

DELAWARE LAW REVIEW

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This issue of the *Delaware Law Review* is dedicated to the memory of Helen L. Winslow, a founding mother of the publication. A clear thinker, consummate writer and energetic dynamo, Helen's contributions have improved every edition of the *Delaware Law Review*, especially during her tenure as Editor in Chief. She is already sorely missed.

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DELAWARE'S SELF-EMPLOYMENT RULE AND THE NEED FOR LEGISLATIVE INTERVENTION

R. Eric Hacker*

Since *O'Brien v. Unemployment Insurance Appeal Board*¹ Delaware courts have enforced a general rule that self-employed individuals are not entitled to unemployment benefits. While this principle is easy to state, it has been difficult to apply. The Superior Court continues to struggle with the self-employment rule, and neither the Delaware Supreme Court nor the General Assembly has yet addressed the issue.

In particular, three questions have confounded courts in the two decades since *O'Brien*. First, how does the concept of self-employment relate to the statutory scheme of unemployment benefits? Some courts have determined that self-employed individuals are unemployed but nonetheless ineligible for benefits; others have determined that self-employed individuals are not unemployed at all. Second, what are the relevant factors necessary to reach a conclusion that an individual is self-employed? For instance, courts have analyzed hours spent and wages earned by the individual. Courts have also reviewed the profitability and duration of the self-employment venture. In expanding the factors, the courts have failed to develop a consistent approach regarding how these factors interact and whether some are preferred over others. Third, are there exceptions to the general principle that would allow self-employed individuals to receive benefits? Stated very generally, this final issue is a question of whether the particulars of an individual's situation may warrant a grant of benefits even though the person is self-employed.

This article examines these questions more closely to illustrate the need for the General Assembly to intervene and codify the self-employment rule. As a matter of law, intervention would resolve outstanding discrepancies in the existing case law. As a matter of policy, intervention would foster the unemployment- system's goals while enhancing its viability. As a matter of practicality, intervention would simplify the self-employment analysis by providing a consistent legal framework for the issue.

I. O'BRIEN AND THE SELF-EMPLOYMENT RULE

Delaware, in response to federal legislation, has created an elaborate set of procedures and requirements to provide benefits for persons unemployed through no personal fault.² These procedures and requirements are codified as a statutory scheme in Chapters 31 through 35 of Title 19 of the Delaware Code.³ Individuals who file for unemployment benefits are

* Law Clerk, Family Court of the State of Delaware; Former Appeals Referee, Division of Unemployment Insurance, Delaware Department of Labor. I am grateful to my colleagues for their helpful comments and discussion.

1. No. 92A-11-005, 1993 WL 603363 (Del. Super. Ct. Oct. 20, 1993).

2. DEL. CODE ANN. tit. 19, § 3301 (West 2013) (the unemployment reserve fund is "for the benefit of persons unemployed through no fault of their own."); *id.* § 3305 ("This chapter is enacted as part of a national plan of social security in conformity to the federal Social Security Act."). Though originally enacted under the Social Security Act, unemployment benefits are currently governed by the Federal Unemployment Tax Act. *See* 26 U.S.C. §§ 3301-11 (2012). *See also* 42 U.S.C. § 503 (2012); 45 C.F.R. pts. 640, 650 (West 2013) (describing required state laws and procedures).

3. Unless otherwise specified, all further statutory citations are to Title 19 of the Delaware Code, available at <http://delcode.delaware.gov>.

known as claimants.⁴ When a claimant initially files for benefits, the Division of Unemployment Insurance (“Division”) of the Delaware Department of Labor (“Department”) must determine if the claimant is within the class of persons who may benefit under the statutory scheme.⁵ This involves an initial determination of whether the claimant’s situation is within the statute’s definition of “unemployment.”⁶ In order to receive benefits, unemployed individuals must then be eligible⁷ and not disqualified.⁸ Because these are continuing requirements, questions of eligibility and disqualification may be revisited over the course of an individual’s claim based upon that individual’s weekly claims for benefits.⁹ Since 2004, the Division has evaluated each claimant first for disqualification and then for eligibility.¹⁰

Courts receive unemployment benefits cases as appeals from the Unemployment Insurance Appeal Board (“UIAB”).¹¹ The UIAB reviews appeals from decisions of a lower tribunal, which generally consists of a single Appeals Referee.¹² Any interested party, including the Department, may appeal the Referee’s decision.¹³ The Referee receives the case as an appeal or referral from a Claims Deputy; Referee appeals are mandatory upon request.¹⁴ The UIAB has the discretion whether to accept appeals from the Referee—it may affirm the Referee based upon the record, or it may conduct a *de novo* review.¹⁵ The Delaware Superior Court has jurisdiction over appeals from decisions of the UIAB.¹⁶ In the absence of legal

4. The term is operationally defined by the code. *See* § 3302(2).

5. §§ 3312, 3317(b)-(c), 3318(a).

6. § 3202(17) currently provides that:

“Unemployment” exists and an individual is “unemployed” in any week during which the individual performs no services and with respect to which no wages are payable to the individual, or in any week of less than full-time work if the wages payable to the individual with respect to such week are less than the individual’s weekly benefit amount plus whichever is the greater of \$10 or 50% of the individual’s weekly benefit amount. The Department shall prescribe regulations applicable to unemployed individuals making such distinctions in the procedures as to total unemployment, part-total unemployment, partial unemployment of individuals attached to their regular jobs and other forms of short-time work as the Department deems necessary.

7. § 3315.

8. § 3314.

9. Individuals must file a weekly claim for benefits in accordance with the Department’s regulations. § 3315(2). Those regulations require individuals to report information regarding their eligibility status, including work searches, earned wages, and medical disabilities. 19-1000-1202 DEL. CODE REGS. § 6.0 (LexisNexis 2014). After a certain amount, earned wages may reduce a claimant’s benefits, § 3313(m), or even remove the claimant’s unemployment status, § 3302(17).

10. In 2004, the General Assembly changed the designation of section 3315 to section 3314 and section 3314 to section 3315. 74 Del. Laws 306 §§ 1, 2 (2004). This change came in response to *Ingleside Homes, Inc. v. Gladden*, which faulted the UIAB for considering disqualification without first considering eligibility. No. 02A-12-009 PLA, 2003 WL 22048205 (Del. Super. Ct. Aug. 27, 2003).

11. § 3323(A).

12. §§ 3318(B)-(C), 3319.

13. §§ 3320(A), 3322(B) (“The Department shall be deemed to be a party to any judicial action involving any such decision...”).

14. § 3318(B)-(C).

15. § 3320(A).

16. § 3323(A).

error, the Superior Court must affirm any UIAB decision that is supported by substantial evidence.¹⁷ Evidence is reviewed in the light most favorable to the party prevailing at the UIAB,¹⁸ and evidence is substantial if it is more than a scintilla.¹⁹

Prior to *O'Brien*, there is no indication that Delaware courts treated self-employment as a separate phenomenon within the unemployment benefits framework.²⁰ With *O'Brien*, and a trio of related cases decided soon thereafter, the court moved from no precedent to an “established rule.”²¹ In the years since, courts have struggled with how to connect the self-employment rule to the statutory scheme and how to determine what circumstances trigger the rule.

A. *O'Brien*, *Weeraratne*, and Statutory Confusion

In *O'Brien*, the court considered the appeal of a laid-off attorney.²² Between receiving the lay-off and filing for benefits, the attorney had initiated the process of starting his own firm. Both the Appeals Referee and the UIAB determined that the venture rendered him ineligible for benefits under section 3314(3) of Title 19 of the Delaware Code.²³ At that time, section 3314 addressed eligibility for benefits, and subsection (3) specified that an individual was eligible only if the individual “[i]s able to work and is available for work and is actively seeking work.”²⁴

The *O'Brien* court affirmed the UIAB's decision. The court noted that the issue was one of first impression for Delaware, and the court looked to laws of other states.²⁵ The court determined that the majority rule among the states was that “self-employment is a bar to receiving unemployment compensation.”²⁶ The court reasoned that this principle matched the legislative intent behind Delaware's statutory scheme.²⁷ The court also noted the similarity between Delaware's declaration of intent at section 3301 and the declarations of Pennsylvania and New Jersey. Under the laws of Pennsylvania

17. *Id.* See *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del.1993).

18. *Thompson v. Christiana Care Health Sys.*, 25 A.3d 778, 782 (Del. 2011) (citing *Pochvatilla v. U.S. Postal Serv.*, No. 96A-06-19-RRC, 1997 WL 524062, at *2 (Del. Super. Ct. June 9, 1997)).

19. *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

20. The *O'Brien* court noted that the UIAB had considered the situation at least once before *O'Brien*. 1993 WL 603363, at *3 (citing Appeal of Darrell Sanders, UIAB Appeal Docket No. 63044-13915-A (June 2, 1991)). In *Appeal of Darrell Sanders*, the UIAB cited to the Pennsylvania self-employment rule, and endorsed the sideline-business exception to the rule. UIAB Appeal Docket No. 63044-13915-A.

21. *Weeraratne v. Unemployment Ins. Appeal Bd.*, No. 95A-05-011-NAB, 1995 WL 840722, at *2 (Del. Super. Ct. Sept. 6, 1995). See *infra* text accompanying notes 53-55.

22. 1993 WL 603363.

23. Section 3314(3) is now section 3315(3). See *supra* note 10.

24. § 3314(3) (1999), redesignated by 74 Del. Laws 306 §§ 1, 2 (2004). See *supra* note 10.

25. *O'Brien*, 1993 WL 603363, at *2.

26. *Id.* (citing sources).

27. *Id.* at *2-3.

and New Jersey, self-employed individuals were ineligible for benefits. Pennsylvania's self-employment rule was codified in its statutory framework.²⁸ New Jersey's was a matter of common law.²⁹

The legal rationale of the *O'Brien* decision rested on the court's interpretation of section 3314(3)'s eligibility requirements. The court found that the claimant's sole focus was on the self-employment activity and that he had ceased seeking other work.³⁰ Because the O'Brien claimant had stopped actively seeking other work, he no longer met section 3314(3)'s eligibility requirements.

As it happened, the court's language in its holding implicated areas beyond mere eligibility: "[o]nce an individual engages in a self-employed business or practice on a full-time basis, the Court finds that the individual is no longer unemployed nor available for work, nor clearly, is that individual 'actively seeking work' other than the self-employment."³¹ The court's inclusion of the phrase "no longer unemployed" is enigmatic since it implicates unemployment status, an issue outside the scope of the eligibility analysis.³² On one hand, the phrase could be unintentional. On the other hand, the phrase could be an intentional reference to Delaware's own section 3302 which defines "unemployment."³³ Because the *O'Brien* court did not further explain the phrase's inclusion, subsequent courts have wrestled with how to apply *O'Brien's* legal rationale.

Along with its legal rationale, the *O'Brien* court also endorsed a variety of policy rationales. In what has become the hallmark of later cases, the court reasoned that the legislative intent behind the unemployment benefits scheme barred benefits to self-employed individuals because the benefits were not intended to "be utilized to support the early stages of a new business."³⁴ Additionally, as previously explained, the phrasing of the *O'Brien* conclusion can be read as a determination that full-time self-employment activity negates an individual's status as unemployed.

In dicta, the *O'Brien* court addressed the sideline-business exception to the self-employment rule. When discussing Pennsylvania's self-employment statute, the court noted that Pennsylvania law exempted some self-employment ventures. These exempt ventures were those that had existed during previous full-time employment, had not changed following the end of that full-time employment, did not interfere with new full-time employment, and were not the claimant's primary source of livelihood. The court also noted the sideline-business exceptions from other jurisdictions.³⁵ Because the *O'Brien* claimant began his venture after becoming unemployed, the court found that the sideline-business exception was not

28. *Id.* at *2. See 43 Pa. Stat. Ann. § 802(h) (2002).

29. *O'Brien*, 1993 WL 603363, at *3 (citing *Pedalino v. Bd. of Review*, 200 A.2d 351 (N.J. Super. Ct. App. Div. 1964), *cert. denied*, 202 A.2d 702 (N.J. 1964). See generally *Caldwell v. Bd. of Review*, No. A-0882-09T1, 2011 WL 2749680 (N.J. Super. Ct. App. Div. July 18, 2011); *Ford v. Bd. of Review*, 670 A.2d 1116 (N.J. Super. Ct. App. Div. 1996).

30. *O'Brien*, 1993 WL 603363, at *3.

31. *Id.* (emphasis added).

32. See § 3315 ("An *unemployed* individual shall be eligible to receive benefits with respect to any week only if the Department finds that the individual [meets the numbered eligibility requirements]") (emphasis added). It is also outside of the Pennsylvania law that the court cites. See 43 Pa. Stat. Ann. § 802(h) (addressing eligibility).

33. See § 3302(17). Other courts have certainly read the phrase this way. See *infra* Part II(B).

34. *O'Brien*, 1993 WL 603363, at *3.

35. *Id.* at n.2 (citing sources).

applicable to the case. Thus, though the *O'Brien* court acknowledged the existence of the sideline-business exception, the court did not include the exception as part of its holding.

Since *O'Brien*, courts have cited it for the proposition that self-employed individuals are not entitled to unemployment benefits. However, courts have struggled with how to anchor this imported proposition to Delaware's statutory scheme. *The O'Brien* court framed the issue as a question of eligibility, yet it also implied that an individual who was self-employed was not unemployed. *O'Brien's* creation of the self-employed/unemployed dichotomy has led to later confusion about how to connect the self-employment rule to the statutory text. This confusion was exacerbated by a series of related cases decided in *O'Brien's* aftermath.

Soon after *O'Brien*, the Superior Court decided three cases involving the same claimant's appeal of UIAB decisions denying his claim for benefits. In the first case ("*Weeraratne I*"), the claimant appealed a determination that he was ineligible for benefits since he was unavailable for work because he was a full-time independent salesperson for an insurance company.³⁶ The claimant had filed for benefits upon his separation from different employment at a marketing firm. During and after the marketing firm work, he had performed the insurance work. The UIAB adopted the decision of the Appeals Referee that the claimant was ineligible because of the insurance work.³⁷ On review, the court determined that the Referee's decision contained numerous factual inconsistencies that undercut the Referee's conclusion that the claimant was not unemployed. The court also expressed reservations about the UIAB's unsupported conclusion that an individual could be a full-time employee when the individual worked full-time hours but did not receive full-time pay.³⁸ Because the claimant's insurance work was commission-based, there was no guarantee of pay for any hours worked. Without discussing, or even citing *O'Brien*, the court remanded the case.

