

Performances of Equity: Why Court of Chancery Transcript Rulings Are Law

By Joel Edan Friedlander*

A large, ever-expanding corpus of unpublished transcript rulings issued by the Delaware Court of Chancery address all aspects of corporate law litigation. Practitioners regularly cite them. Written decisions are influenced by them. Yet, the juridical status of these transcript rulings is unsettled. Several years ago, then-Chancellor Strine proclaimed that transcript rulings have no inhibiting effect on future decisions. In 2020, members of the Court of Chancery issued written decisions describing in different ways how transcript rulings are of lesser status compared to written rulings.

In this article, I argue that the categorical disregard or demotion of transcript rulings decreases judicial accountability, increases uncertainty, and diminishes a repository of judicial wisdom. Transcript rulings should be considered law, just as written opinions of the Court of Chancery are law: They are thoughtful judgments by expert jurists that warrant consideration in similar, subsequent cases, especially if their reasoning is persuasive. Their status as law does not mean that they must be followed. A future judge may reject or distinguish a transcript ruling or interpret it narrowly or broadly.

I further argue that the interplay between transcript rulings and legal doctrine is worthy of study. In the Introduction, I note how transcript rulings can presage future written opinions. In Part I, I discuss the background and import of three transcript rulings that gave rise to three recent written decisions questioning the precedential value of transcript rulings. In Part II, I discuss the implications of a heated debate two decades ago between two leading federal appellate judges (among many others) about court rules that prohibited the citation of unpublished federal appellate decisions and deemed them non-precedential. In Part III, I discuss four transcript rulings of Leo Strine denying motions to dismiss. These rulings are performances of equity. They create exceptions to rules and illustrate how transcript rulings can raise questions about the breadth, vitality, slipperiness, and direction of black letter law.

INTRODUCTION

Lawyers practicing in the Delaware Court of Chancery or advising Delaware corporations about Delaware corporate law read, inquire about, cite, and disseminate

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transcript rulings, which are also known as bench rulings. To the practitioner, they are an indispensable tool. They influence our behavior and those of our adversaries. They help predict future litigation outcomes. In that Holmesian sense, they constitute law: “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”¹

Consider, for example, the backdrop to Chancellor Bouchard’s published opinion in *In re Trulia, Inc. Stockholder Litigation*,² which authoritatively limited then-prevalent disclosure settlements. Months earlier, Vice Chancellor Laster had issued a pair of prophetic transcript rulings in which he offered broad critiques of disclosure settlements.³ Upon issuance of the first such ruling, *The Chancery Daily* advised its subscribers, all of whom are Court of Chancery aficionados, that the ruling’s magnitude rated “approximately Five on the open-ended Richter Scale.”⁴ *The Chancery Daily* described the second ruling as “nuclear”—as seemingly nothing remains, other than foreseeable fallout.”⁵ Chancellor Bouchard’s opinion in *Trulia* cited nine transcript rulings⁶ and an early version of a subsequently published article that gathered and discussed transcript rulings rejecting disclosure settlements and the future course of litigation in two such cases.⁷

A more recent example of the prophetic power of a transcript ruling concerns the pedestrian but critical question of whether the Court of Chancery will deny a motion to dismiss if it is supported by documentation not deemed integral to the complaint. Typically, such documents had been disregarded by the Court or

1. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

2. 129 A.3d 884 (Del. Ch. 2016). *Trulia* was adopted by a federal appellate court applying Rule 23 of the Federal Rules of Civil Procedure. *In re Walgreens Co. S’holder Litig.*, 832 F.3d 718 (7th Cir. 2017) (Posner, J.).

3. Transcript of Settlement Hearing & Request for Attorney Fees & the Court’s Rulings, *Acevedo v. Aeroflex Holding Corp.*, No. 9730-VCL (Del. Ch. July 8, 2015); Transcript of Settlement Hearing & Rulings of the Court, *In re Aruba Networks, Inc. S’holder Litig.*, No. 10765-VCL (Del. Ch. Oct. 9, 2015).

4. *Tectonic Rejection of Settlement and Intergalactic Release*, CHANCERY DAILY (July 8, 2015).

5. *Class Action Dismissed as to Named Plaintiffs for Inadequacy of Representation*, CHANCERY DAILY (Oct. 9, 2015).

6. See *Trulia*, 129 A.3d at 892 n.19 (citing Transcript Ruling at 78–92, *In re Rite Aid Corp. S’holders Litig.*, No. 11663-CB (Del. Ch. Jan. 5, 2016); Transcript Ruling at 47–56, *Sheet Metal Workers Local No. 33 Cleveland Dist. Pension Plan v. URS Corp.*, No. 9999-CB (Del. Ch. Aug. 28, 2014); Transcript Ruling at 100–11, *In re Zalicus Inc. S’holder Litig.*, No. 9602-CB (Del. Ch. June. 13, 2014)); *id.* at 895 n.33 (citing Transcript Ruling at 134, *In re Rural/Metro Corp.*, No. 6365-VCL (Del. Ch. Jan. 17, 2012), *aff’d sub nom.* *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816 (Del. 2015)); *id.* at 896 n.35 (citing Transcript Ruling at 60–79, *Acevedo v. Aeroflex Holding Corp.*, No. 9730-VCL (Del. Ch. July 8, 2015); Transcript Ruling, *In re Intermune, Inc. S’holder Litig.*, No. 10086-VCL (Del. Ch. July 8, 2015); Transcript Ruling, *In re Intermune, Inc. S’holder Litig.*, No. 10086-VCL (Del. Ch. Dec. 29, 2015); Transcript Ruling, *In re TW Telecom, Inc. S’holders Litig.*, No. 9845-CB (Del. Ch. Aug. 20, 2015)); *id.* at 906 n.82 (citing Transcript Ruling, *Turberg v. ArcSight*, No. 5821-VCL (Del. Ch. Sept. 20, 2011)).

7. *Trulia*, 129 A.3d at 895 (discussing draft of Joel E. Friedlander, *How Rural/Metro Exposed the Systemic Problem of Disclosure Settlements*, 40 DEL. J. CORP. L. 877 (2016)).

perhaps stricken at the request of a plaintiff.⁸ But several months after joining the Court of Chancery, Vice Chancellor Fioravanti issued a lengthy but obscure transcript ruling in which he converted defendants' motions to dismiss into motions for summary judgment and ordered that discovery go forward.⁹ This transcript ruling was virtually unknown until Vice Chancellor Fioravanti cited it in a subsequent letter opinion that similarly converted a motion to dismiss into a motion for summary judgment.¹⁰ *The Chancery Daily* discussed the important letter opinion and commended to readers the prior transcript ruling for its "most thorough treatment of the issues."¹¹

In the Delaware Court of Chancery, leadership applications, expedition motions, scheduling disputes, discovery motions, settlement hearings, and fee applications are regularly adjudicated orally or by entry of short minute orders. Merits rulings, such as motions to dismiss, preliminary injunction applications, advancement of legal fees, summary judgment motions, and final decisions¹² may also be adjudicated orally. A large corpus of unpublished rulings address all aspects of corporate law litigation. Transcript rulings are regularly upheld on appeal by the Delaware Supreme Court, even on significant matters.¹³

Data recently collected by Chancellor Bouchard suggests the extent to which the Court of Chancery issues transcript rulings. In remarks and slides presented at a conference that were subsequently published, Chancellor Bouchard advised that, during the ten months between March 1, 2020, and December 31, 2020, when the Court was operating remotely due to COVID-19, the Court convened 1,123 hearings (in addition to 37 trials), and that, during the entirety of 2020, the Court issued 213 written opinions.¹⁴ The data suggest that several hundred hearings in 2020 were resolved by transcript rulings.

Court of Chancery practitioners have long collected, for future reference, transcript rulings, letter opinions, orders, and other unpublished decisions. It was not until the 1990s that unpublished memorandum opinions and letter opinions

8. See, e.g., *In re Gardner Denver, Inc. S'holders Litig.*, No. 8505-VCN, 2014 WL 715705, at *1–2 n.1 (Del. Ch. Feb. 21, 2016) (granting in part and denying in part a motion to strike while noting that the procedural question is typically addressed through disposition of the underlying motion to dismiss).

9. Transcript of Telephonic Oral Argument & Rulings of the Court on Defendants' Motions to Dismiss, *Broadscale OC Invs. L.P. v. Clayton*, No. 2020-0262-PAF (Del. Ch. Oct. 15, 2020).

10. *Acero Capital, L.P. v. Swrve Mobile, Inc.*, No. 2020-0876-PAF, 2021 WL 2207197, at *2 n.2 (Del. Ch. June 1, 2021).

11. *The Long Form*, CHANCERY DAILY (June 9, 2021).

12. See *Donnelly v. Keryx Biopharms., Inc.*, No. 2018-0892-SG, 2019 WL 5446015, at *1 (Del. Ch. Oct. 24, 2019) ("What follows is, for me at least, a rare bird; a written Section 220 decision.").

13. See, e.g., *Swomley v. Schlecht*, No. 180, 2015 WL 7302260, at *1 (Del. Nov. 19, 2005) (affirming Court of Chancery's dismissal, under *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014), as applied at the pleading stage to a privately held corporation, "for the reasons stated in its August 27, 2014 bench ruling"); *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1252–63 (Del. 2012) (affirming, with one justice dissenting, transcript ruling that awarded attorneys' fees of more than \$304 million).

14. See *Chancellor Andre Bouchard Prepares to Leave the Court*, M&A J., Mar./Apr. 2021, at 19, 20 (publishing text of interview); *Court of Chancery Statistics*, M&A J., May 2021, at 7, 8 (publishing slides that set forth data).

became widely available on Lexis. Upon the publication a generation ago of a treatise on practice before the Delaware Court of Chancery, a book review attested to the treatise's utility in light of practitioners' prior need to collect unpublished rulings:

Despite the national prominence of the Court of Chancery, for over 200 years practitioners in the court had no reference to consult as a practice guide. Rather, the "rules" of practice in the Court of Chancery were largely passed down by word of mouth or by resort to yellowing subject matter files filled with old memos and briefs and unreported decisions, transcripts, and orders.

Fortunately, this situation has been remedied¹⁵

The treatise did not render transcript rulings obsolete. To the contrary, the ever-expanding body of transcript rulings generated by a busy court found new outlets. Lawyers in a given case might circulate a ruling by email through informal networks. Purchased transcripts appear on the docket and can be accessed electronically for a fee. Law firms gather transcripts to a greater or lesser degree. Some transcripts are summarized in client memos or attorney advertising on the internet. For a time, subscription services made transcript rulings available.¹⁶ *The Chancery Daily* summarizes and quotes transcript rulings for its subscribers. Transcript rulings also can be fodder for journalistic coverage,¹⁷ blogs, continuing legal education materials, or law review articles.¹⁸ By these less-than-universally-accessible means, observers of Delaware corporate law litigation can read some of what judges say when ruling orally.

15. R. Franklin Balotti & Raymond J. DiCamillo, *Book Review*, 54 BUS. LAW. 757, 757 (1999) (reviewing DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, *CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY: PROCEDURES IN EQUITY* (1998)).

16. See Edward M. McNally, *The Court of Chancery Speaks by Transcript*, MORRIS JAMES LLP (Sept. 12, 2012), <https://www.morrisjames.com/blogs-Delaware-Business-Litigation-Report,the-court-of-chancery-speaks-by-transcript> ("Major Internet reporting services obtain those transcripts and provide them to even the lawyers who are not involved in the particular litigation. . . . At least \$5,000 a year is a common fee from the transcript providers.").

17. For an amusing example of journalistic interest and public interest in a transcript ruling that offers insight into a phase of stockholder litigation that typically generates transcript rulings, see Walter Olson, *Delaware Court Hails Non-Aromatic Fee Request*, OVERLAWYERED (Apr. 20, 2006), <https://www.overlawyered.com/2006/04/delaware-court-hails-non-aromatic-fee-request/>, and Elena Cherney, *When Investors Help Find Fraud, What's It Worth?*, WALL ST. J. (Mar. 16, 2006, 11:00 PM), both of which quote a transcript ruling in which then-Vice Chancellor Strine stated: "I feel queasy a lot of the times when I examine applications for attorneys' fees. . . . But I have to get right in there, take my Maalox, ignore the vile smell, and see whether a fee should be awarded." Transcript of Argument & Ruling on Motion to Dismiss at 52, *Tweedy, Browne Glob. Value Fund v. Hollinger Int'l Inc.*, No. 086-N (Del. Ch. Feb. 9, 2006).

18. See, e.g., Joel E. Friedlander, *Vindicating the Duty of Loyalty: Using Data Points of Successful Stockholder Litigation as a Tool for Reform*, 72 BUS. LAW. 623 (2017) (discussing transcript rulings on leadership applications, motions to dismiss, and settlement hearings); Friedlander, *supra* note 7 (discussing settlement hearing transcripts); Eric A. Chiappinelli, *The Underappreciated Importance of Personal Jurisdiction in Delaware's Success*, 63 DEPAUL L. REV. 911 (2014) (collecting numerous transcript rulings bearing on multi-jurisdictional stockholder class action litigation).

But are transcript rulings an illegitimate form of legal authority? Should litigants not cite them? Should one member of the Court of Chancery not pay attention to a colleague's transcribed words? These questions have arisen recently.

Several years ago, then-Chancellor Strine chided lawyers for treating transcript rulings as “samizdat literature.”¹⁹ In a transcript ruling on a preliminary injunction motion, Chancellor Strine identified “a few important reasons” why he issued transcript rulings:

One, if you don't give transcript rulings when you can, you can't issue timely written decisions in the other cases that require them, and you can't make all the decisions that the interests of justice require you to make when you're managing cases. And you issue transcript rulings when you're not making law.

. . . [T]here are situations where you're going to come back to a case. . . . You have another chance to rule in the case, which is often why, when a judge denies a dispositive motion . . . if you have to assume all the facts pled by the plaintiff as true and you deny a dispositive motion, do you need to write an opinion about people in the world based on a set of hypothetical facts? No. You'll get a chance to judge for yourself what you think the real facts are. . . . So oftentimes when you deny a dispositive motion, judges don't write.

The other is when you don't have time to give a written ruling. And if you don't have time to give a written ruling, that's the least reliable way to make new contributions to the fabric of the common law.²⁰

Chancellor Strine continued by explaining that transcript rulings are not precedential:

And they should be taken as provisional. When people cite me back my transcript rulings . . . I'm like . . . who cares? . . . [Y]ou try to do your best. You do case-specific justice; but if you think that's an inhibiting effect because somebody issued a transcript ruling at some point in time, it's not.

