, 204 (1962) ("A Federal court cannot 'pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.'" (citing Liverpool, N.Y. & P. Steamship Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885))). One exception is that in certain limited circumstances, the justices of the Supreme Court, as individuals, are authorized by statute to issue advisory opinions. *See* RANDY J. HOLLAND, THE DELAWARE STATE CONSTITUTION 181 (2d ed. 2017). Legislation in 1832 required Delaware judges, upon request from the Governor, to provide a written opinion on the proper construction of the Delaware Constitution, United States Constitution, or the constitutionality of any Delaware law. *Id.* This duty was assumed by the justices upon the creation of the separate Supreme Court in 1952. *Id.* In 1972, the statutory enactment made such advisory opinions discretionary. *Id.* In 1983, a majority of both the Senate and House of Representatives was given the statutory authority to seek advisory opinions from the individual justices of the Supreme Court. *Id.*; *see also* Del. Supr. Ct. R. 44 (governing procedures for rendering advisory opinions). A recent example of such an advisory opinion is *Request for an Opinion of the Justices*, 274 A.3d 269 (Del. 2022).

191. *E.g.*, State v. Barnes, 116 A.3d 883, 884 (Del. 2015) (interpretating an ambiguous statute to conform to well-established practice rather than upset it is judicial restraint); Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 931 (Del. 2003) (explaining that our *Unocal* doctrine affords deference to a board of directors and avoids substituting judicial judgment for their own as an exercise of judicial restraint); *Levitt*, 287 A.2d at 673 (describing appellate court's deference to a trial court's factfinding as an "exercise of judicial restraint").

192. Roca v. E.I. du Pont de Nemours & Co., 842 A.2d 1238, 1242–43 (Del. 2004) ("Accordingly, we hold that, assuming arguendo that Roca preserved the Section 343 issue in

Supreme Court Rule 8 provides that absent plain error, the Court will not consider arguments that the appellant makes for the first time on appeal.[193] There are other principles including standing[194] and standards of review,[195] which can serve as guardrails in our judicial opinion writing. But for purposes of limiting the scope of this article, I focus only on jurisdictional boundaries. As between our state government and the federal government, our Delaware Supreme Court has endeavored to stay "in our lane" or within our state jurisdictional perimeter. One can see this sensitivity in a few cases involving the reach of certain forum selection provisions.

For example, in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*,[196] the Court of Chancery held that Section 109(b) of the DGCL authorized a forum selection bylaw designating the Delaware Court of Chancery as the exclusive forum for four kinds of lawsuits: derivative suits, fiduciary duty suits, suits under the Delaware General Corporation Law, and internal affairs suits.[197] There, in an opinion by then-Chancellor Strine, the Court of Chancery addressed the plaintiffs' attempt to identify hypothetical situations where the challenged bylaws would operate unreasonably by precluding plaintiffs from bringing claims—such as derivative claims under the Exchange Act of 1934—that must be brought in federal court.[198] The Court of Chancery observed that facially, "neither of the forum selection bylaws purports in any way to foreclose a plaintiff from exercising any

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the Superior Court, Roca abandoned and waived that issue in his appeal to this Court by raising it for the first time at oral argument."); Flamer v. State, 953 A.2d 130, 134–35 (Del. 2008) ("The failure to cite any authority in support of a legal argument constitutes a waiver of the issue on appeal. Accordingly, we hold that all of the legal issues raised by Flamer in this appeal have been waived." (footnote omitted)); Williams v. State, 34 A.3d 1096, 1098 (Del. 2011) ("Accordingly, we hold that Williams' claim on appeal for prosecutorial misconduct was waived.").

193. *See*, *e.g.,* Del. S. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.").

194. *See, e.g.,* Mills v. Trans Caribbean Airways, Inc., 272 A.2d 702, 703 (Del. 1971) (observing that "[i]t is settled in this State that a party has no standing to challenge the constitutionality of a statute, or of any action thereunder, unless it is shown that a right of the complainant is affected thereby," and that "[t]hese rules reflect a policy of judicial restraint, well established in this State, as well as a rule of practical necessity in the administration of justice").