The second case ("*Weeraratne II*") involved the Division's motion to reargue *Weeraratne I*.³⁹ The Division sought to reargue whether the claimant had full-time employment based upon hours alone. The Division also advanced a new argument that the claimant was self-employed, not unemployed, and that he was not actively seeking work.⁴⁰ The Division based its new argument upon *O'Brien* and the Pennsylvania law cited therein.⁴¹

The court rejected both arguments. As to the first argument, the court again rested its decision on the inconsistent factual record and the UIAB's dissociation of hours worked and wages earned.⁴² The court reasoned that the analysis should always include wages, especially as they related to hours worked, as a matter of practicality.⁴³ As to the

36. *Weeraratne v. Unemployment Ins. Appeal Bd.*, No. 93A-04-003, 1994 WL 164565 (Del. Super. Ct. Apr. 14, 1994) (hereinafter *Weeraratne I*).

37. *Id.* at *2.

38. *Id.* at *3.

39. *Weeraratne v. Unemployment Ins. Appeal Bd.*, No. 93A-04-003, 1994 WL 164559 (Del. Super. Ct. Apr. 27, 1994) (hereinafter *Weeraratne II*).

40. *Id.* at *1.

41. *Id.*

42. *Id.* at *2.

43. *Id.* at *2. However, this practicality is not always readily apparent. Other courts have held that the presence of either wages or services may negate a finding of unemployment. *See infra* at Part II(B).

second argument, the court questioned the Division's invocation of Pennsylvania law, even via *O'Brien*. The court noted the argument's impropriety since the self-employment argument (or the sideline-business exception) had not been raised during the Appeals Referee or UIAB hearings. Still, the court took pains to distinguish the situation in *O'Brien* from the claimant's situation. Ultimately, the court determined it did not need to reach the self-employment argument, and denied the Division's motion.

At the rehearing, the UIAB again denied benefits, and following that, the claimant again appealed the UIAB's decision.⁴⁴ Matching the Division's argument from *Weeraratne II*, the UIAB determined that the claimant was not an unemployed individual under the statutory framework of section 3302.⁴⁵ Additionally, the UIAB determined that the claimant's self-employment activities rendered him unavailable for work and therefore, ineligible for benefits under section 3314(3).⁴⁶ This time, the court affirmed ("*Weeraratne III*").⁴⁷

Regarding the UIAB's first determination, the court agreed that the claimant did not meet the statutory definition of an unemployed person. Under the statute at the time, individuals could be considered fully unemployed in weeks where they earned no wages and performed no work.⁴⁸ Additionally, individuals could be considered partially unemployed if they had had their full-time hours reduced.⁴⁹ The UIAB found that the claimant had been, and continued to be, a part-time employee of the marketing firm. The court agreed that a current part-time employee did not fall into either definition of unemployment. For unclear reasons, the court cited to section 3314, the eligibility section, as authority for its conclusion, even though it had previously noted that the UIAB reached its conclusion under section 3302.⁵⁰ Neither the UIAB nor the court cited *O'Brien* as a basis that the claimant was not unemployed.

Likewise, regarding the UIAB's second determination, the court agreed that the claimant "was unavailable for work because of the many hours spent on self-employment pursuits."⁵¹ The court cited to section 3314(3) for its conclusion.⁵² Unlike *Weeraratne I* or *Weeraratne II*, the court made no mention of the role wages should play in the decision. There is no clear explanation for the absence. The court went on to discuss *O'Brien*, noting that it was an "established rule" that self-employment barred unemployment benefits.⁵³ The court also endorsed one of *O'Brien's* policy rationales:

44. *Weeraratne*, 1995 WL 840722 (hereinafter *Weeraratne III*).

45. *Id.* at *1. At the time, the definition of "unemployment" was found in section 3302(16). *See* 70 Del. Laws 43 §§ 2, 3 (1995) (redesignating § 3302(16) as § 3302(17)).

46. *Weeraratne III*, 1995 WL 840722, at *1. Under the statute's current form, eligibility criteria are in section 3315. *See supra* note 10.

47. *Weeraratne III*, 1995 WL 840722, at *3.

48. § 3302(16), *redesignated by* 70 Del. Laws 43 §§ 2, 3 (1995).

49. *Id.*

50. *Weeraratne III*, 1995 WL 840722, at *1.

51. *Id.* at *2. It is unclear why the court undertook the eligibility analysis since it had already determined the claimant was not an unemployed individual.

52. *Id.* at *2.

53. *Id.*

that unemployment benefits were not meant to support the early stages of a new business. Again, the court offered no explanation for the apparent change between *Weeraratne II* and *Weeraratne III*. Finally, the court determined that there was sufficient evidence to support the UIAB's conclusion that the sideline-business exception did not apply to the claimant's case. On the claimant's further appeal, the Delaware Supreme Court affirmed the court's "well-reasoned Order."⁵⁴

Read together, the *Weeraratne* cases offer no clear picture of how to analyze self-employment or apply *O'Brien*. In addressing the same facts, *Weeraratne I* did not mention *O'Brien*, *Weeraratne II* distinguished *O'Brien*, and *Weeraratne III* endorsed *O'Brien*. Even the expansion of the record between *Weeraratne II* and *Weeraratne III* does not explain how the court moved from treating *O'Brien's* analysis with disdain to regarding it as an "established rule." Additionally, the *Weeraratne* cases mixed the analysis of whether the claimant was unemployed with the analysis of whether the claimant was eligible. *Weeraratne III* attempted to confine its application of *O'Brien* to the eligibility analysis. This should not have been a difficult task since the question of whether the claimant was unemployed involved his marketing work while the question of whether the claimant was ineligible involved his insurance work. Yet, the *Weeraratne III* court cited to the eligibility section as the basis for its conclusion that the claimant was unemployed, and the court included *O'Brien's* "no longer unemployed" language in its discussion regarding eligibility. It is no wonder that subsequent courts have also conflated the two analyses and have struggled to link *O'Brien* to Delaware's statutory framework.

Part of the confusion may also stem from the lack of specificity of language in decisions by the Referees, the UIAB, and the courts.⁵⁵ Under the statutory scheme, an unemployed individual is "eligible" when he or she meets all of the requirements of eligibility and "ineligible" when he or she does not.⁵⁶ Thus, as a statutory matter, the question of eligibility does not arise for persons who are not unemployed under section 3302.⁵⁷ Still, decisions at all levels frequently determine that individuals who are not unemployed are "ineligible" for benefits.⁵⁸ By using the term "ineligible" to describe both a failure of one of the specific eligibility criteria and also a general disentitlement to benefits, the decisions unintentionally equivocate two legally distinct situations: where individuals are unemployed but ineligible for benefits under the eligibility requirements, and where individuals are not unemployed and thus not covered by the statutory scheme at all.

As decisions following *O'Brien* and the *Weeraratne* cases have illustrated, courts continue to struggle not only with how to connect the self-employment rule to the statutory scheme but also when to invoke the rule at all.

B. Jones, Workman, and Multiplying Factors

Courts did not return to the self-employment rule until 2001's *Jones v. Unemployment Insurance Appeals Board*.⁵⁹ The *Jones* decision was the first of several to begin to parse what factors were important in the analysis of whether an

54. *Weeraratne v. Unemployment Ins. Appeal Bd.*, 676 A.2d 909 (Del. 1996) (table). The opinion reflects the Supreme Court's standard language for a summary affirmance.

55. At least part of this confusion might be explained by the renumbering of certain sections of the code. *See supra* notes 10, 45.

56. *See* § 3315; *see also supra* note 32.

57. *Id.*

58. *See, e.g., Weeraratne III*, 1995 WL 840722, at *1; *O'Brien*, 1993 WL 603363, at *2-3. *See infra* Parts II(B)-(C). Even the Delaware Supreme Court is not immune. *See Unemployment Ins. Appeal Bd. v. Div. of Unemployment Ins.*, 803 A.2d 931 (Del. 2002).

59. No. 00A-08-001, 2001 WL 755379 (Del. Super. Ct. June 11, 2001).

individual was self-employed. Because courts reached no consensus on the relevant factors, the uncertainty present in *O'Brien* and the *Weeraratne* cases has also permeated later cases.

In *Jones*, the court considered the appeal of a claimant who had started a new business venture within two weeks of filing for unemployment benefits.⁶⁰ The Claims Deputy determined that the claimant was not unemployed because his situation did not meet the definition of “unemployment” found in section 3302(17). At the hearing with the Appeals Referee, the claimant testified that he worked thirty to fifty hours per week on the business, but he spent an equal amount of time searching for work. The claimant also testified that the business was operating at a loss (even though it had received some payments for services) and that he had not received any wages. The Appeals Referee affirmed, and the UIAB adopted the Referee’s decision without further hearing.

The court affirmed the UIAB, agreeing that the claimant did not meet the statutory definition of an unemployed person. The court determined that payments to the claimant’s business met the definition of “wages” under the statute.⁶¹ After reaching that conclusion, the court found that the claimant’s admission of full-time, self-employment work excluded him from benefits under section 3302(17)’s definition of “unemployment.”⁶² Citing to *O'Brien*, the court found that unemployment benefits were not meant to subsidize a new business. The court also cited *O'Brien*’s conclusion that the legislative intent behind Delaware’s statute aligned with the intent of other jurisdictions that had held that self-employment was a bar to unemployment benefits. Citing to *Weeraratne III*, the court agreed that the bar of benefits to the self-employed was an established rule.

Two principles from *Jones* would become central in later self-employment cases. First, full-time self-employment is a bar to benefits because individuals who perform such work are not “unemployed” under section 3302(17).⁶³ Though the decision used the term “ineligible” in its broader sense, the *Jones* decision was applying section 3302(17) and deciding whether the claimant was an unemployed individual. Second, under *Jones*, the self-employment bar applies even to self-employment ventures that are not profitable. The *Jones* court ignored *Weeraratne I* and *II*’s discussions of parity of hours and wages.⁶⁴ Rather, the *Jones* court endorsed the rationale expressed by *O'Brien* and *Weeraratne III* that unemployment benefits were not meant to support the early stages of a new business.⁶⁵ Like *O'Brien*, the *Jones* court determined that the unemployment statute was for the benefit of workers separated from an employer.⁶⁶

In *Miller v. Herschmann, Inc.*, the court addressed the situation where the claimant’s self-employment was less than full-time.⁶⁷ The claimant operated an on-line computer consulting and sales business, and while he worked full time

60. *Id.* at *1.

61. *Id.* at *2. *See also* § 3302(18) (“‘Wages’ means all remuneration for personal services, including commissions, bonuses, dismissal payments, holiday pay, back pay awards and the cash value of all remuneration in any medium other than cash...”).

62. *Jones*, 2001 WL 755379, at *2-3.

63. *Id.*

64. Other courts have found *Weeraratne I*’s wage argument more persuasive in other contexts. *See* *Schneider v. Unemployment Ins. Appeal Bd.*, No. 03A-09-004 WLW, 2004 WL 2827915, at *2 (Del. Super. Ct. Apr. 30, 2004).

65. *Jones*, 2001 WL 755379, at *2. One cannot help but wonder if the *Jones* court would have reached this same conclusion if neither the claimant nor the business had received any payments. *See infra* text accompanying notes 81-82.

66. *Jones*, 2001 WL 755379, at *2.

67. No. 06A-10-013-JEB, 2007 WL 4577373 (Del. Super. Ct. Dec. 12, 2007).

in some weeks, his hours varied widely. He had received no wages from the business, but it was unclear whether the business received income. The *Herschmann* court concluded that the claimant's situation fell into section 3302(17)'s second definition of unemployment, because he worked less than full-time and earned less than his weekly benefit amount.⁶⁸ Nevertheless, the court concluded that the claimant was not entitled to benefits. Again, the court used the term "ineligible" to describe the claimant's status.⁶⁹

The court opined that, "unemployment is different from self-employment."⁷⁰ The court noted that case law had established that self-employed individuals could not receive unemployment benefits. The court, citing *Weeraratne III*, found this bar to be absolute under the principle that benefits were not meant to support new businesses. Thus, the court concluded that the claimant's efforts on behalf of his business barred him from benefits. The primary significance of the *Herschmann* decision was its determination that a part-time, unpaid, self-employment venture barred a claimant from benefits.⁷¹

Bachman v. Bachman & Associates, Inc.,⁷² also involved part-time, unpaid activities. Technically, *Bachman* was not a self-employment case, yet parts of its analysis have been employed in subsequent self-employment cases. At the outset, the court noted that it was "undisputed that [the claimant] was an employee and is not self-employed."⁷³ *Bachman* involved a claimant who had been a corporate officer and a 50% owner of a defunct corporation. By that time, section 3302 had been amended to include services performed by corporate officers within the definition of "employment."⁷⁴ At the time he filed for benefits, the claimant continued to spend two unpaid hours per week wrapping up the business. The UIAB had determined that the claimant was not unemployed, and additionally, that he was ineligible for benefits because he was unavailable for work.⁷⁵ Thus, the case indirectly implicated both unemployment status and benefits eligibility.

The *Bachman* court's discussion of unemployment status under section 3302 did not involve any extensive analysis of the claimant's self-employment. Despite concluding that the claimant was not self-employed, the court went on to note the differences between wrapping up a closed business and starting a new business venture.⁷⁶ Thus, the *Bachman* court

68. *Id.* at *2.

69. *Id.*

70. *Id.*

71. The court could have analogized the case to the situation in *Jones* and avoided such a broad conclusion. In *Herschmann*, the claimant offered inconsistent testimony, and he admitted to working up to eighty hours in some weeks. 2007 WL 4577373, at *1. Thus, the *Herschmann* court could have determined his venture was full-time self-employment, and under the standard of review, perhaps it should have done so. See *Thompson*, 25 A.3d at 782 (noting that factual inferences should be viewed in the light favorable to the party that prevailed at the UIAB level).