. . . [I]t's now become the new samizdat literature. And that's really important in the Soviet era because that's the only literature you could really rely upon. We do written decisions, many of them. And our Supreme Court in particular does decisions, and they're binding precedent.²¹

19. Transcript of Rulings of the Court from Oral Argument on Plaintiffs' Motion for a Preliminary Injunction at 6, *In re NYSE Euronext S'holders Litig.*, No. 8136-CS (Del. Ch. May 10, 2013) [hereinafter *NYSE Euronext Transcript*], https://www.rlf.com/wp-content/uploads/2020/05/6884_NE051013Rulings.pdf (“I issue that caveat because . . . [transcripts have] now become the new samizdat literature.”); Transcript of Oral Argument on Plaintiffs' Motion to Dismiss & the Court's Ruling at 51–52, *Brinckerhoff v. El Paso Pipeline GP Co.*, No. 7141-CS (Del. Ch. Oct. 26, 2012) [hereinafter *El Paso Pipeline Transcript*] (“People now are putting too much stock in bench rulings. People who are not from Delaware used to never ever see them, and now they trade as some sort of samizdat literature, as if they are published opinions or something. They're not, but they're important to the exercise of justice, actually . . . [W]hen you [publish opinions], then it takes time, and you don't get other things decided, and cases don't move along.”).

20. *NYSE Euronext Transcript*, *supra* note 19, at 4–6.

21. *Id.* at 6.

Chancellor Strine understood that he could send messages to the bar through transcript rulings. When identifying discovery abuse in one case and ordering expedited production of documents, then-Vice Chancellor Strine stated: “I hope this transcript reverberates. Folks need to stop playing edgy games with noncompliance with the rules and then expecting the Court to always give them a break.”²² The joke among practitioners is that his criticism of reliance on transcript rulings could not be taken at face value because it was expressed orally.

The first written decision in the Court of Chancery of which I am aware questioning the precedential value of transcript rulings was issued by Vice Chancellor Glasscock in 2017, in *Frechter v. Zier*.²³ Vice Chancellor Glasscock discussed an “instructive” transcript ruling by Vice Chancellor Laster but stated in a footnote: “I use the word ‘instructive’ advisedly; I do not mean to imply that bench decisions are part of the case-law of this Court, or encourage citation thereto.”²⁴

In a 2020 letter opinion in *Day v. Diligence, Inc.*, Vice Chancellor Glasscock explained his thinking at greater length, when declining to follow a transcript ruling by Vice Chancellor Laster:

Transcript Rulings generally have *no* precedential value in this Court and they should ordinarily not be relied on as precedent—at most they offer persuasive authority. Rulings from the bench most often reflect that the court intended to decide a particular dispute, not to advance the common law. They tend to be informal, and often fail to be cabined in the way a jurist typically limits her rationale in a written decision. They are made in light of the fact that they will have no precedential value. This consideration is stronger where, as here, the transcript itself reflects that the ruling was limited to the case *sub judice*.²⁵

Vice Chancellor Glasscock quoted *Day* two months later in *In re Oracle Corporation Derivative Litigation* when deciding not to follow an unmentioned transcript ruling by Chancellor Bouchard.²⁶ Vice Chancellor Glasscock again cited *Day* in a letter opinion in *Deane v. Saint Gervais, LLC*, in which he stated that he “persist[s] in the traditional rule that oral rulings of this Court have no precedential value.”²⁷

Apart from the oral pronouncements of Chancellor Strine, the source of this “traditional rule” is not clear. *Day* quoted a 2019 decision by Vice Chancellor Slight, which discussed at length a transcript ruling issued several years earlier

22. Transcript of Argument & Ruling on Motion to Compel & Motion for Fee Shifting at 31, *Paige Capital Mgmt., LLC v. Lerner Master Fund, LLC*, No. 5502-VCS (Del. Ch. Nov. 24, 2010).

23. No. 12038-VCG, 2017 WL 345142 (Del. Ch. Jan. 24, 2017).

24. *Id.* at *4 n.27 (citing Transcript of Oral Argument on Cross Motions for Summary Judgment & Rulings of the Court, *In re VAALCO Energy, Inc. S’holder Litig.*, No. 11775-VCL (Del. Ch. Dec. 21, 2015) [hereinafter *VAALCO Transcript*]).

25. *Day v. Diligence, Inc.*, No. 2020-0076-SG, 2020 WL 2214377, at *1 (Del. Ch. May 7, 2020) (internal quotation and footnote omitted) (referencing Transcript Ruling, *Salomon v. Kroenke Sports & Enter., LLC*, No. 2019-0858-JTL (Del. Ch. Feb. 26, 2020)).

26. *In re Oracle Corp. Derivative Litig.*, No. 2017-0337-SG, 2020 WL3867407, at *6 n.60 (Del. Ch. July 9, 2020).

27. *Deane v. Saint Gervais LLC*, No. 2020-0520-SG, 2020 WL 4877538, at *1 (Del. Ch. Aug. 20, 2020) (stating that he misspoke when delivering an oral ruling).

by then-Master, now-Judge LeGrow.²⁸ Vice Chancellor Slights observed that the transcript ruling in question “presented a distinct factual context, and the court there was careful to limit its ruling to the case *sub judice*.”²⁹ In a footnote, Vice Chancellor Slights added:

The fact [that] the court offered its ruling from the Bench further reflects that the court intended to decide a particular dispute, not to advance a new, definitive Section 220 standard. *See, e.g., In re Columbia Pipeline Grp., Inc.*, 2018 WL 4182207, at *4 (Del. Ch. Aug. 30, 2018) (noting the generally fact-specific nature of transcript rulings); *Kalisman v. Friedman*, 2013 WL 1668205, at *7 (Del. Ch. Apr. 17, 2013) (same).³⁰

The observation that transcript rulings tend to be fact-specific and not intended to create new legal rules does not imply that they should not be cited or analyzed. In the above-referenced *Columbia Pipeline* decision, Vice Chancellor Laster devoted two paragraphs to discussing a transcript ruling by then-Vice Chancellor Strine.³¹ In *Kalisman*, Vice Chancellor Laster distinguished two transcript rulings as arising in an inapplicable context.³² Neither case suggested that transcript rulings lack precedential value.

Vice Chancellor Glasscock’s statement in *Day* has been referenced by other members of the Court. In *Rudd v. Brown*,³³ Vice Chancellor Zurn analyzed a transcript ruling, but cited *Day* in a footnote: “I consider this transcript ruling because Plaintiff relies on it, even though such rulings generally have no precedential value.”³⁴ In a more recent opinion concerning the vitality of an unpublished opinion that Vice Chancellor Laster described as “seminal” in light of an earlier transcript ruling relied on by a litigant, Vice Chancellor Laster cited *Day* as follows:

Bench rulings can provide persuasive authority. *See, e.g., Pettry v. Gilead Sciences, Inc.*, C.A. No. 2020-0132-KSJM, tr. 55 (Del. Ch. May 28, 2020); *Day v. Diligence, Inc.*, 2020 WL 2214377, at *1 (Del. Ch. May 7, 2020). Nevertheless, a bench ruling typically reflects a case-specific determination that is intended for the parties, and by virtue of being spoken rather than written, its language and implications may be less

28. *Day*, 2020 WL 2214377, at *1 (quoting *High River Ltd. P’ship v. Occidental Petroleum Corp.*, No. 2019-0403-JRS, 2019 WL 6040285, at *7 n.77 (Del. Ch. Nov. 14, 2019)); *High River Ltd. P’ship*, 2019 WL 6040285, at *6–7 (discussing Transcript Ruling, *High River Ltd. P’ship v. Forest Lab’ys, Inc.*, No. 7663-ML (Del. Ch. July 27, 2012)).

29. *Highland River Ltd. P’ship*, 2019 WL 6040285, at *7.

30. *Id.* at *7 n.77.

31. *In re Appraisal of Columbia Pipeline Grp., Inc.*, No. 12736-VCL, 2018 WL 4182207, at *4 (Del. Ch. Aug. 30, 2018) (discussing Transcript Ruling at 44–52, *Intel v. NVIDIA*, No. 4373-VCS (Del. Ch. Apr. 11, 2011)).

32. *Kalisman v. Friedman*, No. 8447-VCL, 2013 WL 1668205, at *7 (Del. Ch. Apr. 17, 2013) (“Although the defendants have identified two transcript rulings in which the Court limited the production obligation of law firms to external communications when the waiver of privilege resulted from an advice-of-counsel defense, the current situation is different. In an advice-of-counsel situation, the key question is what the client was told. Here, the issues to be litigated involve the planning and scheduling of the meetings and the related structuring of the recapitalization.”).

33. No. 2019-0775-MTZ, 2020 WL 5494526 (Del. Ch. Sept. 11, 2020).

34. *Id.* at *9 n.90 (referencing Transcript of Telephonic Ruling on Defendants’ Motions to Dismiss at 6, *In re PLX Tech. Inc. S’holders Litig.*, No. 9880-VCL (Del. Ch. Sept. 3, 2015) [hereinafter *PLX Transcript*]).

clear. Compared to the written decisions in [various cases], the [transcript] ruling starts at a disadvantage.³⁵

Most recently, Vice Chancellor Fioravanti cited *Vay* and questioned a litigant's assertion that a transcript ruling by then-Vice Chancellor Strine was "clear Delaware precedent."³⁶

In this article, I question whether Court of Chancery transcript rulings stand on a lower footing than written opinions by members of the same court. No court rule or legal rule prescribes categorically different treatment for oral rulings versus written opinions. The rule of law and prudence counsel in favor of considering how a member of the Court of Chancery ruled in a similar case, regardless of the manner in which that ruling is expressed.

Judges think about the intended influence of a decision when they decide whether to render it by means of a transcript ruling, minute order, numbered paragraphs, letter opinion, memorandum opinion for electronic publication, or published opinion in the *Atlantic Reporter*. In the pre-internet era, Chancellor Allen issued a written decision approving the settlement of a meritorious stockholder action because otherwise academics would be unaware of a transcript ruling: "Insofar as the empirical study of the legal system is concerned such rulings are as words written on water."³⁷ The *Caremark* doctrine would be known by another name if Chancellor Allen orally approved the settlement in that case.³⁸

But transcript rulings are not necessarily a lesser form of justice. They are thoughtful expressions of well-prepared expert judges. Transcript rulings may be fully scripted, partially scripted, or not scripted at all. A transcript ruling can convey its own form of rhetorical power. The immediacy of a decision after oral argument and the relative intimacy of a courtroom, conference room, or conference call can lend passion that otherwise would be scrubbed from an edited draft. A transcript ruling can be used to perform justice in an individual case in a fact-specific way or to express concern about a general practice. Simultaneously, judges can speak more forcefully and with less intended precedential import by ruling orally.

A judge's decision to downplay a ruling by rendering it orally should not diminish its precedential value. There should not exist a precedential ranking system of trial court decisions based on the form of issuance. No trial court decision in any form binds a colleague. Any of them warrant due consideration. After all, motion practice in the Court of Chancery affords litigants ample pages and minutes to make their case. Members of the Court all prepare for oral argument. Adjudication is thoughtful, expert, and individualized. Any pertinent prior judicial decision identified by a litigant deserves attention. A future judge may reject or distinguish a transcript ruling or interpret it narrowly or broadly, just as a future

35. *Focus Fin. Partners, LLC v. Holsopple*, 250 A.3d 939, 961 (Del. Ch. 2020).

36. *Pacira BioSciences, Inc. v. Pac. CryoTech, Inc.*, C.A. No. 2020-0694-PAF, 2021 WL 4949179, at *15 (Del. ch. Oct. 25, 2021).

37. *J.L. Schiffman & Co., Inc. Profit Sharing Tr. v. Standard Indus., Inc.*, No. 11267, 1993 WL 271441, at *1 (Del. Ch. July 19, 1993).

38. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

judge may reject or distinguish a written decision or interpret it narrowly or broadly.³⁹

In this article, I discuss, from three different perspectives, why Court of Chancery transcript rulings should be considered law. In Part I, I discuss the circumstances, substance, and influence of three transcript rulings at issue in three recent decisions questioning the precedential value of transcript rulings. In Part II, I discuss a debate from two decades ago about whether unpublished federal appellate decisions should be cited by litigants or considered as precedent by courts. The perceived institutional imperatives for rigidly demarcating between precedential and non-precedential opinions in that context have no applicability to Court of Chancery transcript rulings. In Part III, I discuss four occasions when recently retired Chief Justice Leo Strine denied motions to dismiss in the Court of Chancery by means of transcript rulings. In different ways, these transcript rulings are performances of equity. They add to our understanding about the breadth, vitality, slipperiness, and direction of black letter law. Transcript rulings should be considered precedential. They can become the basis for the subsequent elaboration in writing of a rule or an exception.

I. A NON-RANDOM SELECTION OF RECENTLY CITED TRANSCRIPT RULINGS

Recent statements in written decisions questioning the precedential value of transcript rulings arose because a litigant had recommended a transcript ruling to the Court. In this section, I address certain of those cited transcript rulings so that the reader can consider whether they deserve the status of legal authority.

A. VAALCO

As mentioned above, in *Frechter v. Zier*, the court cited a transcript ruling as “instructive.”⁴⁰ The transcript ruling—one of the most influential transcript rulings in recent memory—captured Vice Chancellor Laster’s resolution of cross-motions for partial summary judgment in *In re VAALCO Energy, Inc. Stockholder Litigation*.⁴¹

39. See, e.g., *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 660 & n.3 (Del. Ch. 1988) (Allen, C.) (“Action designed principally to interfere with the effectiveness of a vote . . . may not be left to the agent’s business judgment. I thus am unable to be guided by the somewhat different view expressed in the unreported case *American [International] Rent-A-Car, Inc. v. Cross* . . .”). What Chancellor Allen denigrated as an “unreported case” was a standard written opinion that would have been physically available at the courthouse library, collected by all Delaware corporate law firms, published by *The Delaware Journal of Corporate Law* (and perhaps other reporting services), and published electronically a decade later. See *Am. Int’l Rent-A-Car, Inc. v. Cross*, No. 7583, 1984 WL 8204 (Del. Ch. May 9, 1984); *Am. Int’l Rent-A-Car, Inc. v. Cross*, 9 DEL. J. CORP. L. 144, 144–49 (1984). Other “unreported” written decisions of that era include *TW Services, Inc. v. SWT Acquisition Corp.*, No. 10427, 1989 WL 20290 (Del. Ch. Mar. 2, 1989), which appeared in my law school casebook a year later, and the hugely influential *Paramount Communications Inc. v. Time Inc.*, No. 10866, 1989 WL 79880 (Del. Ch. July 14, 1989), *aff’d*, 571 A.2d 1140 (Del. 1990).