195. *See, e.g.*, North River Ins. Co. v. Mine Safety Appliances Co., 105 A.3d 369, 381–82 (Del.2014) (observing that "[w]here the support in the record is sufficient for a factual finding, even if there can be a reasonable difference of view, our standard of review compels us to defer to the trial court," and that "[o]ur function here is not to substitute our judgment for the trial court's as though we had before us an original application").

196. Boilermakers Loc. 154 Ret. Fund v. Chevron Corp., 73 A.3d 934 (Del. Ch. 2013).

197. *Id*. at 942–43.

198. *Id.* at 961–62.

statutory right of action created by the federal government."[199] It noted also that the Chevron bylaw had been amended to expressly allow cases to be filed in any state or federal court in Delaware with jurisdiction over the subject matter and the parties.[200]

The Delaware Supreme Court's decision in *Salzberg v. Sciabacucchi*[201] came later. There, the Supreme Court stressed the harmony between Delaware corporation law and federal securities law stating: "[t]his Court has viewed the overlap of federal and state law in the disclosure area as 'historic,' 'compatible,' and 'complimentary.'"[202] In *Salzberg*, several Delaware corporations had charters with federal forum selection provisions requiring any actions arising under the Securities Act of 1933 be filed in federal courts. The 1933 Act, unlike the 1934 Act, allows plaintiffs to file in state or federal court, and it bars removal from state to federal court.[203] The Delaware Supreme Court held that these federal forum provisions were facially valid under Section 102(b)(1) of the DGCL, which broadly defines what charters may contain.[204] In *Salzberg*, the Court emphasized that, "Delaware historically has, and should continue to be, vigilant about not stepping on the toes of our sister states or the federal government."[205]

Even though the question of ultimate enforceability was "down the road," the Court noted that "there are persuasive arguments that could be made to our sister states that a provision in a Delaware corporation's certificate of incorporation requiring Section 11 claims to be brought in a federal court does not offend principles of horizontal sovereignty—just as it does not offend federal policy."[206] It observed that federal-forum provisions, or FFPs, "allow for litigation of federal Securities Act claims in a federal court of plaintiff's choosing, but also allow for consolidation and coordination of such claims to avoid inefficiencies and unnecessary costs."[207]

The Delaware Supreme Court's approach in *Cepac* (where it overruled *Sternberg*), also suggests a similar concern about minding the State's

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199. *Id.* at 962.

200. The Chancellor also observed that "the plaintiff could argue that if the board took the position that the bylaw waived the stockholder's rights under the Securities Exchange Act, such a waiver would be inconsistent with the antiwaiver provisions of that Act, codified at 15 U.S.C. § 78cc." *Id* at 962. However, the court declined "to wade deeper into imagined situations involving multiple 'ifs' because rulings on these situationally specific kind of issues should occur *if and when* the need for rulings is actually necessary." *Id*. (emphasis in original).

201. *Salzberg*, 227 A.3d 102.

202. *Id.* at 114 (quoting Malone v. Brincat, 722 A.2d 5, 13 (Del. 1998)).

203. 15 U.S.C. § 77v(a); *Salzberg*, 227 A.3d at 110.

204. DEL. CODE ANN. tit. 8, § 102(b)(1).

205. *Salzberg*, 227 A.3d at 134.

206. *Id*. at 133–34.

207. *Id*. at 137.

boundaries. The Court stated that "[u]nder a sensible goose-and-gander approach, Delaware should be prudent and proportionate in exercising jurisdiction over foreign corporations[.]"[208] This was perhaps a more formal way of saying that the Court is mindful of staying in its judicial lane.

CONCLUSION

In sum, this article has touched on all five of my principles: Purpose, Precedent, Practicality, Public Policy and Procedural Principles and Judicial Perimeters—guideposts which play a role, at least for me, in crafting and in shaping our Delaware common law. Given the breadth of the topic, the article has only lightly touched on the fascinating subject of the art of creating the common law in the corporate context—Delaware style.

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208. *Genuine Parts Co.*, 137 A.3d at 144.