72. No. 09A-08-005 DCS, 2010 WL 5551332 (Del. Super. Ct. May 26, 2010).

73. *Id.* at *1.

74. See 70 Del. Laws 229 § 1 (1995) (adding the service of "[a]ny officer of a corporation after December 31, 1995" to the definition of "employment" under § 3302(9)); 70 Del. Laws 43 §§ 2, 3 (1995) (redesignating § 3302(9) as § 3302(10)).

75. *Bachman*, 2010 WL 5551332, at *1. The case also involved an issue of disqualification since the claimant's business had closed. Individuals who close a business permanently or temporarily may be disqualified for benefits unless there is an objectively reasonable basis for doing so. See § 3314(1); *Unemployment Ins. Appeal Bd.*, 803 A.2d 931. This situation is outside the scope of this article since the situation addresses the consequences of past self-employment, not current self-employment.

76. *Bachman*, 2010 WL 5551332, at *2-3.

created a distinction between operational and non-operational self-employment ventures. Further portions of the court's analysis also implicated other self-employment cases. Specifically, the court determined that services and wages are "interdependent" under section 3302's definition of unemployment: "[t]he phrase 'with respect to which' (no wages are payable) modifies the services being considered."⁷⁷ In doing so, the court rejected the UIAB's assertion that the two requirements were disjunctive, such that either the performance of services or the earning of wages could place an individual outside the definition of unemployment.⁷⁸ Ultimately, the court determined that the claimant's two hours of unpaid work did not cancel his unemployment status.

The court also addressed self-employment in its discussion of the claimant's eligibility. The UIAB had concluded that the two hours the claimant spent wrapping up a business meant that the claimant was self-employed and unavailable for work. Citing to *Weeraratne III* and *O'Brien*, the court recognized that self-employment was a bar to unemployment benefits because benefits were not meant to support new businesses and because full-time self-employment rendered the individual unavailable for other work. The court also discussed the factual scenarios from *Herschmann*, *O'Brien*, and *Jones*. The court determined that the minimal time the claimant spent on the business was not enough to make him unavailable for work and thus, ineligible for benefits.

Bachman is a curious addition to the self-employment analysis, particularly since it was not a true self-employment case. Without citing to *Weeraratne I* or *II*, the court's discussion of section 3302 returned the specter of wages to the self-employment analysis. Likewise, the *Bachman dicta* indicated a new facet to the self-employment analysis: whether the self-employment venture is operational. Under *Bachman*, individuals who perform work for a non-operational business may not be self-employed. The *Bachman* court also created an implicit exception to the self-employment rule such that minimal self-employment activity is not a bar to benefits if an individual remains available for other work.⁷⁹

In *Annand v. Unemployment Insurance Appeal Board*,⁸⁰ the court addressed substantially the same situation as *Herschmann* yet reached an opposite conclusion. In *Annand*, the claimant worked part time for a surveying company and part time for his own company. The claimant filed for benefits only for those weeks in which he performed little or no work for the surveying company and none for his own company. The UIAB determined that the claimant was not unemployed under section 3302(17) because the claimant was still providing some services to both companies. The court reversed and remanded.

The court reasoned that the claimant was entitled to benefits under the second definition of unemployment—partial unemployment.⁸¹ In contrast to *Herschmann*, the court determined that part-time self-employment was not an absolute bar to benefits. The court based part of its reasoning on its conclusion that the claimant was available for, and performing, work outside of his self-employment. In doing so, the court created a question of whether availability is a factor in partial-unemployment cases or whether the court simply mixed the questions of unemployment status and benefits

77. *Id.* at *2-3.

78. *Id.* at *4-5.

79. Viewed at a high level of abstraction, this exception can be seen as a less forceful version of the sideline-business exception since both address situations where individuals perform self-employment work but remain available for other, full-time work. *See infra* Part III(C).

80. No. S10A-05-003-ESB, 2011 WL 2698620 (Del. Super. Ct. July 1, 2011).

81. *Id.* at *2. Partial unemployment is addressed by the second half of the definition of "unemployment" within section 3302(17), which provides that partial unemployment is subject to regulation by the Department.

eligibility. Additionally, the court determined that it was error for the UIAB to deny the claimant benefits “merely because he owned his own company.”⁸² While the *Annand* court’s reasoning is clear in isolation, its decision is vexing in the context of the other self-employment cases. In particular, the *Annand* court’s refusal to address *Herschmann*, is indicative of the lack of consensus regarding the factors in the self-employment analysis.

Perhaps nowhere was this lack of consensus more evident than in *Workman v. Delaware Department of Labor*.⁸³ As a matter of outcome, *Workman* was relatively straightforward. As a matter of analysis, however, *Workman* remains Delphic.

Like *O'Brien*, *Workman* involved the self-employment ventures of an out-of-work attorney.⁸⁴ In April 2008, the claimant had started an internet-based retail business for income. In April 2009, the claimant had started his own law practice to increase his marketability to other firms. Neither venture yielded a net profit. The claimant collected unemployment benefits from December 2008 until May 2009, when he reported income from the law firm. Upon review, the Claims Deputy, the Appeals Referee, and the UIAB all concluded that the claimant was not unemployed under section 3302(17). The claimant appealed, arguing that his lack of wages rendered him unemployed under the first definition of unemployment, and alternatively, that his lack of full-time work and wages rendered him unemployed under the second definition of unemployment.⁸⁵ The claimant also characterized his business as a “side-line” business.⁸⁶

The *Workman* court began its discussion by citing to *O'Brien* and *Weeraratne III* for the general principle that self-employment acts as a bar to unemployment benefits. The court acknowledged that neither the legislature nor the courts had clearly defined “self-employment.”⁸⁷ For its own purposes, the court determined that, “self-employment exists where an individual has made more than *de minimis* efforts on behalf of an operating business that he or she owns, regardless of whether the business is profitable or the individual remains available for other work.”⁸⁸ The court cited *Herschmann*, *Jones*, and *Bachman* as the basis for its definition. The *Workman* court did not discuss, or mention, *Annand*, which had been decided approximately two months earlier.⁸⁹

Applying the definition to the claimant’s case, the *Workman* court determined that the claimant was not unemployed.⁹⁰ The court distinguished *Bachman* since the business in *Bachman* was not operational whereas the *Workman*

82. *Id.*

83. No. N10A-03-002 WCC, 2011 WL 3903793 (Del. Super. Ct. Sept. 1, 2011).

84. *See id.* at *1. The plight of the unemployed attorney has led to much of the development of the self-employment rule, both in Delaware and in Pennsylvania. For a concise discussion of this phenomenon in Pennsylvania, see James Bradley & Daniel Schuckers, *Eligibility of Attorneys for Unemployment Compensation*, 74 Pa. B. Ass’n. Q. 71, 73, 75-76 (2003).

85. *Id.* at *3.

86. *Id.* at *4.

87. *Id.* at *3.

88. *Id.*

89. *Annand* was submitted on April 11, 2011 and decided on July 11, 2011. 2011 WL 2698620, at *1. *Workman* was submitted on May 19, 2011 and decided on September 1, 2011. 2011 WL 3903793, at *1. While *Annand* may not have been included in third-party legal databases within that short a time frame, *Annand* almost certainly was available through Superior Court’s own database at <http://courts.delaware.gov/opinions/>. *See, e.g.*, *Hitchens v. Unemployment Insurance Appeal Board*, No. 11A-01-008 MMJ, 2011 WL 5345222, at *4-5 (Del. Super. Ct. Nov. 4, 2011) (citing to *Workman*, which had been decided approximately 60 days prior).

90. 2011 WL 3903793, at *4.

claimant's business was operational. The court also noted that the claimant had started the two businesses, worked to make them successful, and accepted payments on behalf of both businesses.⁹¹ The court found these conditions rendered the claimant self-employed.

The court rejected the claimant's assertion that his businesses were sideline businesses. The court noted that Delaware courts had not recognized a sideline exception.⁹² For purposes of argument, the court also noted the claimant's businesses would not be sideline businesses since he started them after becoming unemployed and used them as a means of primary support.⁹³ The court determined that the claimant was barred from benefits.

Workman, at its heart, represents a missed opportunity. Through the case's facts, the court had the chance to clarify many aspects of the self-employment rule, yet did not. The resulting *Workman* analysis is challenging for several reasons. While *Workman's* distillation of the self-employment cases into a single definition is appealing, it is also incomplete. *Workman's* definition of self-employment fails to include several existing factors in the self-employment analysis. The definition does not address Annand or a full reading of the second definition of unemployment. Though the *Herschmann* decision might explain the latter, there is no explanation for the former. Moreover, *Workman* cites to *Bachman* for its proposition that a business must be operational, yet *Workman* fails to address *Bachman's* discussion of wages. *Workman's* only nod to the issue of wages is the suggestion that the self-employment venture's profitability is not a factor to analyze.

Workman's definition is laudable for at least one reason: it excludes availability for work (an eligibility criterion) from the analysis of unemployment status. Thus, the definition does help to resolve the persistent confusion between unemployment status and benefits eligibility.

Outside of the definition, the *Workman* court also missed an opportunity to connect the self-employment rule to the statute. Furthermore, the *Workman* court ironically suggested that any perceived unfairness in the self-employment rule was for the legislature, not the court, to correct—even though the self-employment rule was entirely judicially created.⁹⁴ The court's assertion appears even more perplexing given that *Workman* itself cited to some of the Pennsylvania case law that the *O'Brien* court used to establish the self-employment rule in Delaware.⁹⁵

C. *Workman's* Aftermath and Continued Uncertainty

Since *Workman*, the self-employment cases have been more uniform, at least from an outcome perspective. Additionally, virtually all of the cases from *Workman* forward have involved the UIAB's denial of benefits based solely on section 3302. None of the cases has involved eligibility as a primary issue. Still, courts have continued to disagree about the relevant factors and the viability of the sideline exception.

Shortly after *Workman*, the court decided *Hitchens v. Unemployment Insurance Appeal Board*⁹⁶ which involved the appeal of a claimant who admitted self-employment. The UIAB had determined that the claimant was not unemployed

91. *Id.* Though it did not directly state so, the *Workman* court appeared to be applying the standards from *Jones* and *Herschmann* to the claimant's facts.

92. *Id.* This assertion is questionable. See *infra* Part III(C); note 140 and accompanying text.

93. 2011 WL 3903793, at *4. See *infra* Part III (C).

94. 2011 WL 3903793, at *4. ("While this result may be unfair, it is up to the legislature to correct, not the Court.") See *O'Brien*, 1993 WL 603363, at *2-3.

95. See *Workman*, 2011 WL 3903793, at *3, n. 36.

96. 2011 WL 5345222.

since her self-employment ventures were her primary means of support. On appeal, the claimant's argument appeared to be one for a sideline exception: she asserted that she remained available for other work, and she disputed whether self-employment was her primary source of livelihood.⁹⁷ Nevertheless, relying on the *Workman* definition, the court determined that the claimant was unemployed. The *Hitchens* court did not specifically address the sideline exception.

In *Miller v. Unemployment Insurance Appeal Board*,⁹⁸ the court again endorsed *Workman*. The case involved a claimant who had started a business during the period he received unemployment benefits. Factually, the case mirrored *Jones*: the claimant argued that his business receipts were minimal and that he remained available for other work.⁹⁹ The *Miller* court used *Workman*'s self-employment definition and *Workman*'s analysis of *Herschmann* and *Jones*.¹⁰⁰ The court affirmed the UIAB's decision that the claimant was self-employed, not unemployed.

In *Husband v. Environmental Design, LLC*,¹⁰¹ the claimant appealed a UIAB determination that she was not unemployed. After a layoff and after filing for benefits, the claimant resurrected her previously-closed landscaping business. The claimant worked near full-time hours at the business, and she reported her self-employment status to the Division. Still, the claimant argued that she deserved benefits because of the venture's minimal receipts.¹⁰² The claimant rested her argument on *Annard*, suggesting that the reduced hours in *Annard* were analogous to her reduced wages.¹⁰³ The court disagreed. The court distinguished *Annard* on the grounds that the claimant in *Annard* had reduced hours whereas the current claimant did not.¹⁰⁴ The court also rejected the claimant's arguments about wages.¹⁰⁵ Citing *Jones*, the court noted that the claimant performed work for her business, and as a result, her business received payments for her work. The court determined that the claimant was not unemployed.

The court partially limited the bounds of self-employment in *Delaware Division of Unemployment Insurance v. Scott*.¹⁰⁶ In *Scott*, the claimant filed for benefits after being laid off from a corporation in which he owned a 49% interest. The Appeals Referee found that his ownership stake rendered him self-employed and therefore, barred from benefits. The UIAB reversed, and the Division appealed. In its appeal, the Division suggested that the court should endorse substance over corporate form, and if necessary, pierce the corporate veil.¹⁰⁷ The court noted that the Division's position had merit

97. *Id.* at *1-2.

98. No. S11A-06-005, 2012 WL 1414014 (Del. Super. Ct. Jan. 17, 2012).

99. *See id.* at *2; *Jones*, 2001 WL 755379, at *2-3.

100. *Jones*, 2001 WL 755379, at *3. In fact, the decision quotes almost a page of *Workman*.

101. No. N11A-03-004-JRJ, 2012 WL 14113595 (Del. Super. Ct. Feb. 3, 2012).

102. *Id.* at *2. In describing the claimant's situation, the court interchangeably described the claimant's status in terms of eligibility and qualification even though neither was technically an issue in the case.

103. *Id.* at *3.

104. *Id.* Without explicitly saying so, the court seemed to be differentiating between full and partial unemployment. *Annard* was a partial unemployment case. *See infra* text accompanying notes 81-82.

105. *Husband*, 2012 WL 14113595, at *3.

106. No. N11A-09-003 MMJ, 2012 WL 2580820 (Del. Super. Ct. June 21, 2012).

107. *Id.* at *2.

as a matter of policy since there is little functional difference between a sole proprietor and a sole corporate owner.¹⁰⁸ However, the court decided that “a corporation is a creation of statute [with] independent legal significance” and that the Superior Court lacked jurisdiction to pierce the corporate veil.¹⁰⁹ Ultimately, the court agreed that the claimant was an employee of the corporation, not self-employed. Thus, *Scott* appears to stand for the proposition that a formal corporate structure may shield an individual from the self-employment rule.