40. See *supra* notes 23–24 and accompanying text.

41. *VAALCO Transcript*, *supra* note 24.

VAALCO arose out of a pending consent solicitation involving a board of directors that had been declassified. The stockholder plaintiffs alleged that certain charter and bylaw provisions were in conflict with section 141(k) of the Delaware General Corporation Law because they purported to require a two-thirds supermajority vote to amend the charter and thereby permit removal of directors without cause, even though the board of directors had been declassified. The parties stipulated to expedited briefing and argument on cross-motions for partial summary judgment on the claim seeking declaratory relief. Oral argument was on December 21, 2015, four days after the filing of simultaneous answering briefs. Vice Chancellor Laster knew he would be traveling to a different continent on December 26.

Twenty minutes after oral argument, Vice Chancellor Laster issued a transcript ruling. He noted that the high quality of the briefing “allowed [him] to formulate [his] thoughts coming in.”⁴² He granted plaintiffs’ motion for partial summary judgment, based on the “plain language of 141(k).”⁴³ In doing so, the Vice Chancellor issued a judgment that necessarily applied to other Delaware corporations with non-classified boards of directors and the same mix of charter and bylaw provisions. He noted: “To the extent that this upsets expectations at some give-or-take 175 public companies that may have some strange combination of provisions that attempts to achieve the same result, that is just a consequence of people not reading the statute.”⁴⁴ An immediately appealable order was entered on December 23. The defendants did not appeal.

The transcript ruling in VAALCO was the subject of numerous client memos issued by major law firms.⁴⁵ The ruling inspired an essay by a leading transactional lawyer advocating amendment of section 141(k). That essay treated the transcript ruling in VAALCO as having de facto precedential value equivalent to a ruling by the Delaware Supreme Court:

Uncertainty on this score has now been largely removed as a result of the V[AALCO] decision

. . . .

Although the Delaware Supreme Court has not specifically ruled on the issue, in light of V[AALCO], many assume that [free-standing for-cause-only] director removal provisions that remain in charters of Delaware corporations today are invalid⁴⁶

42. *Id.* at 59.

43. *Id.* (referencing DEL. CODE ANN. tit. 8, § 141(k) (2021)).

44. *Id.* at 67.

45. See, e.g., Alex Talarides, *But Everybody’s Doing It: Delaware Chancery Court Invalidates VAALCO’s “Wacky” Charter and Bylaws Provisions Despite Use by Other Companies*, ORRICK (Jan. 5, 2016), <http://tinyurl.com/orrick-blog>; Paul Scrivano & Sarah Young, *Simply Because a Provision Is in the Charter or Bylaws Does Not Necessarily Mean It Is Enforceable*, O’MELVENY (Mar. 8, 2016), <http://tinyurl.com/omm-vaalco>; Abigail Pickering Bomba et al., *Practice Points for Delaware Companies with Non-Classified Boards After Chancery Court’s VAALCO Energy Decision*, FRIED FRANK (Feb. 5, 2016), <https://tinyurl.com/27utrpmw>; Daniel E. Wolf & Matthew Solum, *Director Removal Without Cause—Delaware Default Rule Is in Fact the Rule*, KIRKLAND & ELLIS (Dec. 29, 2015), <http://tinyurl.com/wolfsolum>.

46. Trevor S. Norwitz, *Accountability Does Not Require Constant Vulnerability: A Simple but Necessary Update to the Delaware General Corporation Law*, 41 DEL. J. CORP. L. 105, 112–13 (2016) (collecting sources); see also Robert S. Reder & Lauren Messonnier Meyers, *Delaware Court Invalidates*

VAALCO inspired follow-on litigation by stockholder plaintiffs of other corporations with similar charter provisions or bylaws. The post-litigation amendment of a bylaw at one such company led to a dispute over the appropriate attorneys' fee payable by the corporation under the corporate benefit doctrine and the mootness doctrine. In *Frechter v. Cryo-Cell International, Inc.*,⁴⁷ Vice Chancellor Glasscock ruled that a fee award of \$50,000 was reasonable because, in part, VAALCO all but assured the outcome of the follow-on litigation:

[A] fee award should reflect the risk undertaken by Plaintiff's counsel, in computing a fee which encourages wholesome litigation. Here, **in light of the outcome in VAALCO which provided the impetus for this action, this was largely a risk-free pursuit**, and the contingency factor is of negligible importance. It is worth pointing out, I think, that had the Company changed its bylaw upon suit being filed (or upon pre-suit demand, had one been made), rather than resisting the relief requested through the time of the filing of an amended complaint and a nine-page summary judgment motion, a nominal fee at most would have been warranted.⁴⁸

Frechter v. Zier was a separate follow-on litigation to VAALCO involving Nutrisystem, Inc. That corporation had amended its bylaws on January 7, 2016, to eliminate the provision stating that stockholders could remove directors only for cause. Citing VAALCO, Vice Chancellor Glasscock observed that the amendment was "presumably in response to a recent holding of this Court interpreting such a provision as unlawful[.]"⁴⁹ The bylaws retained a two-thirds supermajority vote requirement for removal, which was the subject of the litigation. Vice Chancellor Glasscock ruled that the supermajority vote requirement was inconsistent with section 141(k). His textual analysis was bolstered by his reliance on VAALCO:

Finally, I note that Defendant's reading of Section 141(k) is inconsistent not only with the statutory language, but with recent judicial consideration of the section as well. **While no written opinions address the issue**, this Court's bench decision in *In re VAALCO Energy, Inc. Stockholder Litigation* is instructive; the Vice Chancellor there found that the language of Section 141(k) providing that directors "may" be removed with or without cause prohibits bylaws requiring cause for that purpose. Likewise, Section 141(k) also mandates that a majority of stockholders may remove directors. As **the Vice Chancellor stated in VAALCO, "141(k) states affirmatively 'any director or the entire board of directors may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote at an election of directors.' That is the rule.**"⁵⁰

Commonly-Used Corporate Classified Board Provision As Contrary to Delaware Law, 69 VAND. L. REV. EN BANC 177, 183 (2016) ("[N]ow that these provisions are 'broke' in light of Vice Chancellor Laster's *In re VAALCO* ruling, they need to be 'fixed' and should no longer be perpetuated.").

47. No. 11915-VCG, 2016 WL 5864583 (Del. Ch. Oct. 7, 2016).

48. *Id.* at *1 (emphasis added).

49. *Frechter v. Zier*, No. 12038-VCG, 2017 WL 345142, at *1 (Del. Ch. Jan. 24, 2017) (citing VAALCO Transcript, *supra* note 24).

50. *Id.* at *4 (emphases added) (footnotes omitted) (first quoting DEL. CODE ANN. tit. 8, § 141(k) (2021); then quoting VAALCO Transcript, *supra* note 24, at 59–60).

There are a number of reasons why the expedited transcript ruling in *VAALCO* is deserving of respect, notwithstanding the form of its issuance. It was thoughtfully expressed. It resolved the key merits issue in that case. It was issued with the knowledge that it would potentially influence the outcome of a pending consent solicitation and the governance of numerous similarly situated corporations not before the Court. It was not appealed. It prompted the corporate governance bar to eliminate identical charter provisions and bylaws at numerous other corporations. It inspired a proposed statutory amendment. It was deemed “instructive” in *Frechter v. Zier* for purposes of prohibiting supermajority vote requirements for the removal of directors on non-classified boards.

The importance of *VAALCO* raises the question why its discussion in *Frechter v. Zier* prompted the footnote that the Court did not “mean to imply that bench decisions are part of the case-law of this Court, or encourage citation thereto.”⁵¹ *VAALCO* itself is part of the case law of the Court and is worthy of citation.

B. *PLX*

Vice Chancellor Laster issued a transcript ruling in *In re PLX Technology Inc. Stockholders Litigation*⁵² on motions to dismiss filed by numerous, differently situated defendants. He explained that he issued the ruling orally because he lacked the time to edit his lengthy draft opinion:

Unfortunately, due to a string of big opinions that I have had to crank out, I wasn't able to give this as much time as I had hoped. We did do a lot of work on it. As of last weekend it was up to about 80 pages, but that 80 pages reflected the nostrum that if I had more time, I would write something shorter. When I looked at what was coming up this week and next week, I knew that I wasn't going to be able to get you a final polished product, so I needed to bite the bullet and give you an oral ruling.

...

As I say, I am sorry to have burdened you with this, but it did become clear to me that although—I hope you can tell, we did work really hard on this, but we just weren't going to get it done in time.⁵³

It took the Court an hour to deliver its oral ruling and the transcript runs fifty pages.

PLX reflected thoughtfulness. It evaluated post-closing claims for damages due to breach of fiduciary duty and aiding and abetting arising out of the sale of a company. The defendants were the buyer, the financial advisor to the target, an activist stockholder of the target, and individual directors and officers of the target. Vice Chancellor Laster granted a motion to dismiss as to the buyer and two of the individual defendants and sustained claims against the other defendants. The transcript ruling recited facts and cited legal authorities, including a

51. *Id.* at *4 n.27.

52. *PLX Transcript*, *supra* note 34.

53. *Id.* at 4, 54.

“series of articles by now Chief Justice Strine” and two law review articles on different topics co-authored by professors William Bratton and Michael Wachter.⁵⁴

Two major law firms published analyses of Vice Chancellor Laster’s words. Sullivan & Cromwell LLP wrote the following about the transcript ruling: “The ruling, which because of its telephonic nature should not be read as literally as a formal written opinion, reinforces several central issues in recent Delaware jurisprudence.”⁵⁵ Hunton & Williams LLP identified “several important takeaways from this ruling with respect to activist hedge funds.”⁵⁶ Additionally, a practitioner-authored law review article about director oversight of financial advisors discussed *PLX* and quoted it at length.⁵⁷

Three Court of Chancery opinions have cited *PLX* as a rare example when a plaintiff has sufficiently alleged that facially disinterested and independent directors acted in bad faith. Two of those cases sustained duty of loyalty claims against outside directors.⁵⁸ The third case was *Rudd v. Brown*, in which Vice Chancellor Zurn included a footnote about the general lack of precedential value of transcript rulings, but discussed at length the facts and reasoning of the outside director conflict in *PLX* and distinguished it.⁵⁹ Plainly, *PLX* helped influence practitioner and judicial thinking on a number of topics.

C. *KIKIS v. McROBERTS*

On February 4, 2016, Chancellor Bouchard issued a transcript ruling in *Kikis v. McRoberts*⁶⁰ that may be more typical of transcript rulings than *VAALCO* or

54. *Id.* at 27; *see id.* at 27 (referencing William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653 (2010)); *id.* at 27–28 (referencing Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761 (2015); Leo E. Strine, Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1 (2010); Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1 (2007)); *id.* at 35 (referencing William W. Bratton & Michael L. Wachter, *Bankers and Chancellors*, 93 TEX. L. REV. 1 (2014)); *id.* at 38–39 (referencing Bratton & Wachter, *supra*, at 62).

55. *In re PLX Technology Inc. Stockholders Litigation*, SULLIVAN & CROMWELL LLP (Oct. 5, 2015), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_In_re_PLX_Technology_Inc_Stockholders_Litigation.pdf.

56. *Court Addresses Director’s Conflict of Interest from Hedge Fund’s Short-Term Investment Strategy*, HUNTON & WILLIAMS LLP (Oct. 2015), <https://www.huntonak.com/images/content/2/9/v3/2957/court-addresses-directors-conflict-of-interest-from-hedge-funds.pdf>.

57. Eric S. Klinger-Wilensky & Nathan P. Emeritz, *Financial Advisor Engagement Letters: Post-Rural/Metro Thoughts and Observations*, 71 BUS. LAW. 53, 55 n.7, 56 & nn.9–11, 58 n.15, 59–60, 61 n.29, 66 n.55, 72–73 n.71 (2015).

58. *In re Tangoe, Inc. S’holders Litig.*, No. 2017-0650-JRS, 2018 WL 6074435, at *14 n.92 (Del. Ch. Nov. 20, 2018) (citing *PLX Transcript*, *supra* note 34, at 45–46); *In re Saba Software, Inc. S’holder Litig.*, No. 10697-VCS, 2017 WL 1201108, at *20 n.127 (Del. Ch. Apr. 11, 2017) (citing *PLX Transcript*, *supra* note 34, at 9–10).

59. *Rudd v. Brown*, No. 2019-0775-MTZ, 2020 WL 5494526, at *9–10 nn.90–102 (Del. Ch. Sept. 11, 2020) (citing *PLX Transcript*, *supra* note 34, at 6–10, 46–48).

60. Transcript of Oral Argument & Rulings of the Court, *Kikis v. McRoberts*, No. 9654-CB (Del. Ch. Feb. 4, 2016) [hereinafter *Kikis Transcript*]. The transcript was filed with the Court on June 6, 2018. *See id.* at 1.

PLX. *Kikis* does not purport to be a draft version of a written decision respecting the merits of a substantive claim. *Kikis* resolved a discovery dispute involving a small closely held corporation. It was not until June 2018 that the transcript ruling appeared on the public docket. At that time, in the ordinary course, *The Chancery Daily* excerpted and summarized the transcript ruling.⁶¹ *Kikis* otherwise attracted no attention.

The procedural context of *Kikis* was a stockholder challenge to a derivative settlement proposed by a special litigation committee (“SLC”). The stockholder sought, among other documents, the interview memos drafted by the SLC in its investigation into the derivative claims. The SLC argued that interview memos were opinion work product. In a colloquy with the SLC’s counsel, the Chancellor disagreed, based in part on his experience in private practice:

I drafted a lot of interview memos in my day, and I know people always stamp [them “Prepared by Counsel”] . . . but that’s a pretty broad statement. I mean, they reflect what people say in the interviews, which are facts. And maybe from time to time they have a true . . . expression of a view of any attorney that reflects something that might rise to the level of an opinion. But you’re going to have a hard time selling me that they’re just sort of *per se* privileged to that level.⁶²

Kikis ruled on a question likely to recur for which precedent was unclear. The Chancellor pressed the SLC’s counsel about a letter opinion in which Chancellor Chandler ordered an SLC to produce notes and summaries of witness interviews. The SLC’s counsel responded that the letter opinion contained no analysis.⁶³ Chancellor Bouchard ordered the SLC to produce the interview memos except to the extent they contained opinion work product, reasoning orally as follows:

My basic rationale here is, frankly, I think these are—not always but fairly often—produced in cases of this nature. They certainly go to the reasonableness of the investigation that was done by members of the committee, one of the two focuses of the seminal *Zapata* test. And to the extent they contain things that are privileged that don’t rise to the level of opinion work product, I think the *Garner* exception would apply here.