In *Brown v. Unemployment Insurance Appeal Board*,¹¹⁰ the court considered the appeal of a claimant who had started a consulting business. The claimant worked ten hours per week for one client for approximately one month. The *Brown* court decided the case under the first definition of unemployment. The court stated, “[t]he law is clear that a claimant is not an ‘unemployed individual’ unless the claimant performs no services and collects no wages . . .”¹¹¹ Thus, the *Brown* court again divorced services and wages. The court also considered that the claimant had left her previous employment to start her consulting business and that the claimant had restricted her work searches to certain business types.¹¹² Neither fact was relevant to the question of whether the claimant was unemployed: separation issues are matters of qualification,¹¹³ and work searches are matters of eligibility.¹¹⁴ The *Brown* court represented the self-employment rule as an absolute bar, and under that representation, denied benefits.¹¹⁵

These recent decisions highlight the continued confusion surrounding the self-employment rule. The decision in *Brown* indicates that, almost twenty years after *O’Brien*, courts continue to grapple with how the self-employment rule interacts with the statutory scheme. This confusion leads to the insertion of irrelevant factors into the analysis, such as the discussion of availability in *Annand* or the discussion of separation issues in *Brown*. Additionally, there is continued disagreement about how, and if, to factor wages into the analysis. The decisions in *Herschmann* and *Brown* indicated that wages do not matter. By contrast, *Bachman* indicated that wages matter greatly. Beyond wages, recent decisions suggest that the self-employment rule is triggered by virtually all self-employment ventures whereas other decisions suggest the rule is triggered by only full-time self-employment.¹¹⁶

As these recent cases demonstrate, the Superior Court decisions have created an inconsistent view of the self-employment rule and an unpredictable outcome for the individual claimants. The next section of this article argues that Delaware’s General Assembly should take steps to resolve the lingering questions and to simplify matters for courts, claimants, and the Division.

108. *Id.* at *3.

109. *Id.* at *3 (citing sources). As the court noted, under Delaware law, only the Court of Chancery may pierce the corporate veil. *Id.* at *7.

110. N12A-02-005 RRC, 2012 WL 3090834 (Del. Super. Ct. July 23, 2012).

111. *Id.* at *2 (emphasis in original).

112. *Id.* at *1, 3.

113. See § 3314(1). Like the court in *Husband*, the court in *Brown* alternated discussions of the claimant’s status, eligibility, and qualification. See *supra* note 102.

114. See § 3315(3).

115. 2012 WL 3090834, at *3.

116. This dichotomy hints at a more nuanced question: is self-employment actually a bar to, or merely a presumption against, unemployment benefits? While the language the courts have used suggests the former, the analytical methods that courts have employed suggest the latter.

II. THE NEED FOR LEGISLATIVE INTERVENTION

Given that the Superior Court's decisions have endorsed differing statutory and policy justifications for the self-employment rule, it is apparent that this conflict of authority needs a resolution. Legislative intervention is the most direct and efficient way of addressing the self-employment rule because intervention would afford the General Assembly the opportunity to address all of the outstanding statutory, analytical, and policy concerns.

A. The Deficiency of Other Options

This ability to take a wide-ranging approach to the self-employment rule is one reason why legislative intervention is more workable than waiting on the Delaware Supreme Court to resolve the lower court confusion. The problems of waiting on a court decision are myriad. If the Superior Court cases are any indication, it would likely take multiple Supreme Court cases to flesh out the self-employment rule's grounding, factors, and exceptions. Moreover, confusion alone does not mandate swift resolution; confusion must be coupled with a case. This would require both the resolve of the claimants to bring the cases¹¹⁷ and willingness of the Division and the UIAB to defend their respective interpretations of the self-employment rule.¹¹⁸ Even then, the process can be a long one. It was decades before the Supreme Court defined "good cause," the central issue in voluntary separation cases (*i.e., resignations and quits*).¹¹⁹ Thus, logistical difficulties and practical realities reduce the likelihood of the Supreme Court resolving the entire self-employment issue quickly.

Department rule-making is also infeasible without legislative intervention.¹²⁰ Long-standing case law states that the Department cannot exclude an individual from benefits unless there is clear legislative intent to do so.¹²¹ Given that the Superior Court had to reach to Pennsylvania law to create the self-employment rule, it is hard to see where Delaware's statute includes the requisite intent for the Department to accomplish its goals through rule-making. However, rule-making may be part of the tools that the legislature could use. For instance, the General Assembly has created a mixed system of statutes and regulations to address partial unemployment.¹²² The statute specifies that partially-unemployed individuals are unemployed but then directs the Department to establish regulations to differentiate between unemployment and partial unemployment.¹²³ Until August 2013, the Department defined and limited partial unemployment through its

117. The claimants' resolve would have to be paired with financial ability. After all, these are unemployed individuals.

118. So far, both have been keen to do so. *See infra* Part II.

119. *See Thompson*, 25 A.3d 778. It is also worth noting that the Delaware Supreme Court has already passed on the self-employment issue once. *See Weeraratne*, 676 A.2d 909; *see also infra* text accompanying note 74.

120. The Department possesses the statutory authority to promulgate administrative rules and regulations. *See* § 3122; Del. Code Ann, tit. 29, § 10115 (West 2013).

121. *Harper v. Unemployment Ins. Appeal Bd.*, 293 A.2d 813, 816 (Del. Super. Ct. 1972).

122. § 3302(17). *See supra* note 81.

123. § 3302(17) ("The Department shall prescribe regulations applicable to unemployed individuals making such distinctions in the procedures as to total unemployment, part-total unemployment, partial unemployment of individuals attached to their regular jobs and other forms of short-time work as the Department deems necessary.").

formal regulations, but currently, the Department has no regulations in place to address partial unemployment.¹²⁴ As the partial unemployment example illustrates, rule-making may be a tool for the General Assembly to use in its intervention, but rule-making is not sufficient on its own.

B. The Possible Legislative Paths

As an initial matter, intervention provides the General Assembly with the opportunity to decide whether Delaware should endorse a self-employment rule. In theory, the legislature could reject the self-employment rule. In reality, this is unlikely. The legislature's three most recent amendments to the statutory scheme have all addressed the need to stabilize the unemployment benefits fund.¹²⁵ An atmosphere of economic apprehension would be conducive to the legislature's adoption of the rule. This economic reality coincides with *O'Brien's* prudent policy point: unemployment benefits are a safety net for individuals, not a launch pad for new businesses. On the whole, then, economic and policy concerns indicate that the General Assembly would likely adopt the self-employment rule if it addressed the issue.

By amending the unemployment benefits scheme to include the self-employment rule, the General Assembly could clarify the most confounding issue: how the self-employment rule connects to the statutory scheme. As previously explained, the case law progression of the self-employment rule has led to an intertwining of the concepts of unemployment status and benefits eligibility. The legislature could solve this problem simply and efficiently by codifying the rule, and thus, deciding whether self-employed individuals are not unemployed or are unemployed but ineligible for benefits.

The legislative solution should be comprehensive but not limitless or overly complicated. Current case law shows that unlimited review of a case's factual posture, including the use of a multiplicity of factors, will only complicate later analyses. Additionally, the case law approach has led to an analysis with unpredictable outcomes.¹²⁶ To avoid these faults, the legislature should limit the factors of the self-employment analysis, as the Department previously did through rule-making for partial unemployment¹²⁷ or as the legislature currently does statutorily for independent contractors.¹²⁸ For

124. 19-1000-1202 Del. Code Regs. § 15, *amended by* 17 Del. Reg. Regs. 325 (Sept. 1, 2013).

125. *See* 79 Del. Laws 82 (2013) (confirming charges to employers who fail to respond to Department inquiries); 79 Del. Laws 117 (2013) (instituting a one week waiting period for new claims); 79 Del. Laws 173 (2013) (imposing an additional penalty for fraud). *See also* H. Comm. Rep. 147-168, Reg. Sess. (Del. 2013) (House Bill 168, 79 Del. Laws 117, is "necessary to maintain the solvency of the unemployment insurance program in a fair manner.")

126. This has also been the case in Pennsylvania where the statutory scheme includes the self-employment rule but does not define self-employment. *See Kotanchik v. Unemployment Comp. Bd. of Review*, No. 2347 C.D. 2011, 2013 WL 3156581 (Pa. Cmmw. Ct. June 10, 2013) (noting that courts derive the definition of self-employment from different sections of the statutory scheme since the term is not specifically defined). *See also Jia v. Unemployment Comp. Bd. of Review*, 55 A.3d 545 (Pa. Cmmw. Ct. 2012); *Buchanan v. Unemployment Comp. Bd. of Review*, 581 A.2d 1005 (Pa. Cmmw. Ct. 1990).

127. *See infra* text accompanying notes 122-124.

128. § 3302(10) provides that:

"Employment" means: ... (K) services performed by an individual for wages, unless and until it is shown to the satisfaction of the Department that: (i) Such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under the individual's contract for the performance of services and in fact; and (ii) Such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (iii) Such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

independent contractors, the General Assembly has specified a three-part, conjunctive test that determines whether an individual is an employee or an independent contractor.¹²⁹ There is a presumption of employment, and the employer must establish all three factors to overcome the presumption.¹³⁰ Thus, the independent contractor analysis boils a complex issue down to a three-part test.

With the self-employment rule, the legislature could take a similar approach. As an example, the legislature could limit the analysis to a review of the venture's duration; the amount of time the individual has spent to build or perform services; and whether the individual or the venture has received payments for services. Though not exhaustive, these three factors incorporate the bulk of the analysis from the self-employment cases while weeding out the factors that lead to statutory confusion. Duration would address not only when the venture began but also whether it continues to operate. The time-spent requirement addresses concerns about whether the venture is the individual's primary focus while avoiding the slippery slope of adding availability for work (and thus, eligibility) to the analysis. Both the time-spent and the payment factors address the statutory requirements of "unemployment" from section 3302(17), while incorporating some of the case law concerns about individuals who perform work but receive no wages. Evaluation of the factors could be as simple as a rebuttable presumption that the presence of two or more factors means a finding of self-employment and a disentitlement to benefits.¹³¹

In going this route, the legislature could also correct the linguistic confusion surrounding the self-employment rule.¹³² If the legislature linked the self-employment rule to the definition of unemployment, the legislature could further specify that individuals who are not "unemployed" should be referred to as "not entitled to benefits" rather than "ineligible for benefits." The legislature has taken this approach in other sections. For instance, section 3314(6) specifies that a disqualification under that section is known as a "disqualification due to fraud."¹³³

Alternatively, the legislature could determine that self-employment is a matter of eligibility rather than unemployment status. This second approach would likely focus on whether the individual remained available for other work. To incorporate the current case law, the Department could set out a regulatory presumption that self-employed individuals are not eligible for benefits. It would then be up to the claimant to prove his or her availability for work. This is already the approach the Division uses for individuals who were, or are, medically disabled.¹³⁴

129. *Id.* See *Spar Mktg. Servs., Inc. v. Unemployment Ins. Appeal Bd.*, No. K11A-03-003 WLW, 2013 WL 3788874 (Del. Super. Ct. July 9, 2013), *aff'd* 74 A.3d 655 (Del. 2013) (table).

130. *Spar Mktg. Services, Inc.*, 2013 WL 3788874, at *3 (citing *State Dep't of Labor v. Med. Placement Servs., Inc.*, 457 A.2d 382 (Del. Super. Ct. 1982), *aff'd* 467 A.2d 454 (Del. 1983) (table)).

131. For instance, an individual with an operational business who had performed substantial work on behalf of that business could be self-employed, regardless of whether he or she had received payments for the work. By contrast, an individual with an operational business who had taken no steps other than obtaining a business license and who had not received any payments for services might not be self-employed.

132. *See supra* p. 11.

133. § 3314(6).

134. *See* § 3315(3). *See also* § 3314(1) ("[I]f an individual has left work involuntarily because of illness, no disqualification shall prevail after the individual becomes able to work and available for work ... but the Department shall require a doctor's certificate to establish such availability ..."). This is also the approach that the Division takes toward students, though that presumption is derived from a long-standing case-law interpretation of "availability for work" under the eligibility requirements. *See Passwaters v. Unemployment Ins. Appeal Bd.*, No. S12A-10-007 RFS, 2013 WL 3338680 (Del. Super. Ct. June 17, 2013); *Morgan v. Unemployment Ins. Appeal Bd.*, 416 A.2d 1227, 1230 (Del. Super. Ct. 1980). Interestingly, this concept was also imported from Pennsylvania, albeit from case law. *See Morgan*, 416 A.2d at 1230 (adopting a test based upon *Reardon v. Unemployment Comp. Bd. of Review*, 373 A.2d 146, 148 (Pa. Cmmw. Ct. 1977)).

Certain factors, such as wages, need not be an issue under the eligibility approach. The Division already has mechanisms for reducing or eliminating benefits for individuals who receive wages, pensions, or other monetary benefits while filing for unemployment benefits. Each week that a claimant claims benefits, the claimant must report any wages earned or monetary benefits received, and the Division reviews those self-reports.¹³⁵ Most pensions and worker's compensation benefits are subtracted dollar-for-dollar from a claimant's benefits.¹³⁶ Individuals who receive benefits for partial unemployment may earn wages up to 50% of their benefit amount.¹³⁷ Past that, wages are subtracted dollar-for-dollar.¹³⁸ Individuals who earn or receive wages more than certain amounts may not be entitled to any benefits at all.¹³⁹ Since the Division's current procedures already track and limit claimant wages, it would be duplicative to conduct a separate inquiry into wages as part of an eligibility-based self-employment analysis.

C. The Sideline-Business Exception

Regardless of which statutory approach the legislature took, it would be prudent to add a sideline-business exception to the self-employment rule. When the *O'Brien* court adopted Pennsylvania's statutory self-employment rule, the court cited to, but neglected to adopt, Pennsylvania's sideline-business exception, which is part of Pennsylvania's self-employment rule. Presumably, the *O'Brien* court did not adopt the exception because it was inapplicable to that particular claimant. As previously explained, some subsequent courts have applied principles from the sideline-business exception, but none has adopted it.¹⁴⁰ The absence of the sideline-business exception has left a glaring gap in Delaware's self-employment cases.

Properly understood, the sideline-business exception is a limited defense to the application of the self-employment rule.¹⁴¹ Under Pennsylvania law, the sideline-business exception applies to claimants whose self-employment (1) began prior to termination from full-time employment; (2) continued without substantial change after the full-time employment was terminated; (3) does not affect the individual's availability for new full-time employment; and (4) was not the primary source of the claimant's livelihood.¹⁴² From its plain language, the sideline-business exception is of restricted application. It would not apply to individuals who started the venture after becoming unemployed or who increased their self-employment activity upon becoming unemployed. Thus, the factors that create the sideline-business exception also limit its application.

135. *See supra* note 9.

136. § 3313(p).

137. § 3313(m).

138. *Id.*

139. *Id.*

140. This may be because the Division is already utilizing the sideline-business exception when evaluating individual claims. Individual cases are not public record; thus, there is no way to know if the sideline-business exception is a manner of practice. Superior Court discussions of UIAB decisions suggest that the UIAB is using the sideline-business exception in some cases. *See Weeraratne III*, 1995 WL 840722, at *2; *O'Brien*, 1993 WL 603363, at *3. *But see Workman*, 2011 WL 3903793, at *3 (noting, perhaps erroneously, that "Delaware courts have never recognized a side-line exception ..."); *Weeraratne II*, 1994 WL 164559, at *1 (noting that neither the UIAB nor the Appeals Referee had considered "side-line" activities).

141. In this way, it is similar to the independent contractor rule. *See infra* text accompanying notes 129-131.

142. 43 Pa. Stat. Ann. § 802(h).

All of these factors are in keeping with Delaware's existing rules since regular employment that met these criteria would not necessarily exclude an individual from the definition of "unemployment" or render an individual ineligible for benefits. As a matter of practicality, the sideline-business exception could even simplify the entire self-employment analysis—if an individual met the four factors, it might obviate the need for the more complicated standard self-employment analysis.

Moreover, the sideline-business exception would provide a reasonable protection against the self-employment rule's blunt application. Delaware's statutory scheme already includes measures to foster empowerment and promote self-employment as an alternative to long-term unemployment.¹⁴³ The sideline-business exception would continue to foster those goals. In all fairness, it seems contrary to the purpose of the unemployment statute to deny a laid-off individual benefits just because that individual sells items on eBay or markets products from Avon.¹⁴⁴ Likewise, it seems artificial to cite to Pennsylvania's rule and policy rationale while adopting only half of its statutory scheme. Given the strictures of the exception's application, and the wage limits previously discussed,¹⁴⁵ there is no indication that the sideline-business exception would undermine the viability of the benefits scheme. Rather, it would merely complete the legislative framework.

III. CONCLUSION

In *O'Brien*, the Superior Court created Delaware's self-employment rule by importing a Pennsylvania statutory concept based upon the similarity between Delaware and Pennsylvania's policy statements. Since then, courts have struggled to define the rule's statutory connection and bounds. After 20 years, the rule's connection to the statutory text is still unclear, and its application is still unpredictable. The General Assembly should settle these issues by codifying the self-employment rule. Not only would legislative intervention resolve the outstanding legal and policy issues, but also it would solidify the scheme that O'Brien introduced.

143. See § 3328 (describing the "Self-Employment Assistance Program").

144. Courts have already recognized the rule's potentially unfair applications. See *Scott*, 2012 WL 2580820, at *3; *Workman*, 2011 WL 3903793, at *4.

145. See *supra* note 9.

**RECENT DEVELOPMENTS IN DELAWARE TRUST LITIGATION:
NOTABLE DECISIONS ADDRESSING ADULT ADOPTIONS, MIGRATION,
MODIFICATION, CONSTRUCTION, PAYMENT OF COUNSEL FEES,
AND TIME-BARRED CLAIMS**

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I. ABSTRACT

Over the last eighteen months or so, Delaware courts have issued several noteworthy trust law decisions. Most significant among them is the trio of Delaware Supreme Court decisions involving the Peierls trusts. A key takeaway from those decisions is that Delaware law will govern the administration of a trust moved to Delaware unless the trust instrument expressly provides otherwise. But the Peierls decisions weren't the only ones of interest. Other notable opinions involved adult adoptions and several others clarified key provisions of the trust code. What follows are summaries and analysis of the most significant recent decisions in Delaware trust law.

II. CASE SUMMARIES

A. Migration and Modifications

1. *In re Peierls Family Inter Vivos Trusts*, 77 A.3d 249 (Del. 2013);
In re Peierls Family Testamentary Trusts, 77 A.3d 223 (Del. 2013);
In re Peierls Charitable Lead Unitrust, 77 A.3d 232 (Del. 2013)

Historically, parties attempting to move trusts to Delaware often filed petitions with the Court of Chancery. Those petitioners typically sought the confirmation of the appointment of a Delaware corporate trustee, acceptance of jurisdiction over the trust, and the modification or reformation of the trust at issue. Under that practice, the Delaware corporate trustee's acceptance of appointment was often contingent upon the order from the court.

In 2012, the Peierls family sought to move several trusts to Delaware and appoint one corporate trustee for all the trusts in an effort to administer the trusts in an efficient manner.¹ The various trusts had broad dispositive and administrative provisions, were situated in different jurisdictions, and were not served by the same corporate trustee.² Moreover, most of the trusts had two individual trustees and a corporate trustee.³

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1. See *In re Peierls Family Inter Vivos Trusts*, 77 A.3d 249, 254 (Del. 2013).
2. See *id.*
3. See *id.*

The petitioners in Peierls filed several petitions with the Delaware Court of Chancery relating to five inter vivos trusts, seven testamentary trusts, and one charitable lead unitrust.⁴ Each petition requested that the Court: (i) approve the resignation of individual trustees; (ii) confirm the appointment of the Delaware corporate trustee; (iii) accept jurisdiction over the trusts so that Delaware would be the situs of the trusts and Delaware law would govern the administration of the trusts; and (iv) reform/modify certain administrative provisions of the trusts, including the addition of the positions of Investment Direction Adviser and Trust Protector, as well as the modernization of other administrative provisions.⁵

The Court of Chancery denied the petitions on several grounds. First, the Court denied the five inter vivos trusts petitions on the grounds that Delaware law did not govern the trusts and would not govern the trusts even if the Delaware corporate trustee accepted its appointment as successor corporate trustee.⁶ The Court reasoned that because Delaware law did not govern the trusts, it could not consider the proposed modifications.⁷ The Court of Chancery also denied the seven testamentary trust petitions because other states retained jurisdiction over those trusts.⁸ The Court of Chancery held that to consider those petitions would violate interstate comity principles.⁹ Finally, the Court of Chancery denied the charitable lead unitrust petition because, according to the Court of Chancery, the petitioners could change the situs and the law governing administration of the trust without court action, that Washington law still governed the administration of the trust, and that the ability to reform or modify the trust was, therefore, a matter of Washington law.¹⁰

Additionally, the Court of Chancery held that because the resignation and appointment of trustees was provided for in the trust instruments, it could not rule upon the resignation and appointment of trustees because doing so would constitute as an impermissible advisory opinion.¹¹ The petitioners appealed.

The Delaware Supreme Court analyzed three key issues in its opinions: (i) when does Delaware law govern the administration of a trust,¹² (ii) when can/should a court exercise jurisdiction over a trust,¹³ and (iii) whether the relief requested constituted an impermissible advisory opinion.¹⁴

The Supreme Court concluded that where a trust contains a choice of law provision, even one that references “administration,” the law governing the administration of a trust will change when the location of administration of the

4. *See id.* at 252.

5. *See In re Peierls Charitable Lead Unitrust*, 77 A.3d 232, 234 (Del. 2013).

6. *See Peierls Inter Vivos Trusts*, 77 A.3d at 260.

7. *See id.* at 255.

8. *See id.* at 229-30.

9. *See id.* at 227.

10. *See id.* at 237-38.

11. *See id.* at 237.

12. *See id.* at 256.

13. *See id.* at 228.

14. *See id.* at 237.

trust changes via a proper appointment of a successor trustee, unless the settlor specifically states her intent that a state's law shall *always* govern the administration of that trust.¹⁵

In analyzing what trust matters properly constitute “administration” such that they would be governed by the administrative law that applies to a trust, the Supreme Court ruled that all of the items of relief requested in the petitions - the change of existing trustees, the acceptance of jurisdiction over the trusts, the change of trust situs and administrative law, and the modifications of the trusts, including the creation of the positions of Investment Direction Adviser and Trust Protector - were “administrative matters.”¹⁶ The Supreme Court suggested that the analysis of the effect of a change in the place of administration of a trust on the law governing the administration of a trust may be different when “the trustee has become subject to the continuing jurisdiction of a particular court to which the trustee is thereafter accountable.”¹⁷

The Supreme Court, relying heavily on the *Restatement (Second) Conflict of Laws*, also analyzed the issue of when a Court can properly exercise jurisdiction over a trust.¹⁸ The Court noted that for a typical inter vivos trust that has never been the subject of court action, a court acquires jurisdiction “[o]nly when a beneficiary or trustee brings a suit over the trust,” and that this situation is distinguishable from the situation where the trustee has become subject to the continuing jurisdiction of a court to which the trustee is thereafter accountable.¹⁹ The Supreme Court determined that the Court of Chancery did have jurisdiction to adjudicate issues of administration of the testamentary trusts because all parties, including the trustee, had consented to the jurisdiction of the Court of Chancery, which satisfied the Due Process Clause.²⁰

The Supreme Court further concluded that, although the out-of-state order accepted jurisdiction over the trusts, there was no evidence that the Texas court exercised active control over the trusts and, therefore, it did not have exclusive jurisdiction or primary supervision over the trusts.²¹ Thus, the fact that a court at some point exercised jurisdiction over a trust does not mean a subsequent court order is needed for the court to relinquish jurisdiction; the key issue is whether the court specifically retained jurisdiction or is exercising ongoing control over the trust.²²

The Supreme Court upheld the Court of Chancery's holding that because no case or controversy existed with respect to the resignation or appointment of trustees of the unitrust, to rule upon such matters would constitute an impermissible advisory opinion.²³ Further, the Court instructed parties to play “pitch and catch” in situations where a foreign court has jurisdiction.²⁴ In other words, parties are advised to ask permission from the court to which the trust is accountable for the trust to leave the state and to ask the court which will assume jurisdiction to accept it.

15. *See id.* at 258-59.

16. *Id.* at 256.

17. *Id.* at 258 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 272 cmt. e. (1971)).

18. *See Peierls Inter Vivos Trusts*, 77 A.3d at 258.

19. *See id.*

20. *See id.* at 231.

21. *See id.* at 231.

22. *See id.*

23. *See id.* at 235.

24. *See id.* at 231.

2. *In re Latimer Trust*, 78 A.3d 875 (Del. Ch. 2013)

In this case, the Court of Chancery denied a petition that sought to modify a trust under the *cy pres* doctrine.²⁵ The trustee and a cemetery filed joint petitions to modify a trust established for the maintenance of two burial lots.²⁶ The settlor had established the trust at issue in 1924 for the benefit of two burial plots and their immediate surroundings in the cemetery.²⁷ Specifically, the trust “instructs that excess net income . . . be used (i) ‘for the renewal and replacement . . . of the vaults, monuments, [and] iron fence railing,’ (ii) ‘for the defence [sic], if needful, against any attempt to condemn the property for any purpose whatsoever,’ and (iii) if that defense is unsuccessful, ‘to remove the bodies’ from the Burial Lots ‘to another location.’”²⁸

The petitioners brought this action because the cemetery was in jeopardy of draining its endowment, and as a result, needed more money to maintain the property.²⁹ The trust had principal well in excess of what was needed to maintain the two burial plots.³⁰ The petitioners argued that the trust’s application of income and/or principal provisions could be read broadly to include surrounding areas of the cemetery and asked the Court to modify the trust to permit the trustee to distribute a unitrust amount to the cemetery annually.³¹ In support of their request for modification, the petitioners argued that the doctrine of *cy pres*, as reflected in the common law and as reflected in the *cy pres* statute, warranted the use of the trust’s funds to support the needed maintenance of a broader area of the cemetery which would in turn benefit the lots.³²

The Court of Chancery held that the trust was not a charitable trust because “[i]t provides for the preservation and maintenance of two specific burial lots and their immediate surroundings.”³³ Because the trust is a private trust, the Court of Chancery held that the common law doctrine of *cy pres* was not available.³⁴

The Court of Chancery then decided whether 12 *Del. C.* §3541 (the codification of the *cy pres* doctrine) allowed it to modify a trust.³⁵

In its current form, Section 3541 states:

- (a) Subject to subsection (b) of this section, if a particular charitable purpose or noncharitable purpose becomes unlawful under the Constitution of this State or the United States or the trust would otherwise no longer serve any religious, charitable, scientific, literary, educational, or noncharitable purpose:

25. See *In re Latimer Trust*, 78 A.3d 875, 877 (Del. Ch. 2013).

26. See *id.*

27. See *id.* at 877-78.

28. *Id.* at 878.

29. See *id.*

30. See *id.*

31. See *id.* at 878-79.

32. See *id.* at 879.

33. *Id.* at 882.