The *Kikis* side of the caption here has 43 percent of this company. Obviously there are meaningful claims here because the SLC has actually concluded there is merit to five of the six claims that are at issue here. These are the primary *Garner*-motivating factors. I reviewed the *Wal-Mart* decision this morning to recall the analysis of the Supreme Court in that case. The same drivers that would apply to *Garner* creating an exception to the attorney-client privilege would equally apply with respect to nonopinion work product.⁶⁴

61. *The Long Form*, CHANCERY DAILY (June 21, 2018).

62. *Kikis Transcript*, *supra* note 60, at 35–36.

63. *Id.* at 38–39 (referencing *Kindt v. Lund*, No. 17751, 2001 WL 1671438 (Del. Ch. Dec. 14, 2001)).

64. *Id.* at 44–45 (referencing *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970); *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264 (Del. 2014); *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981)).

Two years later, the same issue arose. Chancellor Bouchard issued a similar transcript ruling in *Sandys v. Pincus*,⁶⁵ a more prominent derivative action involving publicly traded Zynga Inc. The case was in the same procedural posture as *Kikis*, and the key issue was identical—whether a plaintiff challenging the proposed dismissal of a derivative action by an SLC could obtain the SLC’s interview memos. The Chancellor entered an accompanying order that had the same effect as in *Kikis*:

[T]he Special Litigation Committee shall produce interview memoranda and interview notes where interview memoranda do not exist, but may redact from the documents material that constitutes opinion work product. Based upon the principles set forth in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), the SLC may not withhold [such] materials . . . based upon an assertion of attorney-client privilege⁶⁶

The Chancery Daily excerpted and summarized the transcript ruling in the ordinary course.⁶⁷ It otherwise received no attention.

In 2020, Vice Chancellor Glasscock was confronted with a similar discovery dispute in a unique procedural posture. At issue was the discoverability of SLC interview memoranda after the SLC had handed back the derivative claims to the derivative plaintiff. The case challenged a multi-billion-dollar transaction by Oracle Corporation, and the Vice Chancellor decided to issue a written decision.⁶⁸

Unlike the outcome in *Kikis* and *Sandys v. Pincus*, Vice Chancellor Glasscock declined to require production of any non-opinion work product in the SLC interview memos. Given the different procedural posture of the case, and the rationale for his decision, it is not clear if the Vice Chancellor was disagreeing with the prior rulings. In a footnote, Vice Chancellor Glasscock noted that the plaintiff relied “heavily on a transcript opinion” (i.e., *Kikis*) and then quoted Day’s statement that “Transcript Rulings generally have no precedential value in this Court and they should ordinarily not be relied on as precedent—at most they offer persuasive authority.”⁶⁹ In the same footnote, the Vice Chancellor refers to *Sandys v. Pincus* as a “brief ukase.”⁷⁰

The *Oracle* decision raises a juridical question. In a future dispute over SLC interview memos, does *Oracle* stand on a higher precedential footing than *Kikis* and *Sandys v. Pincus*? None of the three decisions is published in the *Atlantic Reporter*. All three decisions are rendered by an individual judge sitting on a

65. Transcript of Oral Argument on Plaintiff’s Motion to Compel & Ruling of the Court at 48–51, *Sandys v. Pincus*, No. 9512-CB (Del. Ch. July 3, 2018).

66. Order Denying in Part & Granting in Part Plaintiff’s Motion to Compel at para. 2.B, *Sandys v. Pincus*, No. 9512-CB, 2018 WL 3431457 (Del. Ch. July 13, 2018).

67. *The Long Form*, CHANCERY DAILY (Sept. 17, 2018).

68. *In re Oracle Corp. Derivative Litig.*, No. 2017-0337-SG, 2020 WL 3867407 (Del. Ch. July 9, 2020).

69. *Id.* at *6 n.60 (quoting *Day v. Diligence, Inc.*, No. 2020-0076-SG, 2020 WL 2214377, at *1 (Del. Ch. May 7, 2020)).

70. *Id.* (citing *Sandys*, 2018 WL 3431457, at *1).

trial court. They each take a different form, but a reader can divine the underlying reasoning in each. Chancellor Bouchard, on two occasions, devoted his attention to a particular form of discovery dispute, applied Delaware Supreme Court authority, resolved the question before him, and stated his rationale. Are Chancellor Bouchard's transcript rulings and implementing orders requiring production of redacted interview memos owed less consideration by a future judge than the written decision rendered in *Oracle*?

II. THE DEBATE OVER UNPUBLISHED FEDERAL APPELLATE DECISIONS

Twenty years ago, a debate arose about the juridical status of unpublished federal appellate opinions. Among much other commentary on the subject, two titans of the federal appellate bench argued opposite sides. Judge Richard S. Arnold, the former chief judge of the U.S. Court of Appeals for the Eighth Circuit, wrote an essay⁷¹ and a judicial opinion⁷² arguing against court rules prohibiting the citation of unpublished decisions. Judge Alex Kozinski, the future chief judge of the U.S. Court of Appeals for the Ninth Circuit, was a leading defender of such rules.⁷³ The debate was partially resolved in 2006 by the adoption of Federal Rule of Appellate Procedure 32.1(a), which provides:

A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like; and (ii) issued on or after January 1, 2007.⁷⁴

Disuniformity remains about whether unpublished federal circuit court opinions have precedential value.⁷⁵

The debate over the juridical status of unpublished federal circuit court opinions involves certain distinct legal issues that are inapplicable to the Delaware Court of Chancery. For instance, the federal debate concerned, in part, whether unpublished panel decisions should be considered binding precedent on future panels, in the same way that published opinions of panels of federal appellate courts must be followed until they are overruled by the entire court sitting *en*

71. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219 (1999).

72. *Anastoff v. United States*, 223 F.3d 898 (8th Cir. 2000) (Arnold, J.), *r'hrq en banc granted & vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (*en banc*).

73. *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (Kozinski, J.); Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW., June 2000, at 43; Letter from Alex Kozinski, Judge, U.S. Court of Appeals for the Ninth Circuit, to Samuel A. Alito, Jr., Judge, U.S. Court of Appeals for the Third Circuit, and Chairman, Advisory Comm. on Appellate Rules (Jan. 16, 2004) [hereinafter Kozinski Letter], <http://nonpublication.com/kozinskiletter.pdf>.

74. FED. R. APP. P. 32.1(a).

75. See, e.g., D.C. CIR. R. 32.1(b)(1)(B) (“All unpublished orders or judgments of this court, including explanatory memoranda (but not including sealed dispositions), entered on or after January 1, 2002, may be cited as precedent.”); D.C. CIR. R. 36(e)(2) (“[A] panel’s decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition.”); 8TH CIR. R. 32.1A (“Unpublished opinions . . . are not precedent.”); 10TH CIR. R. 32.1(A) (“Unpublished opinions are not precedential, but may be cited for their persuasive value.”).

banc. By contrast, no Court of Chancery ruling in any form constitutes binding precedent on another member of that Court. The federal debate also concerned the desirability of maintaining rules of court prohibiting lawyers from citing unpublished panel decisions. No court rule restricts Delaware lawyers from citing transcript rulings or other unpublished decisions. Another inapplicable component of the debate between Judge Arnold and Judge Kozinski concerned whether issuing and ignoring unpublished decisions is consistent with exercise of the “judicial power” in Article III of the U.S. Constitution.⁷⁶ Despite the above differences, arguments on both sides of the federal debate shed light on the appropriate weight to accord a transcript ruling by the Delaware Court of Chancery.

A. JUDGE ARNOLD’S ARGUMENTS AND THEIR IMPORT

In 1999, Judge Arnold published an essay expressing disquiet with Eighth Circuit Rule 28A(i), which provided in relevant part: “Unpublished opinions are not precedent and parties generally should not cite them.”⁷⁷ Judge Arnold wrote that the rule is “seemingly so much at odds with traditional ways of adjudication,” reasoning:

[A] court should not, without very good reasons publicly acknowledged, depart from past holdings. Our rule 28A(i) says, quite plainly, that this principle applies only when the court wants it to apply. If we mark an opinion as unpublished, it is not precedent. We are free to disregard it without even saying so. Even more striking, if we decided a case directly on point yesterday, lawyers may not even remind us of this fact. The bar is gagged. We are perfectly free to depart from past opinions if they are unpublished, and whether to publish them is entirely our own choice.⁷⁸

Judge Arnold’s principal concern was that “all decisions have precedential significance,” even when a court follows a prior ruling and concludes that the “proffered distinctions lack merit under the law.”⁷⁹ The practice of issuing unpublished decisions deemed not “precedential” also creates a problem for “the psychology of judging,” by tempting a judge to reject a proffered factual distinction and follow a published precedent “by deciding the case in an unpublished opinion and sweeping the difficulties under the rug.”⁸⁰ Judge Arnold also observed that significant issues were being adjudicated by means of unpublished decisions, thus leaving the same issue open for future resolution by a future panel, “creating a vast underground body of law, fully accessible to the public at a reasonable cost by way of computers, but disavowed by the very judges who are producing it.”⁸¹

76. U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

77. Arnold, *supra* note 71, at 220 (quoting the rule as it then existed).

78. *Id.* at 221.

79. *Id.* at 222.

80. *Id.* at 223.

81. *Id.* at 225.

Several months later, Judge Arnold was confronted with a statutory question that had been previously adjudicated in an unpublished decision. Judge Arnold authored a published panel opinion, *Anastoff v. United States*, which followed the prior unpublished decision and struck down Eighth Circuit Rule 28A(i) as inconsistent with the “doctrine of precedent” and thus the judicial power of Article III.⁸²

Anastoff contains a wealth of historical citations not found in Judge Arnold’s prior essay. *Anastoff* invokes Coke, Hale, Blackstone, Madison, Hamilton, and Story about the authority of precedent.⁸³ Judge Arnold also cites early American legal practice respecting unpublished decisions: “Although they lamented the problems associated with the lack of a reporting system and worked to assure more systematic reporting, judges and lawyers of the day recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer’s unpublished memorandum.”⁸⁴

Judge Arnold devoted one paragraph of *Anastoff* to the practical objection “that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision.”⁸⁵ In response to that objection, Judge Arnold suggested the creation of more judgeships or “for each judge to take enough time to do a competent job with each case. If that means backlogs will grow, the price must still be paid.”⁸⁶

Judge Arnold’s arguments have force as applied to Court of Chancery transcript rulings. The size of the Court was expanded from five to seven judgeships in 2018. By all accounts, members of the Court take sufficient time to render considered decisions on all pending disputes. Full briefing and lengthy oral argument is the norm for merits-related motions. Oral arguments on motions to dismiss filed by various sets of defendants respecting a challenged corporate transaction may take half a day or more. A discrete discovery dispute is presented through a motion of up to 3,000 words, an opposition of up to 3,000 words, a reply of up to 2,000 words,⁸⁷ plus an oral argument. Unlike many other courts, there are no motion days in the Court of Chancery during which numerous litigants each have a few minutes to make their case. Expedience may demand that many decisions be expressed in a transcript ruling or in a short order, but any such ruling reflects considered, individualized justice by the Chancellor or Vice Chancellor. That undertaking benefits from Court of Chancery judges knowing how their colleagues disposed of similar disputes.

82. *Anastoff v. United States*, 223 F.3d 898, 900–01 (8th Cir. 2000) (Arnold, J.), *r’hrq en banc granted & vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

83. *See id.* at 900–04 & nn.4–14 (collecting sources).

84. *Id.* at 903 (citing PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA 30 (1997); JESSE ROOT, THE ORIGIN OF GOVERNMENT AND LAWS IN CONNECTICUT (1798), *reprinted in THE LEGAL MIND IN AMERICA* 38–39 (Perry Miller ed., 1962)).

85. *Id.* at 904.

86. *Id.*

87. DEL. R. CH. CT. 171(f)(B).

B. JUDGE KOZINSKI'S ARGUMENTS AND THEIR IMPORT

In 2000, Judge Kozinski co-authored an essay in which he argued that eliminating the court rule prohibiting the citation of unpublished federal appellate opinions is an “uncommonly bad idea” that would “damage the court in important and permanent ways.”⁸⁸ In the essay, Judge Kozinski reported that circuit judges properly expend great effort on published opinions, which are “binding on all federal judges in the circuit—district, bankruptcy, magistrate, administrative, and appellate,” and that they spend little time overseeing the issuance of unpublished opinions, which “are a nullity.”⁸⁹

Drafting and commenting on published opinions and considering petitions for rehearing *en banc*, and thereby “[k]eeping the law of the circuit clear and consistent[,] is a full-time job”⁹⁰ By comparison, unpublished opinions are mostly “drafted by law clerks with relatively few edits from the judges.”⁹¹ Forty percent of the Ninth Circuit’s unpublished opinions “are in screening cases, which are prepared by . . . central staff. Every month, three judges meet with the staff attorneys who present [them] with the briefs, records, and proposed [unpublished opinion] in 100 to 150 screening cases. If [the trio of judges] unanimously agree that a case can be resolved without oral argument, [they] make sure the result[] is correct, but [they] seldom edit the [unpublished opinion], much less rewrite it from scratch.”⁹² Judge Kozinski subsequently described judicial oversight of the screening cases as follows:

[The staff attorneys] present to a panel of three judges during a process . . . call[ed] “oral screening”—oral, because the judges don’t see the briefs in advance, and because they generally rely on the staff attorney’s oral description of the case in deciding whether to sign on to the proposed disposition. . . .

. . . After you dispose of a few dozen such cases on a screening calendar, your eyes glaze over, your mind wanders and the urge to say okay to whatever is put in front of you becomes almost irresistible. . . . It often takes a frantic act of will to continue questioning successive staff attorneys about each case, or to insist on reading key parts of the record or controlling precedent to ensure that the case is decided by the three judges whose names appear in the caption, not by a single staff attorney.⁹³

In 2001, Judge Kozinski seized the opportunity in *Hart v. Massanari*⁹⁴ to write a published opinion rejecting *Anastoff*, in the context of an order to show cause why a lawyer should not be disciplined for violating Ninth Circuit Rule 36-3, which prohibited the citation of unpublished decisions. In *Hart*, Judge Kozinski explained that issuing non-precedential opinions is not problematic as a matter of legal history because the common law was not built on a system of binding

88. Kozinski & Reinhardt, *supra* note 73, at 81.

89. *Id.* at 43.