34. *Id.*

35. See *id.* at 882-83.

- (1) The trust does not fail in whole or in part;
 - (2) The trust property does not revert to the trustor or the trustor's successors in interest; and
 - (3) The Court of Chancery shall modify or terminate the trust and direct that the trust property be applied or distributed, in whole or in part, in a manner consistent with the trustor's charitable or noncharitable purposes, whether or not such purposes be specific or general.
- (b) The power of the Court of Chancery to modify or terminate a charitable or noncharitable purpose trust, as provided in subsection (a) of this section, is in all cases subject to a contrary provision in the terms of the trust instrument, whether such contrary provision directs that the trust property be distributed to a charitable or noncharitable beneficiary.
- (c) For purposes of this section, a "noncharitable purpose" is a purpose within the meaning of §3555 or §3556 of this title.³⁶

The Court of Chancery determined that Section 3541 set up a two-step inquiry before it could modify the trust.³⁷ The first inquiry is whether "the trust's purpose has become unlawful" or "whether the trust does not otherwise serve 'any ... noncharitable purpose'."³⁸ The second inquiry is "whether the settlor contemplated the particular contingency and provided for it."³⁹ The Court of Chancery held that "[b]y its terms, Section 3541 does not authorize judicial modification of burial lot trusts", and that if Section 3541 did apply the petitioners would not have gotten past the first step (i.e., they did not "allege that the trust's purpose became unlawful or that the trust no longer served 'ny ... noncharitable purpose'").⁴⁰ In essence, the Court of Chancery said, "the petitioner's real beef is that the Trust does not serve the purpose they prefer."⁴¹

The Court also rebutted the petitioner's argument that by failing to modify the trust to accommodate the needs of the cemetery, the cemetery will fall into despair, thereby damaging the burial plots by pointing out that the trust provided for the excess net income to "remove the bodies" from the burial lots "to another location."⁴²

Important in the Court's ruling was the acknowledgment that under Delaware's codification of the *cy pres* doctrine, even though expanded to include noncharitable trusts, a court's power to modify a trust requires a first inquiry into whether the trust is unlawful or no longer serves any charitable or noncharitable purpose, and not whether it is excessively funded or wasteful.⁴³ The Court of Chancery also held that the statutory *cy pres* doctrine is not available to trusts for the

36. *Id.* at 883 (quoting DEL. CODE ANN. tit. 12, § 3541 (West 2008)).

37. *Latimer Trust*, 78 A.3d at 883.

38. *Id.* (quoting DEL. CODE ANN. tit. 12, § 3541(a) (West 2008)).

39. *Latimer Trust*, 78 A.3d at 883.

40. *Id.* at 883-84 (quoting DEL. CODE ANN. tit. 12, § 3541(a) (West 2008)).

41. *Latimer Trust*, 78 A.3d at 884.

42. *Id.*

43. See *Id.*

maintenance of cemetery plots, by its terms.⁴⁴ One way to look at this ruling is to view it as a window into the Court of Chancery's opinion on when it is appropriate to modify trusts and that this court is reluctant to modify a trust even when there are no human beneficiaries and all other interested parties have consented to the modification. The other way to look at this ruling is to view it as a sign that the Court of Chancery is committed to ensuring that the settlor's intent is upheld unless the modification expressly meets the criteria under either common law or statutes that allow for modification.

B. Formation

1. *Otto v. Gore*, 45 A.3d 120 (Del. 2012)

Wilbert ("Bill") and Genevieve ("Vieve") Gore, founders of W. L. Gore and Associates, Inc., decided to form a trust for their grandchildren.⁴⁵ The Gores placed most of their company stock into a holding company and the holding company issued preferred stock, reducing the value of the common stock to almost nothing.⁴⁶ From there, the holding company transferred the common stock to a family trust for the Gore's grandchildren.⁴⁷ The Gores did this to "avoid incurring significant gift taxes at the time of transfer" by shifting any future appreciation on the value of the stock out of their estates and into the trusts which would then realize any gain.⁴⁸

The Gores formed the holding company in January, 1972.⁴⁹ In May of 1972, the Gores signed a trust (the "May Trust") before two witnesses and a notary.⁵⁰ The May Trust provided a formula for distributing the shares per stirpes.⁵¹ Attached to the May Trust was a Schedule A that listed 1,000 shares of the holding company as the property of the May Trust,⁵² but it was not signed or initialed.⁵³ Bill wrote a contemporaneous letter describing the May Trust and a plan of distribution for the stock that was different than that contained in the May Trust.⁵⁴ After Bill sent the letter, the letter and the May Trust disappeared into a file and were not discovered until they were produced during the discovery process of the litigation.⁵⁵

Meanwhile, the Gores subsequently signed another Trust in October, 1972 (the "October Trust").⁵⁶ Like the May Trust, the Gores attached a Schedule A to the October Trust listing 1,000 shares of the holding company as the

44. *See id.* at 884.

45. *See Otto v. Gore*, 45 A.3d 120, 124-125 (Del. 2012).

46. *See id.* at 125.

47. *See id.*

48. *Id.*

49. *See id.*

50. *See id.*

51. *See id.* at 126.

52. *See id.* at 125-26.

53. *See id.* at 126.

54. *See id.*

55. *See id.*

56. *See id.*

trust's property.⁵⁷ Unlike the May Trust, the Gores initialed this Schedule A and incorporated a new formula—the Pokeberry formula—into the October Trust.⁵⁸ Furthermore, instead of merely signing the October Trust as they did with the May Trust, the Gores placed “blue backers” on the trust to signify it as an original, delivered a copy to their lawyer, and requested a taxpayer identification number from the IRS.⁵⁹ It was this trust, the October Trust, that the parties initially believed governed the distribution of the shares, and it was the application of the October Trust's Pokeberry formula that ultimately spurred the underlying litigation.⁶⁰

Susan Gore, Bill and Vieve's daughter, married Jan C. Otto (“Jan C.”), and had three children (the “Otto Grandchildren”).⁶¹ Susan later divorced Jan C. during the 1990s.⁶²

In the early 2000s, Nathan Otto, one of Susan's children, discovered that upon Vieve's death, each of the grandchildren would receive 420 Gore shares, except for the Otto Grandchildren, who would receive only 95 shares pursuant to the Pokeberry formula.⁶³ The Otto Grandchildren received a lesser number of shares than the other grandchildren under the formula because four out of five of Bill and Vieve's children had four children of their own, whereas Susan had only three.⁶⁴ If Susan had had another child before Vieve passed, there would have been 20 grandchildren and each grandchild would have received 350 shares.⁶⁵ This would equalize the total number of shares to be owned by the grandchildren after inheriting shares owned directly by their parents.⁶⁶

Nathan wrote a letter to his extended family to discuss the Pokeberry formula.⁶⁷ Then, in March, 2013, while celebrating Vieve's birthday, Nathan asked Vieve to change the Pokeberry formula so that every grandchild received the same amount of shares.⁶⁸ Vieve declined to do so.⁶⁹

57. *See id.* at 126.

58. *See id.*

59. *See id.* at 127.

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.* at 128.

64. *See id.*

65. *See id.*

66. *See id.*

67. *See id.* at 127.

68. *See id.* at 128.

69. *See id.*

Thereafter, Susan considered adopting a child to equalize the Pokeberry formula allocation.⁷⁰ Jan C., her ex-husband, suggested that Susan adopt him⁷¹ which she later did.⁷² Jan C. agreed to give his shares back to the corpus of the October Trust and take only a nominal fee for serving as an adoptee.⁷³ Soon after the adoption, Jan C. began to reconsider this agreement.⁷⁴ After discovering Jan C.'s change of heart, Susan and the Otto Grandchildren discussed whether or not to un-adopt him; however, before a decision could be made, Vieve died, triggering the distribution of shares.⁷⁵

Susan eventually filed a petition for construction of the Pokeberry formula in the Delaware Court of Chancery, spawning the ensuing litigation and discovery that uncovered the May Trust.⁷⁶ Upon discovering the May Trust, and its alternate formula for distributing the shares, the Otto Grandchildren argued that the May Trust should control the distribution of shares instead of the October Trust because it was a validly executed irrevocable trust.⁷⁷ The Otto Grandchildren further argued that, with the May Trust in place and funded, the Gores could not have funded the October Trust with the shares.⁷⁸

The Court of Chancery held that, despite the Gores having signed the May Trust in the presence of two witnesses and a notary, and that the May Trust explicitly stated that it was an "Irrevocable Trust," the Gores actually intended to create a revocable place holder until the Gores completed their estate planning with the October Trust.⁷⁹

On appeal, the Delaware Supreme Court had to accept this lower court finding because it was one of fact.⁸⁰ As such, the Supreme Court reframed the legal issue before it to be whether the Gores intended to create a final legal document at all when they signed the May Trust.⁸¹

The Supreme Court relied on Delaware case law and treatises such as *Bogert on Trusts* and the *Restatement (Third) of Trusts* to decide this question.⁸² According to *Bogert's*, a settlor must form the intent to create a trust in order for that trust to be enforceable, and under the *Restatement*, the intent must be evidence by writing or by conduct.⁸³ The Supreme

70. *See id.* at 128.

71. *See id.*

72. *See id.* at 129.

73. *See id.*

74. *See id.*

75. *See id.*

76. *See id.* at 129.

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.* at 129.

81. *See id.* at 132.

82. *See id.* at 130.

83. *See id.*

Court noted that in this atypical case, it was presented with “extrinsic evidence” that “contradict[ed] the written manifestation of intent.”⁸⁴ The Court ultimately held that the Gores had not formed the requisite intent to create an enforceable trust when they signed the May Trust.⁸⁵

The Supreme Court defined intrinsic evidence as “evidence existing within the writing”, and extrinsic evidence as evidence relating to the writing but not appearing on the face of it.⁸⁶ Here the extrinsic evidence consisted of “the circumstances surrounding the creation of the trust[s] and the conduct” of the Gores.⁸⁷ The Supreme Court clarified that under the parol evidence doctrine they could not consider extrinsic evidence relating to the meaning of specific terms of the May Trust, but could use it to determine the Gores’ intent in creating the May Trust.⁸⁸

The Supreme Court concluded that there was clear intrinsic evidence that the Gores intended to create the May Trust, as evidenced by their signatures and the terms of the trust itself.⁸⁹ However, the Court found that the extrinsic evidence outweighed that of the intrinsic evidence, thereby demonstrating the Gores intent not to create a binding legal document when they signed the May Trust.⁹⁰

The Supreme Court applied the factual findings made by the Court of Chancery,⁹¹ to the legal issue of whether or not the Gores intended for the May Trust to be a “final and legally binding trust at all.” In doing so, the Court rejected the lower court’s holding that the May Trust was a legally binding, but revocable trust.⁹² First, the Supreme Court concluded that under “well-settled law,” the decision not to communicate the existence of a trust to anyone, while not conclusive, is persuasive evidence that the Gores had not intended for the May Trust to be enforceable.⁹³ The Court found other evidence, such as the Gores’ failure to use the same “formal procedure they used when signing other irrevocable trusts both before and after” the May Trust to be more convincing.⁹⁴ For example, for the other twenty-seven trusts the Gores executed, “they (i) signed two originals not just one, (ii) placed a color backer on the signed originals to indicate that it was a final trust instrument, (iii) initialed Schedule A of the originals, (iv) sent a conformed copy to their lawyer, and (v) requested a taxpayer identification number from the IRS.”⁹⁵ The Supreme Court noted that the Gores did none of these procedures for the May Trust.⁹⁶

84. *Id.*

85. *See id.* at 134.

86. *See id.* 130-31.

87. *See id.* at 131.

88. *See id.*

89. *See id.*

90. *See id.* at 132-34.

91. *See id.* at 130.

92. *Id.* at 132.

93. *See id.* at 132.

94. *Id.* at 133.

95. *See id.*

96. *Id.*

Although the Supreme Court adopted the Vice-Chancellor's finding that the Gores intended to create a "placeholder" with the May Trust, it determined that the May Trust was not even a revocable trust because, by definition, a placeholder "cannot establish a settlor's intent to create a finalized, enforceable trust."⁹⁷

The other extrinsic evidence that the Supreme Court found "particularly persuasive" was that in May, 1972, Bill sent a letter to his lawyer requesting that the trust "equalize as nearly as possible to the expectations of Gore stock," a request that, according to the Supreme Court, was contrary to the distribution method in the May Trust.⁹⁸ After balancing all the evidence, the Supreme Court concluded that, despite the intrinsic evidence of the Gores' intent for the May Trust to be irrevocable, the extrinsic evidence to the contrary (i.e., the Gores' conduct before and after the execution of the documents) was too strong and proved otherwise.⁹⁹

This ruling makes clear that the Delaware courts may look to evidence outside of the document when determining the settlor's intent when the intent is not clear. This ruling also raises some new questions: What if the Gores had executed the May Trust with the same procedural steps they had taken with the other twenty-seven trusts, but told no one of its existence, or vice-versa? In other words, how much extrinsic evidence is needed to overcome the clear intrinsic evidence?

C. Adult Adoptions

1. *Otto v. Gore*, 45 A.3d 120 (Del. 2012)

As mentioned in the previous section, Susan Gore adopted her ex-husband, in the words of the Court of Chancery, "for the sole, and improper, purpose of thwarting or circumventing the Gores' intentions regarding the [October] Trust."¹⁰⁰ Shortly after Nathan failed to convince his grandmother Vieve Gore to change the Pokeberry formula, Jan C. Otto, Nathan's father and Susan's ex-husband, suggested that Susan adopt him to "equalize" the application of the formula.¹⁰¹ Within four months Susan formally adopted him.¹⁰²

The Court of Chancery held that although the adoption was legal under Wyoming law, it would not recognize Jan C. as a grandchild and, therefore, as a beneficiary, for purposes of the October Trust.¹⁰³ The Delaware Supreme Court adopted the Court of Chancery's factual findings and affirmed the ruling.¹⁰⁴

The Delaware Supreme court again looked to both extrinsic and intrinsic evidence to determine whether or not the Gores intended to include adopted adults as beneficiaries of the October Trust.¹⁰⁵ On its face, the October Trust defines

97. *Id.*

98. *See id.* at 134.

99. *See id.*

100. *Id.* at 136.

101. *See id.* at 128.

102. *See id.* at 129.

103. *See id.* at 137.

104. *See id.* at 137.

105. *See id.* at 136.

child as “child, children, or issue of that person by adoption as well as by blood.”¹⁰⁶ The October Trust did not define “grandchild.”¹⁰⁷ The Supreme Court then upheld the Vice-Chancellor’s ruling that there was an ambiguity as to “whether a person adopted as an adult for purely strategic reasons, and not for the purpose of creating a parent-child relationship with its attendant emotional ties is a ‘grandchild’” under the October Trust.¹⁰⁸

The Supreme Court then adopted the Vice-Chancellor’s factual finding that the Gores “did not intend to provide for adult adoptees with whom their children had no parent-child relationship.”¹⁰⁹ The Court of Chancery found evidence for this in a letter that the Gores sent to their lawyer stating that the class of beneficiaries would close “at the time of the death of the last of G.W.G. or W.L.G. or at the time our daughter Betty reaches 45 years of age (or May 2, 1992) whichever occurs last—note: *so that all our Grandkids are born.*”¹¹⁰ It was this language that the Court emphasized demonstrated that “the Gores considered grandchildren as minors and who were part of and integral to the parent-child relationship.”¹¹¹ Since Jan C. was 65 years old at the time of the adoption, the Supreme Court found that the Gores did not intend for him to be a beneficiary.¹¹²

The Supreme Court also held that under existing Delaware law it may consider the purpose of the adoption to determine the “collateral economic consequences of an adult adoption for a trust”¹¹³ and noted that there are “common sense limitations on any adult adoption.”¹¹⁴ Because this adoption was purely for the strategic purpose of circumventing the Pokeberry formula, the Supreme Court upheld the Court of Chancery’s decision not to include Jan C. as a beneficiary of the October Trust.¹¹⁵

2. *H.M.A. v. C.A.H.W.*, C.A. No. 95-05-03-A, 2013 WL 1748618 (Del. Fam. Ct. Mar. 28, 2013)

In 1995, “for the purposes of financial and estate planning and to formalize the close emotional relationship existing between them,” the petitioner legally adopted the respondent.¹¹⁶ At the time of that adoption and for fifteen years thereafter, Delaware did not recognize civil unions.¹¹⁷ In 2011, however, Delaware passed a bill allowing same-sex couples to

106. *Id.*

107. *See id.*

108. *Id.*

109. *Id.*

110. *See id.* at 136.

111. *Id.*

112. *See id.* at 137.

113. *Id.* at 137.

114. *Id.*

115. *See id.*

116. *H.M.A. v. C.A.H.W.*, C.A. No. 95-05-03-A, 2013 WL 1748618, at *1 (Del. Fam. Ct. Mar. 28, 2013).

117. *See id.* at *2.

enter into civil unions with all the rights and responsibilities of marriage under Delaware Law.¹¹⁸ Delaware's governor signed that bill into law on May 11, 2011, and same-sex couples have been able to enter into civil unions since January 1, 2012.¹¹⁹

The petitioner and respondent desired to enter into a civil union.¹²⁰ Delaware law prohibits civil unions between a person and his "ancestor" or "descendant," among others.¹²¹ Thus, the parties sought relief pursuant to Family Court Civil Rule 60(b)(5) and 60(b)(6), arguing that it is no longer equitable for the decree of adoption to apply prospectively.¹²²

Noting that the court can reopen and vacate adoptions in limited circumstances, the Family Court of Delaware for Sussex County did so on equitable grounds—upon a finding of "extraordinary circumstances"—so that the parties could enter into a civil union.¹²³ While court orders are rarely vacated, the circumstances here were such that equity dictated it be done.¹²⁴

D. ADMINISTRATION

1. *In re the Trust of Vale ex rel. Asche*, C.A. No. 7662-ML, 2013 WL 3804584 (Del. Ch. July 19, 2013)

Mrs. Vale died testate in 1961, leaving in her will a trust for the benefit of her daughter, Mrs. Asche.¹²⁵ "Mrs. Vale's will provided that, upon Mrs. Asche's death, the principal of the trust would be divided into equal shares" among Mrs. Vale's grandchildren.¹²⁶ Mrs. Asche died in 2001.¹²⁷ One of the shares set up a trust for Frederic B. Asche, Jr., a.k.a. Tex ("Tex").¹²⁸ Mrs. Vale's will gave Tex a power of appointment.¹²⁹ If he failed to exercise his power of appointment, the trust would distribute the remaining principal to Tex's issue, per stirpes.¹³⁰

118. *See id.*

119. *See id.* at *1.

120. *See id.*

121. *See id.*

122. *See id.* at *1.

123. *See id.* at *2.

124. *See id.*

125. *See In re the Trust of Vale ex rel. Asche*, C.A. No. 7662-ML, 2013 WL 3804584, at *1 (Del. Ch. July 19, 2013).

126. *See Id.*

127. *See id.*

128. *See id.*

129. *See id.* at *2.

130. *See id.*

When Tex died, he left behind five children and his wife, Sallie.¹³¹ During Tex's life, Tex executed several wills and codicils.¹³² On September 29, 2011, Tex purportedly exercised his power of appointment, leaving everything in the trust to Sallie.¹³³ After Tex's death, Sallie filed an application to admit Tex's will to probate on October 18, 2011.¹³⁴

Shortly after applying Tex's will to probate, Sallie died, leaving her estate to a trust, the beneficiary of which was Baylor University Medical Center of Dallas ("Baylor").¹³⁵ If Tex's power of appointment was valid, the assets of Tex's trust would go to Baylor.¹³⁶ If it was invalid, the assets would go to his children.¹³⁷

Tex's children filed a will contest in the Texas probate court on August 1, 2012, alleging that their father lacked capacity to make a will and was under undue influence.¹³⁸ The executrix of Sallie's estate meanwhile demanded that PNC Delaware Trust Company ("PNC"), the trustee of Tex's trust, distribute the trust's assets to Sallie's estate so that Sallie's executrix could then transfer those assets to Baylor.¹³⁹

PNC filed a petition in the Delaware Court of Chancery seeking, among other things, instructions on whether it should distribute Tex's trust's assets to Sallie's estate.¹⁴⁰ Sallie's estate and Tex's children each filed briefs in support of their respective positions.¹⁴¹ Sallie's estate argued that, because the Texas Probate Court granted an "order" admitting the will to probate, and that that order stated that the testator was of sound mind and body, PNC had to distribute the trust assets to Sallie's estate.¹⁴² Tex's children, on the other hand, argued that PNC should hold the assets pending resolution of the will contest.¹⁴³

In her final report, Master LeGrow pointed out that the granting of the probate order was a quasi-administrative proceeding that was uncontested and convened without notice to Tex's children.¹⁴⁴ She further held that, because Tex's children had challenged the validity of the will itself and not the ability of the executor to gather assets pursuant to the

131. *See id.* at *2.

132. *See id.*

133. *See id.*

134. *See id.*

135. *See id.* at *3.

136. *See id.*

137. *See id.* at *4.

138. *See id.* at *3.

139. *See id.* at *4.

140. *See id.*

141. *See id.*

142. *See id.* at *5.

143. *See id.* at *5.

144. *See id.* at *3.

probate order, objecting to an immediate distribution in this matter was not a direct challenge to the Texas probate order, and therefore not a collateral attack on the Texas order.¹⁴⁵ In Master LeGrow’s words, to view it otherwise would “mean that if an independent executor attempts to gather an asset, the ownership of which is disputed, no court in the land can enter an order respecting that asset, other than the court that appointed the executor.”¹⁴⁶

Likewise, Master LeGrow determined that, although the Texas probate order was final for the purpose of taking an appeal, entry of an order instructing PNC to hold and manage the trust assets through the pendency of the Texas will contest would not be in violation of the Full Faith and Credit Act because the issue of the decedent’s testamentary capacity had not been made final by the Texas Probate Court.¹⁴⁷

The take-away from this case is that a trustee should not proceed with the distribution of a trust’s assets when there is an action in another jurisdiction challenging the ultimate beneficiaries of the trust. Here, the will—whose power of appointment would have the assets go to Sallie—was being challenged by the default trust beneficiaries. The life beneficiary’s death necessitated PNC to distribute the trust’s assets, but the will contest cast doubt on who should receive those assets. The Court of Chancery did not need to consider the merits of the will contest, to order PNC to hold the assets pending final resolution of the Texas case. This case shows that the court will use its equitable powers to weigh the hardships parties to a will contest might ultimately suffer, similar to how a court balances the equities in a preliminary injunction case.

E. Litigation and Attorneys’ Fees

1. *Mennen v. Wilmington Trust, C.A. No. 8432-ML, 2013 WL 5288900* (Del. Ch. September 18, 2013); *Mennen v. Wilmington Trust, C.A. No. 8432-ML, 2013 WL 4083852* (Del. Ch. July 25, 2013)

The Plaintiffs in this still-ongoing case, Kathryn Mennen, Sarah Mennen, John Mennen, Shawn Mennen, and Alexandra Mennen (collectively, the “Beneficiaries”) are beneficiaries of a trust created in 1970 by George S. Mennen for the benefit of John H. Mennen (the “Trust”).¹⁴⁸ The defendants are Wilmington Trust Company (“Wilmington Trust”), the corporate trustee of the Trust, and George Jeff Mennen (“Jeff” together with Wilmington Trust, the “Co-Trustees”), who is the individual trustee.¹⁴⁹ Plaintiffs seek damages in excess of \$100 million as a result of alleged breaches of the Co-Trustees’ fiduciary duties.¹⁵⁰

This action was preceded by a petition for instructions filed by Wilmington Trust to remove Jeff as the individual co-trustee of the Trust (the “Petition Action”).¹⁵¹ In the Petition Action, Wilmington Trust alleged that Jeff had caused

145. *See id.* at *7.

146. *Id.* at *8.

147. *See id.* at *9.

148. *See Mennen v. Wilmington Trust, C.A. No. 8432-ML, 2013 WL 4083852, at *1* (Del. Ch. July 25, 2013).

149. *See id.*

150. *See id.*

151. *See id.*

the Trust to lose a substantial portion of its value.¹⁵² Wilmington Trust argued that the Trust was a directed trust, requiring Wilmington Trust to follow Jeff's instructions.¹⁵³ "Wilmington Trust sought (1) removal of Jeff as individual trustee, (2) an order authorizing the adult beneficiaries of the Trust to appoint a successor individual co-trustee, and (3) access to certain investment information Jeff allegedly was withholding."¹⁵⁴ The Beneficiaries did not participate in that case, but in March 2013, the Beneficiaries filed this case and the Court of Chancery stayed the Petition Action.¹⁵⁵

On June 12, 2013, the Beneficiaries filed a motion to compel (the "First Motion to Compel") production of the Co-Trustees' internal and external communications with counsel related to the Petition Action which they had continued to refuse to do.¹⁵⁶ Wilmington Trust also refused to create a privilege log for the documents it withheld relating to the Petition Action.¹⁵⁷ In addition, while Wilmington Trust raised the "advice of counsel defense," it refused to produce documents related to that defense.¹⁵⁸

The Motion to Compel sought from Wilmington Trust "all privileged documents related to the Trust through March 22, 2013," the date they filed their Verified Complaint, as well as "all privileged documents related to the Trust" and created thereafter if "not created in connection with [the] defense" of this action.¹⁵⁹ The Plaintiffs asserted that, under *Riggs National Bank of Washington D.C. v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976), "Wilmington Trust must turn over all documents related to the Petition Action because that action ... was brought on behalf of the Beneficiaries, who were, in effect, the ultimate clients of the attorneys ... representing Wilmington Trust."¹⁶⁰ Wilmington Trust argued that because litigation with the Beneficiaries was reasonably anticipated when it retained counsel, and because it paid for that legal advice itself rather than using trust assets to pay those fees, the *Riggs* factors did not support the application of a fiduciary exception to attorney-client privilege.¹⁶¹

The Motion to Compel raised three issues: (1) whether Wilmington Trust could withhold documents that related to the Petition Action under *Riggs National Bank of Washington, D.C. v. Zimmer*; (2) whether communications regarding Wilmington Trust's powers and duties under the Trust Agreement were privileged under *Riggs*; and (3) whether Wilmington Trust's decision to plead the affirmative defense of advice of counsel in its answer to the complaint waived the privilege.¹⁶² On July 25, 2013, Master LeGrow issued a final report recommending that the Court find that (1) Wilmington Trust was entitled to withhold the Petition Action documents, but was required to produce a privilege log of the

152. *See id.*

153. *See id.*

154. *See id.* at *1.

155. *See id.*

156. *See id.* at *2.

157. *See id.*

158. *See id.*

159. *Id.* at *8 -10.

160. *See id.* at *2.

161. *See id.*

162. *See id.*

withheld documents; (2) the powers and responsibilities documents that were not related to the Petition Action or the Beneficiary Action were not privileged under *Riggs*;¹⁶³ and (3) Wilmington Trust should determine, if it had not already done so, whether to pursue its advice of counsel defense.¹⁶⁴

While the Master acknowledged that *Riggs* continues to be the law in Delaware, she found that the plaintiffs-beneficiaries bear the burden of showing that *Riggs* applies to each of the categories of documents that they sought to compel.¹⁶⁵ As the Master explained, in *Riggs*, “the application of the fiduciary exception to the attorney-client privilege primarily turned on a determination of who the ‘real’ or ‘ultimate’ client was, meaning the person for whose benefit the legal advice was procured.”¹⁶⁶ To make this determination, Delaware courts apply *Riggs* and examine: “(i) the purpose of the legal advice; (ii) whether litigation was pending or threatened between the trustee and the beneficiaries at the time the advice was obtained; and (iii) the source from which the legal fees associated with the advice were paid.”¹⁶⁷ Here, the Court found that Wilmington Trust decided to obtain the legal advice because it was reasonably worried about its liability exposure.¹⁶⁸ Moreover, the Court also found that there was a real threat of litigation between Wilmington Trust and the beneficiaries¹⁶⁹ because the trust’s largest holding had gone bankrupt which resulted in a significant decline in the trust’s value. Regarding the last prong of the *Riggs* test, the Court explained that “Delaware law confirms that a trustee’s retention of counsel, and its payment of counsel’s fees out of trust funds, does not operate as a waiver of the attorney-client privilege.”¹⁷⁰ As a result of those findings, the Master upheld the privilege as to the documents at issue, but required Wilmington Trust to create a privilege log.¹⁷¹

Two days before the Master issued her final report on the First Motion to Compel, Wilmington Trust “alerted the parties that it intended to pursue its advice of counsel defense and therefore would withdraw its claim of privilege with regard to ‘advice and documents related to the Co–Trustees['] duties and powers.’”¹⁷² However, “Wilmington Trust stated that its withdrawal of its privilege claim ‘[did] not affect Wilmington Trust’s assertion of privilege with regard to any advice or documents created in early 2012, following the bankruptcy filing of Wave2Wave Communications, Inc., and thereafter.’”¹⁷³

163. *See id.* at *10.

164. *See id.* at *8.

165. *See id.* at *4.

166. *Id.* (citing *Riggs Nat’l Bank v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976)).

167. *Mennen*, 2013 WL 4083852, at *4.

168. *See id.* at *5.