90. *Id.* at 44.

91. *Id.*

92. *Id.*

93. Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1099 (2004).

94. 266 F.3d 1155 (9th Cir. 2001).

precedent. “Because published opinions were relatively few, lawyers and judges relied on commentators’ synthesis of decisions rather than the verbatim text of opinions.”⁹⁵ In such a world, the precise wording employed by a judge was not critical. “The value of case reports turned not on the accuracy of the report but on the acuity of their authors.”⁹⁶ Over time, a system evolved of binding precedent as declared by appellate courts and published in case reporters, which meant that, “when crafting binding authority, the precise language employed is often crucial to the contours and scope of the rule announced.”⁹⁷

In *Hart*, Judge Kozinski raised a host of practical objections to allowing litigants to cite unpublished appellate decisions, which he described as, “more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court’s decision.”⁹⁸ Publishing those decisions would force judges to spend more time drafting them, and conferring with their panel colleagues on the appropriate language. Judges would have less time to spend on opinions that should be published.⁹⁹ According to Kozinski, *Anastoff’s* suggestion of multiplying the amount of precedential authority would mean that lawyers would have more opinions to read—increasing the cost of legal services—and databases would be cluttered with “redundant and thus unhelpful authority.”¹⁰⁰ Judge Kozinski concluded that “certain types of cases do not deserve to be authorities, and that one important aspect of the judicial function is separating the cases that should be precedent from those that should not.”¹⁰¹

Judge Kozinski led a lobbying campaign against adoption of Federal Rule of Appellate Procedure 32.1.¹⁰² In a twenty-two-page, single-spaced letter, he advocated against adoption of the rule, warning: “When the people making the sausage tell you it’s not safe for human consumption, it seems strange indeed to have a committee in Washington tell people to go ahead and eat it anyway.”¹⁰³ Judge Kozinski argued that lawyers should not be compelled to analyze the wording of unpublished opinions “because little or no judicial time will have been spent in drafting that language, and thus the perceived nuances of phrasing will mean nothing at all.”¹⁰⁴ He wrote that citing unpublished opinions—“as if they represented more than the bare result as explicated by some law clerk or staff attorney—is a particularly subtle and insidious form of fraud.”¹⁰⁵

95. *Id.* at 1165–66.

96. *Id.* at 1166 (citing Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CAL. L. REV. 15, 18–19 (1987)).

97. *Id.* at 1170–71.

98. *Id.* at 1178.

99. *Id.*

100. *Id.* at 1179.

101. *Id.* at 1180.

102. See Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang Over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1449, 1458–59 (2005).

103. Kozinski Letter, *supra* note 73, at 2.

104. *Id.* at 13.

105. *Id.* at 7.

Penelope Pether, a scholar who closely examined the Arnold/Kozinski debate, was a deep critic of the bifurcated federal appellate review processes described and lauded by Judge Kozinski. She wrote that the stakes of that debate are whether “w[e] have ceased to be a common law country [W]e have moved to a version of precedent that seeks to bind the future rather than to be informed by the past [A]s long as modern institutionalized unpublication persists, we will not normalize common law judges ethically negotiating the boundaries between past and future”¹⁰⁶

There is no obvious institutional rationale for categorically deeming transcript rulings of the Delaware Court of Chancery as lacking precedential value, and thus not informing future adjudication. Unlike the bureaucratic imperative that gave rise to bifurcated federal appellate review, the choice in the Court of Chancery between rendering a transcript ruling and a written opinion does not entail fundamentally different modes of adjudication.

The Court of Chancery is a trial court of specialized and limited jurisdiction. Its jurisdiction includes applying Delaware common law and Delaware statutes bearing on corporate disputes. Such disputes receive the judges’ full attention regardless of the size of the corporation. The members of the Court retain personal responsibility for all motions in a particular case. They speak the words that comprise a transcript ruling.

There exists no rigid distinction in the Court of Chancery between decisions intended to be precedential and those that are not. Relatively few written opinions issued by the court are denominated as “Opinions” warranting publication in the *Atlantic Reporter*, as opposed to “Memorandum Opinions” or letter opinions, which will be published electronically on Lexis or Westlaw, or more summary dispositions, such as transcript rulings. Even published opinions issued by a member of the Court of Chancery articulating a proposed rule of law, such as the landmark opinions in *Caremark* or *Blasius*, can only aspire to be adopted by the Delaware Supreme Court as binding precedent.

The various types of corporate and commercial litigation in the Court of Chancery often present variations of common themes. There are strong commonalities among section 220 disputes for the inspection of corporate books and records, motions to dismiss derivative cases for failure to make demand on the board of directors, *Revlon* cases, broken deal cases, appraisal cases, or alleged breaches of organic agreements for publicly traded alternative entities. All sides in a case typically devote tremendous resources to the litigation effort, which includes studying how similar cases are litigated and resolved. Presenting transcript rulings to the Court assists the judges in efficiently managing their dockets, reaching the

106. Penelope Pether, *Take a Letter, Your Honor, Outing the Judicial Epistemology of Hart v. Massanari*, 62 WASH. & LEE L. REV. 1553, 1593–94 (2005) [hereinafter Pether, *Take a Letter*]; see also Penelope Pether, *Constitutional Solipsism, Toward a Thick Doctrine of Article III Duty; or Why the Federal Circuits’ Nonprecedential Status Rules Are (Profoundly) Unconstitutional*, 17 WM. & MARY BILL RTS. J. 955, 964 (2009) (referring to “the widespread institutional and cultural failure of national judicial ethics implicated in nonprecedential status rules”).

right result in a particular procedural posture, and refining the applicable legal standards.

Transcript rulings reflect the integrity of the judicial process. The sausage-making is largely performed in public view. The personal and performative aspect of a transcript ruling can amplify the reasoning with directness, candor, and passion. The full oral argument transcript usually provides a factual context, even if the ruling itself does not. Future judges can determine whether the reasoning of a particular transcript ruling is persuasive or inadequate, whether the wording lacks necessary precision, or whether the factual and procedural commonalities warrant some level of deference to the result reached by a colleague.

III. LEARNING FROM TRANSCRIPT RULINGS OF LEO STRINE

A central question bearing on the juridical status of transcript rulings is whether they are redundancies that merely repeat and apply black-letter rules, in which case they safely can be ignored, or whether they shed light on the limits of dicta or legal rules. If the latter is true, then banning or discouraging the citation of transcript rulings would truly transform them into what Chancellor Strine jokingly characterized as “samizdat literature”;¹⁰⁷ they would rebuke the official version of Delaware law. Judge Arnold referred to the temptation to use a non-precedential unpublished opinion as a means of “sweeping the difficulties under the rug.”¹⁰⁸ Professor Pether referred to modern institutionalized nonpublication as a type of judging that does not seek to be “informed by the past.”¹⁰⁹ So long as a transcript ruling is a legitimate source of precedent, resolution of a difficult, fact-specific case in a transcript ruling contributes to the development of the law and the historic task of equity, which is creating exceptions to established rules in the interest of justice.¹¹⁰

Chancellor Strine noted that he commonly used transcript rulings as a vehicle to deny a motion to dismiss a stockholder claim for breach of fiduciary duty.¹¹¹ Apart from his stated reasons for doing so, the denial of a motion to dismiss is an interlocutory ruling that is not ordinarily appealable under Delaware Supreme Court Rule 42(b), creating less need to defend the ruling in written form from appellate review than if a motion to dismiss is granted. Denials of motions to dismiss also cut against the grain. If stockholder claims are viewed as being filed too frequently, and as being mostly meritless, then a written opinion granting a motion to dismiss can serve as a guide for the dismissal of similar lawsuits. A transcript ruling denying a motion to dismiss will read as a fact-specific exception. Treating the transcript ruling as non-precedential will prevent judicial recognition of the exception.

107. *NYSE Euronext Transcript*, *supra* note 19, at 6; *El Paso Pipeline Transcript*, *supra* note 19, at 51.

108. Arnold, *supra* note 71, at 223.

109. Pether, *Take a Letter*, *supra* note 106, at 1594.

110. See 19 ARISTOTLE, NICOMACHEAN ETHICS 5.10.6 (H. Rackham trans., Harv. Univ. Press 1934) (“This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality.”).

111. See *supra* note 20 and accompanying text.

In this section, I discuss four transcript rulings by then-Chancellor or then-Vice Chancellor Leo Strine in which he denied motions to dismiss in four different areas of fiduciary duty law. My aim is to show how these transcript rulings illuminated subsequent developments in different areas of substantive Delaware corporate law in ways that are less obvious than if he had issued written decisions instead.¹¹² By way of analogy, study of the transcript rulings of now-retired Chief Justice Strine is like studying the recorded colloquies of a late medieval jurist in the English Year Books, prior to the settling of the common law.¹¹³

A. TELECORP

Then-Vice Chancellor Strine's transcript ruling in *In re TeleCorp PCS, Inc. Shareholders Litigation*¹¹⁴ denied motions to dismiss for reasons that stand in some tension with published opinions written years later by then-Chancellor Strine.

In *TeleCorp*, plaintiff-shareholders challenged a stock-for-stock merger that effected the sale of TeleCorp PCS, Inc. ("TeleCorp") to its 23 percent stockholder and operational partner, AT&T Wireless Services, Inc. ("AT&T Wireless"). Following document discovery, plaintiffs filed an amended complaint that asserted claims against numerous participants in the challenged transaction. Only two defendants moved to dismiss: (i) a subsidiary of insurer Conseco, Inc. that had owned 8.15 percent of TeleCorp, and (ii) the CEO of Conseco, Gary Wendt, who had served as a director of TeleCorp for two days, until his resignation the day before TeleCorp's board approved the merger. The theory of the amended complaint was that various large stockholders of TeleCorp, including the Conseco subsidiary, had participated in merger negotiations instigated by AT&T Wireless before TeleCorp's full board of directors had been informed of AT&T Wireless's approach, and that they had pressed forward with the merger to obtain liquidity for their stakes in TeleCorp.¹¹⁵

Immediately upon the conclusion of oral argument Vice Chancellor Strine ruled on the motion to dismiss. He began by stating: "This is an interesting . . . case, and this is an interesting situation; but I am prepared to rule. I've thought a lot about it; and . . . because it's a motion to dismiss, I'm comfortable doing it from the

112. On this point I disagree with a fellow Delaware practitioner. See McNally, *supra* note 16 ("Some bench rulings are too unique to that case to be reliable precedent. That is particularly true of decisions denying a motion to dismiss a complaint. . . . A judge's comment that in such a case a complaint states a litigable claim is entitled to less weight than a formal opinion, even if there is a transcript containing the judge's reasoning.").

113. Cf. Frederick Pollock, *Has the Common Law Received the Fiction Theory of Corporations?*, 27 L.Q. REV. 219, 233–35 (1911) (discussing abridgements of corporate law cases that recorded statements of fifteenth century jurist Chief Justice Thomas Bryan, who Pollock described as a "man of legal genius to whom justice must be done by some future editor").

114. Transcript of Oral Argument on Defendants' CTIHC, Inc. and Gary C. Wendt's Motion to Dismiss and Ruling of the Court, *In re TeleCorp PCS, Inc. S'holders Litig.*, No. 19260 (Del. Ch. June 17, 2002) [hereinafter *TeleCorp Transcript*].

115. I addressed *TeleCorp* in two earlier articles. Friedlander, *supra* note 18, at 652–55; Joel E. Friedlander, *Confronting the Problem of Fraud on the Board*, 75 BUS. LAW. 1441, 1457–58 (2019).

bench.”¹¹⁶ The transcript ruling runs fourteen pages. Strine discussed the factual allegations against the Consec subsidiary and the Consec CEO and held as follows:

[A]t the pleading stage, [plaintiffs have] raised a number of plausible reasons why certain of the large investors were willing to take less than a fair price for their shares to accomplish other objectives, lack of liquidity being the primary one and, in Consec’s case, its urgent need for cash. . . . [These large stockholders] weren’t entitled . . . to use their influence as fiduciaries to procure liquidity from AT&T Wireless on the backs of public stockholders in an unfair merger. . . . I simply find that there is enough evidence in the record that Consec and Wendt used the preferential access to information they had and used Mr. Wendt’s service on the board to effect an unfair merger for reasons that were beneficial to Consec.¹¹⁷

A decade later, amidst an explosion in stockholder litigation challenging mergers,¹¹⁸ then-Chancellor Strine issued a published opinion in *In re Synthes, Inc. Shareholder Litigation*¹¹⁹ that dismissed with prejudice a challenge to a controlling stockholder’s acceptance of a bid to buy a corporation. *Synthes* announced a rule whereby a controlling stockholder’s receipt of “pro rata treatment remains a form of safe harbor under our law.”¹²⁰ The rule reflected a policy judgment. In a published opinion a year earlier, then-Chancellor Strine had written of his “reluctan[ce] to call a stockholder’s desire for liquidity an interest, because there is likely utility in having directors who represent stockholders with a deep financial stake that gives them an incentive to monitor management and controlling stockholders closely.”¹²¹ In *Synthes*, he wrote that controlling stockholders should be incentivized to obtain liquidity through sale transactions in which all stockholders are treated equally:

As a general matter, therefore, if one wishes to protect minority stockholders, there is a good deal of utility to making sure that when controlling stockholders afford the minority pro rata treatment, they know they have docked within the safe harbor created by the business judgment rule.¹²²

Rather than cite *TeleCorp* as an exception to his proposed rule, Chancellor Strine hypothesized “very narrow circumstances in which a controlling stockholder’s immediate need for liquidity could constitute a disabling conflict of interest irrespective of pro rata treatment. Those circumstances would have to involve a crisis, fire sale where the controller [acted] to satisfy an exigent need

116. *TeleCorp Transcript*, *supra* note 114, at 82.

117. *Id.* at 95–96.

118. In 2012, 93 percent of M&A deals valued over \$100 million were litigated, with an average number of five lawsuits per deal, typically in two or more jurisdictions. OLGA KOUMRIAN, SHAREHOLDER LITIGATION INVOLVING ACQUISITIONS OF PUBLIC COMPANIES: REVIEW OF 2014 M&A LITIGATION 1–3 (2015).

119. 50 A.3d 1022 (Del. Ch. 2012).

120. *Id.* at 1024.

121. *In re S. Peru Copper Corp. S’holder Derivative Litig.*, 52 A.3d 761, 768 n.68 (Del. Ch. 2011), *aff’d sub nom.* *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).

122. *Synthes*, 50 A.3d at 1035.

(such as a margin call or default in a larger investment)”¹²³ Chancellor Strine postulated the following fantastical hypothetical:

The world is diverse enough that it is conceivable that a mogul who needed to address an urgent debt situation at one of his coolest companies (say a sports team or entertainment or fashion business), would sell a smaller, less sexy, but fully solvent and healthy company in a finger snap (say two months) at 75% of what could be achieved if the company sought out a wider variety of possible buyers, gave them time to digest non-public information, and put together financing.¹²⁴

In a footnote, Chancellor Strine cited with approval a written decision denying a motion to dismiss on the following extreme allegations:

[T]he director, who was also a large stockholder, was in desperate need of liquidity to (i) satisfy personal judgments and repay loans that in total exceeded \$25 million and (ii) fund a new venture, in conjunction with allegations that (iii) the director had been fired from his job, (iv) had no other discernable sources of cash inflow or other liquid assets, and that (v) the director threatened fellow board members with lawsuits if they did not take action to sell the company.¹²⁵

One year later, amidst the same litigation explosion, Chancellor Strine issued a published opinion that followed *Synthes*. It dismissed a complaint challenging the sale of Morton’s Restaurant Group, Inc., due to the absence of any allegations that a large stockholder with board representation was engaged “in a rushed fire sale.”¹²⁶ The Court held that the complaint “fails to plead facts supporting a pleading stage inference that [the large stockholder], after holding Morton’s stock for over five years, faced some exigent crisis that suddenly compelled it to sell its shares in a deal that was not reasonably designed to let it receive top dollar for Morton’s.”¹²⁷

In *TeleCorp*, Strine upheld a complaint based on specific alleged facts following significant discovery. Consecro, the 8.15 percent holder, allegedly faced an urgent need for cash, while other large holders were desirous of liquidity. This group of large stockholders did not all face an “exigent crisis” or “fire sale” that would pass muster under *Synthes* and *Morton’s*. The transcript ruling in *TeleCorp* calls into question the breadth of the dicta in *Synthes* and *Morton’s*.

In 2020, then-Vice Chancellor, now-Chancellor McCormick issued a lengthy written decision sustaining a complaint challenging the sale of Mindbody, Inc.¹²⁸ The complaint in *Mindbody* was filed long after the conclusion of the litigation explosion and with the benefit of significant document discovery. *Mindbody* cites *TeleCorp*, among other cases, as standing for the proposition that a desire

123. *Id.* at 1036.

124. *Id.*

125. *Id.* at 1036 n.67 (citing N.J. Carpenters Pension Fund v. InfoGrp., Inc., No. 5334-VCN, 2011 WL 4825888, at *4, *9–10 (Del. Ch. Sept. 30, 2011)).

126. *In re Morton’s Rest. Grp., Inc. S’holders Litig.*, 74 A.3d 656, 667 (Del. Ch. 2013).

127. *Id.* at 669.

128. *In re Mindbody, Inc., S’holders Litig.*, No. 2019-0042-KSJM, 2020 WL 5870084 (Del. Ch. Oct. 2, 2020).

to gain liquidity may lead directors to breach their fiduciary duties.¹²⁹ Doing so was not new.¹³⁰ But *Mindbody* also referred to the “hyperbolic language in *Synthes*,” stating that *Synthes* “is best read in the context in which it was issued, where then-Chancellor Strine was reacting to a particularly poorly drafted complaint ‘strikingly devoid of pled facts to support’ the alleged liquidity-driven conflict.”¹³¹ *Mindbody*’s unapologetic quotation of the transcript ruling in *TeleCorp* helps distinguish published trial court opinions proposing a different rule and helps identify the “rare set of facts that will support a liquidity-driven conflict theory.”¹³²

B. *PUDA COAL*

The transcript of the oral argument and bench ruling in *In re Puda Coal, Inc. Stockholders Litigation*¹³³ is a fascinating document. The entire proceeding lasted just forty-one minutes and consumed only twenty-five pages of transcript. The oral argument of defense counsel consisted of his short answers to a series of questions posed by Chancellor Strine over the space of seven transcript pages. In ten pages, Chancellor Strine sustained the breach of fiduciary duty claim using emphatic language of first principles. With sympathetic editing, the transcript ruling would be suitable for publication in a casebook or magazine about the functional obligations of directors and potential liability under *Caremark*.

The case concerned alleged looting of corporate assets in China by the CEO and another insider without the knowledge (over a span of eighteen months) of the three outside directors. Two of the outside directors were based in the United States. One of them did not speak Chinese. After suit was filed, the three outside directors concluded that assets had been looted and resigned. The two U.S.-based outside directors defended the lawsuit under Court of Chancery Rule 23.1, arguing that demand was not futile because a board majority at the time suit was filed was independent. The sole director at the time of the hearing was the alleged looter CEO, who did not appear in Delaware to defend against the allegations.

Chancellor Strine posed the following question to defense counsel: “I’m just wondering how, if my state embraces this [Rule 23.1 defense], we are not subject to totally legitimate ridicule.”¹³⁴ When ruling, Chancellor Strine explained that, “to use doctrinal law in some sort of gotcha way is just not appropriate.”¹³⁵ He

129. *Id.* at *15 n.117 (citing, among other decisions, *TeleCorp Transcript*, *supra* note 113).

130. Vice Chancellor Laster previously had quoted *TeleCorp* for the same proposition. See *Quadrant Structured Prods. Co., v. Vertin*, 102 A.3d 155, 189 n.13 (Del. Ch. 2014) (citing, among other decisions, *TeleCorp Transcript*, *supra* note 113, at 16); *In re Rural/Metro Corp. S’holders Litig.*, 102 A.3d 205, 257 n.32 (Del. Ch. 2014) (same), *aff’d sub nom.* *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816 (Del. 2015); *Chen v. Howard-Anderson*, 87 A.3d 648, 671 n.11 (Del. Ch. 2014) (same).

131. *Mindbody*, 2020 WL 5870084, at *17 (quoting *Synthes*, 50 A.3d at 1037).

132. *Id.* at *18.

133. Transcript of Oral Argument & the Court’s Ruling, *In re Puda Coal, Inc. S’holders Litig.*, No. 6476-CS (Del. Ch. Feb. 6, 2013) [hereinafter *Puda Coal Transcript*].

134. *Id.* at 6–7; *see id.* at 10.

135. *Id.* at 15.

stated that predicating dismissal on the prior existence of an independent board majority that had subsequently handed over board control to a looter would be Kafkaesque:

I think it would be drawing the wrong lessons from Kafka for me to premise a dismissal of this case on demand excusal grounds. I think Kafkaesque is the only way one could put that. It would be ridiculous and it would be wrong. And I will not—do not believe our law requires such a ridiculous result, and I am rejecting the demand excusal argument.¹³⁶

Chancellor Strine further explained that the outside directors had to defend a *Caremark* claim due to their alleged failure to take steps to prevent looting:

[I]f you're going to have a company domiciled for purposes of its relations with its investors in Delaware and the assets and operations of that company are situated in China that, in order for you to meet your obligation of good faith, you better have your physical body in China an awful lot. You better have in place a system of controls to make sure that you know that you actually own the assets. You better have the language skills to navigate the environment in which the company is operating. You better have retained accountants and lawyers who are fit to the task of maintaining a system of controls over a public company. . . .

. . . .

I believe that the magnitude of what happened here, the length of time it went undiscovered, the repetitive filing of statements saying that the company owned assets they didn't, I do think it gives rise to a *Caremark* claim

. . . .

I'm talking about the loyalty issue of understanding that if the assets are in Russia, if they're in Nigeria, if they're in the Middle East, if they're in China, that you're not going to be able to sit in your home in the U.S. and do a conference call four times a year and discharge your duty of loyalty. That won't cut it. . . . There's no such thing as being a dummy director in Delaware, a shill, someone who just puts themselves up and represents to the investing public that they're a monitor. . . .

. . . .

You can't just go on this [board] and act like this was an S&L regulated by the federal government in Iowa and you live in Iowa.¹³⁷

This holding was no small thing in the development of Delaware law. As of 2013, the Delaware Supreme Court had yet to uphold a *Caremark* claim on a motion to dismiss. The only prior occasion when Chancellor (or Vice Chancellor) Strine had stated that factual allegations respecting *Caremark* violations were sufficient to get past the particularized pleading standard of Rule 23.1 was in the

¹³⁶ *Id.* at 17.

¹³⁷ *Id.* at 17–18, 19, 21, 22 (referencing *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996)).

context of denying a motion for preliminary injunction of a merger which, when consummated, would eliminate stockholder standing to pursue the *Caremark* claim.¹³⁸ That case involved “a pattern of major [mine] safety violations” that preceded a mine explosion with mass fatalities.¹³⁹

Separately, Chancellor Strine concluded, in the *Puda Coal* transcript ruling, that the outside directors’ resignations were themselves actionable:

[T]here are some circumstances in which running away does not immunize you. It in fact involves a breach of duty. And I think the extreme circumstances here might well constitute one. If these directors are going to eventually testify that at the time that they quit they believed that the chief executive officer of the company had stolen the assets out from under the company, and they did not cause the company to sue or do anything, but they simply quit, I’m not sure that that’s a decision that itself is not a breach of fiduciary duty. And that’s another reason for sustaining the complaint.¹⁴⁰

This theory of liability had not previously been explicated in Delaware law, apart from the *TeleCorp* transcript ruling, which discussed the potential liability of the Consecoco CEO for having resigned from the TeleCorp board the day before the board approved the challenged merger.¹⁴¹

Chancellor Strine’s emphatic transcript ruling in *Puda Coal* became precedent for a published opinion issued by Vice Chancellor Glasscock two months later in *Rich v. Chong*.¹⁴² *Rich v. Chong* similarly involved alleged looting at a China-based subsidiary of a Delaware corporation and the resignation of two outside directors after management frustrated the work of the audit committee. Vice Chancellor Glasscock held that demand futility and a *Caremark* violation had been sufficiently alleged.

Vice Chancellor Glasscock explicated *Puda Coal* in support of his holding that the complaint stated a claim under *Caremark* due to the absence of meaningful controls over the corporation’s operations in China:

Chancellor Strine recently suggested that U.S.-based directors of companies with substantial operations outside the U.S. cannot be “dummy directors”; that is, they must actively monitor the extraterritorial operations of the Delaware entity. See *Puda Coal*, 21:1–4. As the Chancellor noted, however, any analysis of liability under *Caremark* is a rigorous inquiry that will depend on the facts of the case. See *id.* at 18:21–24 (“[P]roportionality comes into play in assessing *Caremark* and the reasonableness of peoples’ efforts at compliance because you can’t watch everybody everywhere. You have to have a system.”).¹⁴³

138. *In re Massey Energy Co. Derivative & Class Action Litig.*, No. 5430-VCS, 2011 WL 2176479, at *21 (Del. Ch. May 31, 2011).

139. *Id.* at *19.

140. *Puda Coal Transcript*, *supra* note 132, at 23.

141. See *TeleCorp Transcript*, *supra* note 113, at 92–94 (“[H]aving accomplished all of its goals, Consecoco was in a position to, frankly, have Mr. Wendt just resign. . . . Wendt . . . then quit to advance Consecoco’s own aims. And . . . critically to me, at the stage he quit, Wendt had to have known it would be too late to get anybody to step into his duties. . . . His decision to quit does not absolve him of accountability for his prior actions . . .”).

142. 66 A.3d 963 (Del. Ch. 2013).

143. *Id.* at 983 n.166 (first quoting *Puda Coal Transcript*, *supra* note 132, at 21; then quoting *id.* at 18) (referencing *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996)).

Rich v. Chong also memorialized *Puda Coal* in the *Atlantic Reporter* respecting how outside directors can create liability for themselves, rather than exonerate themselves, by resigning:

[E]ven though Hollander and Brody purported to resign in *protest* against mismanagement, those directors could still conceivably be liable to the stockholders for breach of fiduciary duty. As Chancellor Strine recently noted, it is troubling that independent directors would abandon a troubled company to the sole control of those who have harmed the company. See *In re Puda Coal, Inc. S'holders Litig.*, C.A. No. 6476-CS, at 15–17, Feb. 6, 2013 (TRANSCRIPT). I do not prejudge the independent directors before evidence has been presented, but neither are those directors automatically exonerated because of their resignations.¹⁴⁴

One month later, Vice Chancellor Laster cited *Puda Coal* in another case involving alleged lack of good-faith oversight respecting the looting of a China-based company and the potential liability of outside directors who resigned:

For purposes of Rule 12(b)(6), it is reasonable to infer that Teng, Y. Tang, Zhu, Wang, and Law knew about the oversight problems and failed to stop them. At a later stage of the case, I will take into account Wang and Law's resignations, which could well serve to limit their potential liability for events described in the Complaint that post-date their board service. See *In re Puda Coal, Inc. S'holders Litig.*, C.A. No. 6476-CS, at 15–17 (Del. Ch. Feb. 6, 2013) (TRANSCRIPT). But because Wang and Law will remain in the case regardless as to certain claims, I will not attempt to parse the implications of their resignations at the pleadings stage.¹⁴⁵

The above trio of cases were all submitted to the Court of Chancery for resolution in February 2013. By ruling orally and emphatically in *Puda Coal*, Chancellor Strine influenced the outcome of pending cases involving similar facts, created a baseline for allegations sufficient to state a claim under *Caremark*, provided ammunition for lawyers advising outside directors amidst a corporate crisis, and gave judges a precedent for not letting formalistic legal arguments compel “Kafkaesque” results.¹⁴⁶

Chancellor Strine's issuance of a transcript ruling in *Puda Coal*, rather than a written decision, also meant that the ruling had less of a public profile. The transcript ruling was summarized in various specialized legal blogs,¹⁴⁷ and two

144. *Id.* at 980 n.138 (citing *Puda Coal Transcript*, *supra* note 132, at 15–17).

145. *In re China Agritech, Inc. S'holder Derivative Litig.*, No. 7163-VCL, 2013 WL 2181514, at *24 (Del. Ch. May 21, 2013) (citing *Puda Coal Transcript*, *supra* note 132, at 15–17; DEL. CH. CT. R. 12(b)(6)).

146. *Puda Coal Transcript*, *supra* note 133, at 17 (“I think Kafkaesque is the only way one could put that . . . I . . . do not believe our law requires such a ridiculous result, and I am rejecting the demand excusal argument.”); *Park Emps.' & Ret. Bd. Emps.' Annuity & Benefit Fund of Chi. v. Smith*, No. 11000-VCG, 2016 WL 3223395, at *11 (Del. Ch. May 31, 2016) (“While the facts here are very different from those in *Puda Coal*, the same Kafkaesque quality would attach to a decision that the superseded May 7 Board, rather than the May 11 Board actually served with the Complaint, is the appropriate body to which a demand futility analysis must apply.”) (Glasscock, V.C.), *aff'd*, 175 A.3d 621 (Del. 2017).

147. See, e.g., Brian JM Quinn, *Puda, Caremark, and Director Engagement*, M&A LAW PROF BLOG (Mar. 7, 2013), <https://lawprofessors.typepad.com/mergers/2013/03/puda-and-director-engagement.html>; Kevin LaCroix, *Delaware Chancery Court: A Sweeping Vision of Outside Directors' Foreign*

Delaware practitioners wrote a short article summarizing the above trio of cases involving China-based corporations,¹⁴⁸ but *Puda Coal* was not recognized as a landmark in the evolution of the *Caremark* doctrine. A law review article discussing *Caremark* cases that have survived a motion to dismiss omits *Puda Coal* (but includes the two other cases in the above trio).¹⁴⁹ Another law review article that omits *Puda Coal* concludes that “*Caremark*’s force is more ‘soft’ than ‘hard’—directors hardly need fear liability under *Caremark*.”¹⁵⁰

The denial of the motion to dismiss in *Puda Coal* evidences the hardness of *Caremark* as a liability rule. So does the subsequent published decision in *Rich v. Chong* that quotes *Puda Coal*. The form of the transcript ruling in *Puda Coal* should not detract from that hardness, but it has that effect if *Puda Coal* is not known or if transcript rulings are not deemed as having precedential value. As a matter of historical fact, *Puda Coal* was recognized by judges and lawyers in 2013 as having precedential value. It is deserving of study as representative of evolving Delaware law, and perhaps as anticipating Chief Justice Strine’s opinion for the Delaware Supreme Court in *Marchand v. Barnhill*, which reversed the dismissal of a complaint, stating that *Caremark* is not a “chimera” and “it does require that a board make a good faith effort to put in place a reasonable system of monitoring and reporting about the corporation’s central compliance risks.”¹⁵¹ *Puda Coal* sent a similar message to a smaller audience.

C. BARNES & NOBLE

Vice Chancellor Strine’s denial of a motion to dismiss in *In re Barnes & Noble Stockholders Derivative Litigation*¹⁵² is striking because the Vice Chancellor’s decision to issue a transcript ruling appears to reflect his discomfort with the doctrinal formalism of demand futility jurisprudence and his reluctance to issue a written opinion crafting a new legal rule. The effect of the transcript ruling was to allow a significant case to proceed on unclear grounds while allowing

Operations Oversight Responsibilities?, D&O DIARY (Feb. 27, 2013), <https://www.dandodiary.com/2013/02/articles/shareholders-derivative-litigation/delaware-chancery-court-a-sweeping-vision-of-outside-directors-foreign-operations-oversight-responsibilities/>; Tariq Mundiya, *Independent Director Duties of Delaware Corporations with Foreign Operations*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 23, 2013), <https://corpgov.law.harvard.edu/2013/02/23/independent-director-duties-of-delaware-corporations-with-foreign-operations/>; Francis Pileggi, *Delaware Board’s Fiduciary Duty of Oversight for Foreign Operations*, DEL. CORP. & COM. LITIG. BLOG (Feb. 19, 2013).

148. Kevin R. Shannon & Christopher N. Kelly, *Delaware Chancery Court Clarifies Delaware Boards’ Fiduciary Oversight Duties as to Corporate Operations Abroad*, BLOOMBERG BNA CORP. GOVERNANCE REP. (Apr. 7, 2014), https://www.potteranderson.com/media/publication/136_BNA_Insights_Corporate_Governance_Report_Apr_7_2014_KRS_CNK.pdf.

149. Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2036–42 (2019) (referencing, among other cases, *Rich v. Chong*, 66 A.3d 963 (Del. Ch. 2013), and *In re China Agritech, Inc. S’holder Litig.*, No. 7163-VCL, 2013 WL 2181514 (Del. Ch. May 21, 2013)).

150. Claire A. Hill, *Caremark as Soft Law*, 90 TEMPLE L. REV. 681, 697 (2018) (referencing *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996)).

151. 212 A.3d 805, 824 (Del. 2019).

152. Transcript of Oral Argument, *In re Barnes & Noble S’holders Derivative Litig.*, No. 4813-VCS (Del. Ch. Oct. 21, 2010) [hereinafter *Barnes & Noble Transcript*].

the law to develop in future cases without regard for the outcome in *Barnes & Noble*.

Vice Chancellor Strine began his ruling by commenting on why he issued a transcript ruling:

Well, this is an odd one. It is. It's an odd situation. I'm a big believer in not making [rigid] doctrinal decisions based on oddments unless one has the full context. You can end up messing up the law. You end up doing reputational harm potentially to people whose situation you don't fully understand because of the nature of the limited record, and you can also end up foreclosing remedies that should be available to stockholders if you do that.¹⁵³

The challenged transaction was the acquisition by Barnes & Noble of a business owned by Len Riggio, the chairman and 31 percent stockholder of Barnes & Noble. The two-prong test under *Aronson v. Lewis* asked (i) whether a board majority was disinterested and independent, or (ii) whether the challenged transaction was otherwise the product of a valid exercise of business judgment.¹⁵⁴

During oral argument, Vice Chancellor Strine pressed defense counsel whether a plaintiff had to plead that a majority of the board faced unexculpated monetary liability in order to satisfy the second prong of *Aronson*.¹⁵⁵ In his ruling, Vice Chancellor Strine stated: "I don't actually want to put an opinion in A.2d saying Miss Miller is not independent. But honestly, I'm not really prepared to put [an opinion] in the A.2d saying that she is."¹⁵⁶ Vice Chancellor Strine also stated: "I really have spent much of the last week on the following issue, which is, do Dillard, Monaco and Miller get out under 102(b)(7)? I believe it's a very close call."¹⁵⁷

Rather than make a decision as to the independence of each director, or decide whether plaintiffs needed to plead an unexculpated breach of duty as to a board majority, or whether there existed any residual vitality to the second prong of *Aronson*, Vice Chancellor Strine rendered a case-specific transcript ruling in which he raised a series of factual questions about the merits of the transaction and hinted toward new tests for director independence and demand futility:

All together, frankly, the plaintiffs have pled **a bunch of specific facts** that, when piled up together, **give off a pretty fishy smell** at [the] pleading stage. . . . Why would you pick Mr. Riggio's protégé and friend of 15 years to chair a committee to negotiate this?

. . . .

[T]here are multiple questions raised that cast doubt on their independence and cast doubt in my mind about the following. Would these directors have approved

153. *Id.* at 129–30.

154. 473 A.2d 805, 814 (Del. 1984).

155. *Barnes & Noble Transcript*, *supra* note 152, at 43.

156. *Id.* at 141.

157. *Id.* at 156 (referencing DEL. CODE ANN. tit. 8, § 102(b)(7) (2021)).

this transaction in this form if the owner of College Bookstores was anyone in the world other than Len Riggio?

. . . .

I don't want this cited back to me that Strine held you're necessarily not an independent director. What Strine held here is, in a very unusual situation, with a bunch of particularized facts pled, including business circumstances that bear explanation on a fuller record, that *I'm not prepared to rule out the possibility that ties of personal friendship and long-standing business relationships influenced these directors to do something that strayed from what was best for the company and that they knew that.*¹⁵⁸

One prominent commentator for *The New York Times* described the independence analysis in *Barnes & Noble* as “driven by the substance of the underlying transaction. In other words, the test for independence in Delaware is in large part a ‘fish’ test where judges will apply the standard in a way that captures transactions that do not appear to be kosher.”¹⁵⁹ Such a “‘fish’ test” test may well describe *Barnes & Noble*, but the leading precedents at the time did not examine director independence or interestedness due to potential personal liability in a way that combined the connections between directors and the substance of the underlying transaction.

At the time, it was unclear whether a longstanding business relationship or personal relationship rendered a director not independent. The then-leading decision on director independence was *Beam v. Stewart*, which held that allegations that directors and a controlling stockholder “move in the same business and social circles, or a characterization that they are close friends, is not enough to negate independence for demand excusal purposes.”¹⁶⁰ Subsequent Delaware Supreme Court decisions authored by Chief Justice Strine put more weight on longtime business relationships and personal relationships.¹⁶¹ Even so, independence is commonly thought of as unrelated to the substance of the challenged transaction.¹⁶²

Similarly, at the time, it was unclear whether there remained any residual vitality to the second prong of *Aronson* if a majority of the board was not deemed disabled for reasons of lack of independence or personal interest. The second

158. *Id.* at 147, 155, 157–58 (emphases added).

159. Steven Davidoff Solomon, *How Independent Are Barnes & Noble Directors?*, N.Y. TIMES (Oct. 25, 2010, 2:28 PM), <https://dealbook.nytimes.com/2010/10/25/how-independent-are-barnes-noble-directors/>.

160. 845 A.2d 1040, 1051–52 (Del. 2004).

161. See *Marchand v. Barnhill*, 212 A.3d 805, 820 (Del. 2019); *Sandys v. Pincus*, 152 A.3d 124, 130 (Del. 2016); *Del. Cnty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1021 (Del. 2015).

162. A subsequent transcript ruling by Vice Chancellor Laster is similar to *Barnes & Noble* in that it refers to a “constellation of multiple, well-pled threads all contributing and leading to a decision that at least at this point appears to have been more favorable to the founder and long-time leader than one might think properly motivated fiduciaries would have reached” Transcript of Oral Argument on Defendants’ Motion to Dismiss & the Court’s Ruling at 42, *Casey v. Moffett*, No. 12554-VCL (Del. Ch. Mar. 31, 2017).

prong asked whether “the challenged transaction was otherwise the product of a valid exercise of business judgment”¹⁶³—language that suggests an inquiry into whether a board decision gives off a fishy smell.

Several years earlier, then-Vice Chancellor Strine issued an influential published opinion in which he described the second prong of *Aronson* as a “safety valve” that is applicable if the challenged board decision was not entitled to business judgment rule protection or if there was a threat of personal liability that cast a reasonable doubt on the board’s impartiality.¹⁶⁴ The claims in that earlier opinion did not challenge a particular board decision and the opinion ultimately rested on the lack of particularized allegations that a board majority was not excupated from monetary damages.¹⁶⁵

In *Barnes & Noble*, Vice Chancellor Strine applied a seemingly more lenient standard. He reasoned that he was “not prepared to rule out the possibility” of personal liability, in light of allegations respecting longtime relationships and allegations that gave rise to a “pretty fishy smell” regarding the transaction.¹⁶⁶

Barnes & Noble teaches that a transcript ruling can be a means of innovating in a fact-specific way. An oral ruling can avoid the hard edges of legal doctrine that frame a written opinion. The issuance of a transcript ruling applying more lenient standards than were found in published opinions suggests that Chancellor Strine was unwilling to openly challenge or modify the dogma of the time.

The freedom of action in a transcript ruling to express a rationale that fairly can be described as “in large part a ‘fish’ test”¹⁶⁷ should not come with an injunction that bars its future citation. But what weight should a judge confronted with similar facts place on Vice Chancellor Strine’s reasoning and ruling respecting a \$596 million conflict transaction?

To take a concrete example, *In re Oracle Corp. Derivative Litigation* involved a challenged transaction similar in form to *Barnes & Noble*: the purchase by the nominal defendant of a business controlled by the founder, chairman, and largest stockholder of the nominal defendant. At oral argument on the motion to dismiss in *Oracle*, Vice Chancellor Glasscock observed that *Barnes & Noble* was “similar in a lot of ways,” but also that “[w]e don’t typically, as a court, accord any precedential weight to bench rulings of the Court.”¹⁶⁸ In deciding the motion to dismiss, Vice Chancellor Glasscock did not cite or follow the analysis of *Barnes & Noble*.

163. *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984). *But see* *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, No. 404, 2021 WL 4344361, at *17 (Del. Sept. 23, 2021) (reformulating the *Aronson* inquiry).

164. *Guttman v. Huang*, 823 A.2d 492, 500 & n.15 (Del. Ch. 2003). *See also In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 939 n.58 (Del. Ch. 2003) (“One way for a plaintiff to impugn the impartiality of the board is to plead particularized facts creating a reasonable doubt that the board complied with its fiduciary duties. In that circumstance, the danger is that the board might be influenced by its desire to avoid personal liability in a lawsuit in which the plaintiffs have stated a claim under a heightened pleading burden.”).

165. *Guttman*, 823 A.2d at 499–507.

166. *Barnes & Noble Transcript*, *supra* note 152, at 147, 158.

167. *Davidoff Solomon*, *supra* note 159.

168. Transcript of Oral Argument on Defendants’ Motion to Dismiss the Verified Derivative Complaint at 34, *In re Oracle Corp. Derivative Litig.*, No. 2017-337-SG (Del. Ch. Jan. 25, 2018).

The analysis in *Oracle* of the directors' independence from the founder/chairman was formally distinct from the analysis of the directors' conduct.¹⁶⁹

Barnes & Noble settled for \$29 million, or approximately five percent of the size of the transaction, which is facially a substantial recovery.¹⁷⁰ The litigation is a well-publicized historical fact in a nationally prominent court. It is problematic for a ruling on a motion to dismiss in such a significant case to be treated as a nullity that has no bearing on a future similar case.

Treating *Barnes & Noble* as a nullity by virtue of it being a transcript ruling elides the questions whether *Barnes & Noble* was decided correctly, whether it can be squared with published precedent, or whether it suggests a need for demand futility jurisprudence to evolve into more of a “fish’ test.”¹⁷¹ *Barnes & Noble* was seemingly issued as a transcript ruling so that the case could proceed without openly creating new precedent about when personal relationships render a director non-independent, or when such relationships combine with legitimate questions about the merits of the challenged transaction to raise a reasonable doubt about a director's personal liability, or whether the second prong of *Aronson* can be invoked even when a board majority is deemed independent and not facing personal liability for a board decision.

Avoiding those questions begs the question whether individualized justice properly can apply to one case alone. Doing “case-specific justice” was an express rationale stated by Chancellor Strine in *NYSE Euronext* for the appropriateness of transcript rulings that deny motions to dismiss.¹⁷²

Barnes & Noble may be seen as an intentionally missed opportunity for a written opinion. One problem is that the law then develops based on fact patterns in other cases, which may seem more worthy of dismissal. In 2020, Vice Chancellor Laster dismissed a follow-on stockholder derivative action seeking to recover costs expended by a corporation in defending a prior meritorious action, stated that “[p]erhaps the time has come to move on from *Aronson* entirely,”¹⁷³ and proposed a reformulated demand-excused inquiry. In September 2021, the Delaware Supreme Court adopted Vice Chancellor Laster's three-part test for demand futility, which creates no safety valve in the absence of pleading that at least half of the board members either face a substantial likelihood of personal liability or lack independence from someone who does.¹⁷⁴ The clarity of this rule resolves questions left open by *Barnes & Noble*.

169. *In re Oracle Corp. Derivative Litig.*, No. 2017-337-SG, 2018 WL 1381331, at *10–23 (Del. Ch. Mar. 19, 2018).

170. Order and Final Judgment, *In re Barnes & Noble S'holders Derivative Litig.*, No. 4813-CS (Del. Ch. Sept. 4, 2012); Jef Feeley, *Barnes & Noble's Riggio's Investor Suit Settlement OK'd*, BLOOMBERG (Sept. 4, 2012, 3:29 PM), <https://www.bloomberg.com/news/articles/2012-09-04/barnes-noble-s-riggio-s-investor-suit-settlement-ok-d>.

171. Davidoff Solomon, *supra* note 159.

172. *NYSE Euronext Transcript*, *supra* note 19, at 6; *see id.* at 4–6.

173. *United Food & Com. Workers Union v. Zuckerberg*, 250 A.3d 862, 890 (Del. Ch. 2020), *aff'd*, No. 404, 2021 WL 4344361 (Del. Sept. 23, 2021).

174. *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, No. 404, 2021 WL 4344361, at *17 (Del. Sept. 23, 2021) (“[C]ourts should ask the following three questions on a director-by-director basis when evaluating allegations of demand

D. EL PASO PIPELINE

El Paso Pipeline is a transcript ruling in which Chancellor Strine stated that people “are putting too much stock in bench rulings . . . as if they are published opinions or something.”¹⁷⁵ It is also a transcript ruling that ultimately had a more significant impact on the future development of Delaware law than did the written decisions issued the same year addressing the same subject.

El Paso Pipeline involved a then-recent innovation in the drafting of limited partnership agreements and limited liability company agreements for publicly traded alternative entities. Following statutory amendments in 2004, drafters eventually coalesced around a strategy for defeating unitholder challenges to conflict transactions: contractually eliminate fiduciary duties; create a contractual liability standard of subjective “good faith”; establish “special approval” procedures for conflict transactions, the satisfaction of which may also operate as a “conclusive presumption” of good faith.¹⁷⁶ In 2012, the Court of Chancery adjudicated four cases in which defendants moved to dismiss complaints challenging conflict transactions involving entities that had variants of these types of provisions.¹⁷⁷ *El Paso Pipeline* was the fourth of those decisions. In each of the prior three cases, the Court granted the motion to dismiss.

Chancellor Strine began his transcript ruling by stating that he was “a bit of two minds about whether I should burden the world with an opinion on another hall of mirrors limited partnership agreement.”¹⁷⁸ The Chancellor stated that he decided to issue a transcript ruling because he deemed it his duty to do so, as a matter of the efficient administration of justice, “if I can give people a solid answer and let them move on more promptly.”¹⁷⁹

Chancellor Strine stated that the limited partnership agreement imposed on the plaintiff “the burden not simply to prove unfairness but to prove bad faith on the part of [the conflict] committee in the sense—and Vice Chancellor Parsons and Vice Chancellor Noble have opinions on this which I think are sound—that the committee consciously approved a transaction that it believed

futility: (i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand; (ii) whether the director faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand; and (iii) 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.”)

175. *El Paso Pipeline Transcript*, *supra* note 19, at 3.

176. See Brent J. Horton, *Modifying Fiduciary Duties in Delaware: Observing Ten Years of Decisional Law*, 40 DEL. J. CORP. L. 921, 955–67 (2016).

177. See Bruce L. Silverstein, Kathaleen St. J. McCormick & Tammy L. Mercer, *Key Decisions of 2012 in Delaware Corporate and Alternative Entity Law*, 14 DEL. L. REV. 1, 17–25 (2013) (discussing *Gerber v. Enter. Prods. Holdings, LLC*, No. 5989-VCN, 2012 WL 34442 (Del. Ch. Jan. 6, 2012), *aff'd in part, rev'd in part*, 67 A.3d 400 (Del. 2013); *In re K-Sea Transp. Partners L.P. Unitholders Litig.*, No. 6301-VCP, 2012 WL 1142351 (Del. Ch. Apr. 4, 2012), *aff'd sub nom. Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354 (Del. 2013); *In re Encore Energy Partners LP Unitholder Litig.*, No. 6347-VCP, 2012 WL 3792997 (Del. Ch. Aug. 31, 2012), *aff'd sub nom. Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93 (Del. 2013); *El Paso Pipeline Transcript*, *supra* note 19).

178. *El Paso Pipeline Transcript*, *supra* note 19, at 51.

179. *Id.*

was unduly favorable to the parent at the expense of the interest the committee was charged to protect.¹⁸⁰ Unlike the prior decisions, Chancellor Strine held that the plaintiff in *El Paso Pipeline* had pleaded facts “that suggest[] an inference of bad faith.”¹⁸¹

Chancellor Strine pointed to two particularized facts about the challenged sale of assets to the limited partnership: (i) “a contemporaneous transaction in the same asset space involving the parent, a transaction that the pricing terms of which create an inference of fairly gross price mismatching”; and (ii) the contemporaneous decision of the parent not to exercise “an option to buy into this wonderful space.”¹⁸² These facts had “a close and inconvenient pleading stage nexus to the critical determination that this conflicts committee was supposed to make about an important conflict transaction,” and the “absence of any candid dealing with them” created a permissible pleading stage inference.¹⁸³

El Paso Pipeline is an outlier. An academic’s review of written decisions by the Court of Chancery over a ten-year period found six occasions when motions to dismiss this type of claim (involving a “special approval” provision) were granted and none in which motions to dismiss were denied.¹⁸⁴ The author was apparently unaware of the *El Paso Pipeline* transcript ruling, and he erroneously assumed that all cases that are “complicated enough” require issuance of a written decision.¹⁸⁵

Chancellor Strine’s unique finding of a permissible inference of bad faith had important consequences. The case went to trial. In a stinging post-trial opinion, Vice Chancellor Laster found that the conflict committee members did not act in subjective good faith and awarded damages of \$171 million.¹⁸⁶ The judgment was reversed on appeal due to the plaintiff’s loss of derivative standing following a merger, but Justice Valihura began her opinion for the Delaware Supreme Court by expressing agreement with the findings of liability and damages:

In a detailed, well-reasoned decision, the Court of Chancery held that a conflicts committee approved a conflict transaction that it did not believe was in the best interests of the limited partnership it was charged with protecting. In fact, the court found that the committee—and the committee’s financial advisor in particular—knew the transaction was unduly favorable to the limited partnership’s general partner. In its post-trial opinion, the Court of Chancery undertook a detailed analysis explaining why \$171 million was a conservative estimate of the overpayment approved by the committee and used that figure as the basis for its damages award.¹⁸⁷

180. *Id.* at 55–56.

181. *Id.* at 53.

182. *Id.* at 56, 57.

183. *Id.* at 58.

184. Horton, *supra* note 176, at 955–59.

185. *Id.* at 921. In fairness, the author noted the risk of “publication bias” and further noted that transcript rulings “are very difficult (and expensive) to obtain.” *Id.* at 927.

186. *In re El Paso Pipeline Partners, L.P. Derivative Litig.*, No. 7141-VCL, 2015 WL 1815846, at *25, *27 (Del. Ch. Apr. 20, 2015).

187. *El Paso Pipeline GP Co. v. Brinkerhoff*, 152 A.3d 1248, 1250 (Del. 2016).

Within three months, the Delaware Supreme Court issued two major decisions reversing dismissals of challenges to similar conflict transactions subject to similar contractual provisions. In *Dieckman v. Regency GP LP*,¹⁸⁸ the Delaware Supreme Court held that the plaintiff had pleaded sufficient facts of the violation of the implied covenant of good faith and fair dealing so that neither of two contractual safe harbors were available to the general partner.¹⁸⁹ In *Brinckerhoff v. Enbridge Energy Co.*,¹⁹⁰ the Delaware Supreme Court held that the general partner had “fallen short of making a dispositive, pleading-stage showing that it is entitled to invoke the conclusive presumption of good faith.”¹⁹¹ The *Enbridge Energy* Court also disavowed a restrictive definition of “good faith” that required pleading the equivalent of waste.¹⁹² Then-Justice now-Chief Justice Seitz’s opinion in *Enbridge Energy* placed weight on the banker’s failure to consider the alleged “most relevant precedent transaction,”¹⁹³ which is similar to Chancellor Strine’s reasoning in *El Paso Pipeline*, in which the failure to consider the implications of a contemporaneous transaction permitted an inference of bad faith.

The two reversals in *Regency* and *Enbridge Energy* reflect skepticism about the integrity of related-party transaction negotiations on behalf of entities with governing agreements similar to those in *El Paso Pipeline*. At oral argument in *Enbridge Energy*, strident questioning from then-Chief Justice Strine augured a shift to new legal standards governing this type of related-party transaction.¹⁹⁴ That same skepticism had been apparent years earlier in *El Paso Pipeline*. In short, *El Paso Pipeline* was a little-known transcript ruling that cut against the grain of written decisions, allowed a case to go forward, led to factual findings of bad faith, and, ultimately, as an historic matter, presaged significant modification of this area of the law.

CONCLUSION

Transcript rulings are an important means by which the Court of Chancery adjudicates motions. As discussed in the Introduction and in Part I, these rulings are relied on by litigants as a guide to the resolution of future similar disputes. As discussed in Part II, unlike the bureaucracy within the federal appellate court system that works through the bulk of federal appeals, there exists no institutional reason why Court of Chancery transcript rulings should be treated as anything other than the thoughtful expressions of expert and busy trial judges.

Institutional factors support treating transcript rulings as law. The stakes of the corporate law cases on the Court’s docket are high; transcript rulings are

188. 155 A.3d 358 (Del. 2017).

189. *Id.* at 361–62.

190. 159 A.3d 242 (Del. 2017).

191. *Id.* at 261.

192. *Id.* at 250, 259.

193. *Id.* at 261.

194. See Oral Argument at 1:30–4:15, 21:30–25:00, 38:00–43:20, *Brinckerhoff v. Enbridge Energy Co.*, 159 A.3d 242 (Del. 2017) (en banc) (No. 273-2016), <https://courts.delaware.gov/supreme/oralararguments/> (capturing argument held on Jan. 11, 2017).

official documents that are publicly available (though not automatically, universally, and immediately); the corporate litigation bar is sophisticated and resourceful; fact patterns are recurring; development of the law is subtle; the Court of Chancery's jurisdiction is specialized and of national importance; and the judges are knowledgeable, prepared, and intentional in their decision-making. The fact that transcript rulings are not fully scripted or edited is not itself a reason to treat them as lacking precedential value. Nor is immediate, universal accessibility to an edited publication a precondition for legal authority. The fact that Delaware counsel, active practitioners in the Court, and subscribers to *The Chancery Daily* or other publications have better access to transcript rulings works no systemic injustice on any defined group of Court of Chancery litigants.

The transcript rulings discussed in Part III point to a juridical problem. These rulings are virtuoso performances of equity. They explain why an exceptional case should go forward for reasons that are not obvious from published opinions. Years later, they continue to provide insight into legal doctrine. Yet, the same judge who issued these rulings pronounced that transcript rulings should not serve as a guide for the adjudication of similar fact patterns. If the same case that survived a motion to dismiss later settled, approval of the settlement and fee award would itself take the form of a transcript ruling. Institutionalizing a juridical rule that transcript rulings lack precedential value consigns such successful prosecutions of stockholder cases to legal nullities. The law is shaped instead by written decisions that mostly dispose of meritless actions.

The more general problem is that the rule of law depends on a system of precedent in which like cases are decided alike, unless the prior case is distinguished or rejected. The promulgation of transcript rulings that operate as individualized justice in a single case is antithetical to the leading role of the Court of Chancery as a specialized trial court for the judicial enforcement of fiduciary duties. Exceptional cases that call into question general rules or general practices need to be integrated into the body of Delaware corporate law.

The same principle applies to non-exceptional cases. Transcript rulings were the favored medium for the mass judicial administration of a shadow docket of seemingly meritless stockholder cases that quickly settled for nominal consideration, broad releases from future liability, and the payment of attorneys' fees. So long as such settlements were approved, there was a virtue in systemizing them. As Vice Chancellor Laster noted in a published opinion about fee awards: "Recognizing the ranges developed through case-by-case adjudication—often in unreported transcript rulings—provides sister jurisdictions with helpful guidance when awarding fees in cases governed by Delaware law."¹⁹⁵ In such unexceptional cases, transcript rulings functioned as law, just as later transcript rulings rejecting disclosure settlements were legal precedent for *Trulia*.

There exists no historical practice, no legal rule, no court rule, and no equitable principle that warrants deeming a subset of Court of Chancery reasoned disposi-

195. *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1136 (Del. Ch. 2011).

tions as categorically inferior due to their form. The concept of categorically disregarding transcript rulings appears inseparable from the idea that transcript rulings perform case-specific justice. That idea carries a high cost. Categorical judicial disregard of transcript rulings decreases accountability and removes a source of judicial wisdom for future decisions. Regularizing the citation of transcript rulings connects the past to the present and the present to the future. That learning should be brought to bear.

The practical imperatives that lead to the creation of transcript rulings inevitably will create a demand to digest them. Judges justifiably issue decisions in different forms, for reasons of expediency, with due consideration to what form a given ruling deserves. Lawyers justifiably gather transcript rulings and use them to predict and influence future decisions. Whether the Court should take steps to make transcript rulings more universally and immediately accessible is beyond the scope of this article. Nevertheless, it may better serve litigants, lawyers, future judges, and the public if the Court memorialized more rulings in written form, such as by issuing orders with numbered paragraphs or letter opinions.