169. *See id.*

170. *Id.*

171. *See id.* at *6.

172. *Mennen v. Wilmington Trust*, C.A. No. 8432-ML, 2013 WL 5288900, at *3 (Del. Ch. Sept. 18, 2013) (quoting *Shindel Aff. Ex. 6*, at 1).

173. *Mennen v. Wilm. Trust*, 2013 WL 5288900, at *3 (quoting *Shindel Aff. Ex. 6*, at 2).

The Beneficiaries then sought clarification (the “Second Motion to Compel”) of what the First Motion to Compel order required Wilmington Trust to produce in light of its decision to pursue the advice of counsel defense.¹⁷⁴ “[T]he Beneficiaries argued that Wilmington Trust’s advice of counsel defense had placed all the Powers and Responsibilities Documents at issue, even those after the Wave2Wave bankruptcy”, and as such, Wilmington Trust needed to produce those documents.¹⁷⁵

At the conclusion of the hearing on the Second Motion to Compel, Master LeGrow issued a draft report from the bench that recommended the Court enter an order finding that, “by invoking an advice of counsel defense regarding the directed nature of the Trust, Wilmington Trust had waived attorney-client privilege as to all Powers and Responsibilities Documents, regardless of when those documents were created.”¹⁷⁶ She also held that the “‘at issue’ waiver of privilege did not equate to a waiver of work-product protection, and that [she] would not address whether Wilmington Trust was required to produce work-product until a privilege log had been produced and the Beneficiaries explained why production of specific work-product documents was appropriate under Rule 26(b)(3).”¹⁷⁷

In her final Report, Master LeGrow held that Wilmington Trust “waived attorney-client privilege for all communications with counsel regarding its powers and duties under the trust agreement”, other than communications in which counsel directly evaluated the trustee’s potential exposure or its litigation strategy.¹⁷⁸ Wilmington Trust maintained that the trust is directed.¹⁷⁹ Given that stance, the Master found that the trustee placed at issue the advice of counsel regarding to what extent the trust agreement required the corporate trustee to follow investment directions from Jeff.¹⁸⁰ Wilmington Trust agreed that it was waiving privilege as to all powers and responsibilities documents, but it sought to limit that waiver to communications relating to challenged decisions.¹⁸¹ The Master concluded, however, that allowing the requested limitation “would unfairly limit or eliminate the Beneficiaries’ ability to assess the reliability of the advice and the factual information on which it was based.”¹⁸² Wilmington Trust cited patent infringement cases and argued that the waiver should only extend to the information base of the legal advice from which the reliance allegedly arose.¹⁸³ Nevertheless, the Master found that the patent infringement case law was not convincingly analogous.¹⁸⁴

174. *See* *Mennen v. Wilm. Trust*, 2013 WL 5288900, at *3.

175. *Id.*

176. *Id.* at *4.

177. *Id.*

178. *Id.* at *1.

179. *See id.* at *2.

180. *See id.* at *6.

181. *See id.*

182. *Id.*

183. *See Id.* at *7.

184. *See id.* at *8.

F. Non-Prevailing Parties Fees to be Paid Out of Trust

1. *IMO Trust for Grandchildren of Gore, C.A. No. 1165-VCN, 2013 WL 771900, at *5 (Del. Ch. Feb. 27, 2013)*

At the conclusion of the litigation regarding the Gore Trusts (previously discussed herein), the court ordered that all parties' fees be paid by the trust.¹⁸⁵ The discovery taken by the non-prevailing parties in the course of the litigation uncovered a possible alternative trust instrument that may have controlled the distribution of shares of stock.¹⁸⁶ This trust instrument appeared to be "irrevocable" and predated the other previously known trust instrument.¹⁸⁷ Had the Court held that this alternate instrument held the shares of stock and controlled its distribution, the respondents would have been entitled to the greater number of stock shares they were seeking.¹⁸⁸ The Court of Chancery concluded that without the judicial resolution resulting from the discovery of the second instrument, proper administration of the trust would have been impossible.¹⁸⁹ Therefore, the Court reasoned, the litigation –regardless of its original intent– benefitted the trust.¹⁹⁰

This case also involved a strategic adoption which was not disclosed until after the death of the surviving co-settlor.¹⁹¹ The prevailing parties in the underlying litigation had argued that the failure to disclose the adoption was in bad faith because it deprived the surviving co-settlor of the opportunity to clarify the intention of the trust and as such should serve to shift the payment of fees related to the litigation to the non-prevailing parties instead of the trust.¹⁹² In declining to shift fees, the Court of Chancery concluded that there were other plausible reasons for the failure to disclose the adoption in the final days of the elderly co-settlor's life and that it was unlikely the disclosure would have prevented litigation.¹⁹³

One additional point of interest was the Court's decision to reimburse out of the trust the co-trustees for tax counsel fees and expenses related to this litigation.¹⁹⁴ The Court of Chancery, while admittedly unfamiliar with the intricacies and scope of the tax work involved (because the specific nature of the work was not disclosed), found that the tax analysis provided relevant, beneficial information regarding a potential settlement.¹⁹⁵ And while the tax counsel fees were "large," the court found that they "were reasonable in amount and will be approved."¹⁹⁶

185. See *IMO Trust for Grandchildren of Gore, C.A. No. 1165-VCN, 2013 WL 771900, at *5 (Del. Ch. Feb. 27, 2013)*.

186. See *id.* at *4.

187. See *id.* at *3.

188. See *id.*.

189. See *id.*

190. See *id.*

191. See *id.* at *2.

192. See *id.*

193. See *id.* at *3.

194. See *id.* at *1.

195. See *id.*

196. *Id.*

In a subsequent opinion, the Court of Chancery decided that the amount of attorneys' fees it previously awarded in a lengthy trust dispute should be in the public domain,¹⁹⁷ unless the parties could demonstrate a "principled basis" for keeping it under seal.¹⁹⁸ The Court explained that "the Public is entitled to know what the Court does" and that the fees awarded provided an example to the Public of just how expensive litigation can be.¹⁹⁹

Before releasing an un-redacted order, the Court invited the parties to offer any further arguments as to why those fee awards should remain under seal.²⁰⁰ The parties opted not to do so, and on April 5, 2013, the Court publicly released its Order Awarding Attorneys' Fees without any redactions.²⁰¹

G. Time-barring Statutes

1. *Cummings v. Lewis*, C.A. No. 6948-VCP, 2013 WL 2987903, at *2 (Del. Ch. June 17, 2013)

Plaintiff sought an award against the estate of her daughter's father under Delaware's after-born child statute, 12 *Del. C.* §301.²⁰² Plaintiff maintained that the decedent, well-known boxing promoter and businessman, Ronald E. "Butch" Lewis, fathered her child shortly before his death.²⁰³ Thirteen months after Mr. Lewis died, Plaintiff filed a statement of claim with the Register of Wills for future child support.²⁰⁴ The Court of Chancery had previously stayed much of the case pending resolution of the child support claims in Family Court on the grounds that those claims were not ripe or, alternatively, sought advisory opinions.²⁰⁵

The only request that the Court of Chancery allowed to go forward was the estate's request for a declaratory judgment that the Plaintiff's child support claims are time-barred by 12 *Del. C.* §2102(a).²⁰⁶ Section 2102(a) states that "all claims before the death of a decedent must be made against the decedent's estate within eight months after his death."²⁰⁷

197. See Letter to Counsel at 2, IMO Trust for Grandchildren of Gore, C.A. No. 1165-VCN, ID 51412389 (Del. Ch. Feb. 27, 2013).

198. Letter to Counsel, *supra* at 2.

199. See Letter to Counsel, *supra* at 2.

200. See Letter to Counsel, *supra* at 2.

201. See IMO Trust for Grandchildren of Gore, C.A. No. 1165-VCN, 2013 WL 1402219 (Del. Ch.) (Del. Ch. Apr. 5, 2013) (TRIAL ORDER).

202. See *Cummings v. Lewis*, C.A. No. 6948-VCP, 2013 WL 2987903, at *2 (Del. Ch. June 17, 2013).

203. See *id.*

204. See *id.* at *1.

205. See *id.*

206. See *id.*

207. *Id.* (citing DEL. CODE ANN. tit. 12, § 2102(a) (West 1995)).

Plaintiff contended that her claim was timely because it was asserted within six months of the birth of her daughter.²⁰⁸ For support, Plaintiff cited to Section 2012(b)'s language that "[a]ll claims against a decedent's estate which arise at or after the death of the decedent" are barred against the estate "within 6 months after [the claim] arises."²⁰⁹

The Court, however, relied on the language of Section 2102(a) and found that the Plaintiff's child support claim was time-barred.²¹⁰ The Court held that the clock started running from conception and not birth based on Section 2012(a)'s application to all claims whether "due or to become due, absolute or contingent."²¹¹ The Court concluded that because the Plaintiff knew of the conception before Mr. Lewis' death, she had a claim for child support that was contingent on a live birth, and therefore it came within the statute.²¹²

Notably, the Court explained that this result was not unduly harsh because Plaintiff could have fairly easily made a claim against the estate while she was pregnant.²¹³

**2 *In re IMO the Revocable Trust of Conlin*, C.A. No. 8052-ML, 2014 WL 242655,
at *5 (Del. Ch. Jan. 21, 2014)**

In entering summary judgment in favor of the trustee in this case of alleged breach of fiduciary duties, Master in Chancery LeGrow found that the undisputed facts showed that the beneficiary was on inquiry notice of any alleged wrongdoing by the trustee no later than January 2008.²¹⁴ It was at this time the beneficiary began receiving monthly statements for the trust and at which point the Master found that the beneficiary was aware of what assets the trustee held in the trust.²¹⁵ Further, the beneficiary had started "asking questions about the trust and the assets that comprised the trust corpus no later than 2007."²¹⁶ The Master noted that "although the beneficiary retained counsel and requested documents from [the trustee] during that time period and apparently believed the documents the trustee provided did not fully satisfy her requests, [the beneficiary] took no further steps to assuage her concerns until 2012, when she finally hired a forensic accountant."²¹⁷ The beneficiary didn't file this case until November 21, 2012.²¹⁸ The Master found that the beneficiary's "receipt of the monthly statements and [the beneficiary's] own conduct in raising questions about assets

208. See *Cummings*, 2013 WL 2987903, at *1.

209. *Id.* at *4 (quoting DEL. CODE ANN. tit. 12, § 2102(b) (West 1995)).

210. See *Cummings*, 2013 WL 2987903, at *8 (citing DEL. CODE ANN. tit. 12, § 2102(a) (West 1995)).

211. *Cummings*, 2013 WL 2987903, at *5 (quoting DEL. CODE ANN. tit. 12, § 2102(a) (West 1995)).

212. See *Cummings*, 2013 WL 2987903, at *5.

213. See *id.*

214. See *In re IMO the Revocable Trust of Conlin*, C.A. No. 8052-ML, 2014 WL 242655, at *5 (Del. Ch. Jan. 21, 2014).

215. See *id.*

216. *Id.*

217. *Id.*

218. *Id.* at *2.

she believed were missing from the trust demonstrates she was aware or should have been aware of the conduct she alleges constituted a breach of [the trustee's] fiduciary duties."²¹⁹

The Master applied the three year statute of limitations under 10 *Del. C.* §8106 (a point conceded by the beneficiary), and noted that the three years "begins to run at the time of the alleged wrongful act, even if a party is ignorant of the cause of action or harm suffered."²²⁰ The Master also found that there was no basis to toll the statute of limitations.²²¹ As a result, the Master recommended dismissal of the beneficiary's claims.²²²

H. Spendthrift Trusts

1. *Mennen v. Wilmington Trust Company, C.A. No. 8432-ML, at 1 (Court? January 17, 2014)*

The Plaintiffs in this on-going case, the beneficiaries of a trust, are seeking the removal of the co-trustees and damages in excess of \$100 million as a result of alleged breaches of the co-trustees' fiduciary duties.²²³ The trust is one of four created by the grantor for each of his children and their issue.²²⁴ The defendant trustees include an individual who is the beneficiary of one of the other four trusts.²²⁵ "If the Plaintiffs succeed in their claims against the individual trustee of the trust, they may be entitled to tens of millions of dollars in damages that the individual trustee likely will not be able to pay."²²⁶ Hence, if they are awarded damages, Plaintiffs seek to pierce the individual trustee's separate trust, despite it being subject to a spendthrift clause.²²⁷

In addition to arguing that summary judgment on this issue was not ripe because there remained disputed issues of fact, Plaintiffs disputed the enforceability of the spendthrift provision against them. In support of this, Plaintiffs argued that they are not creditors contemplated by the trust's terms or 12 *Del. C.* §3536 (Delaware's spendthrift statute).²²⁸ Plaintiffs also argued that, "even if they are creditors, they may pierce the spendthrift trust because (1) public policy precludes

219. *Id.* at *5.

220. *See id.* at *3-4.

221. *See id.* at *4-5.

222. *See id.* at *6.

223. *Mennen v. Wilmington Trust, C.A. No. 8432-ML, 2013 WL 4083852, at *1 (Del. Ch. July 25, 2013).*

224. *Id.* at 2.

225. *See Mennen v. Wilmington Trust Company, C.A. No. 8432-ML, at *1 (Del. Ch. January 17, 2014).*

226. *Id.*

227. *See id.*

228. *See id.* at 5.

enforcing a spendthrift trust against tort claimants of the [Plaintiffs'] variety, or (2) the [trusts at issue] are essentially sub-trusts, and the [Plaintiffs] are entitled to impound" the individual trustee's interest in his separate trust.²²⁹

The Master rejected all of Plaintiffs' arguments. In so doing, she explained that, "[a]lthough the policy arguments against enforcement of spendthrift clauses are interesting and compelling, the passage of Section 3536 made clear that this Court must enforce such clauses, subject only to the limits contained or permitted in the statute."²³⁰ She went on to note that, while spendthrift clauses are not "entirely unassailable," Plaintiffs' arguments for an exception under these facts are unavailing.²³¹ Specifically, the Master concluded that if Plaintiffs were successful at trial, they would merely become creditors of the individual trustee within the meaning of Section 3536.²³² The Plaintiffs argued that as tort claimants and family members they should be entitled to pierce the trust, but the Master explained that there is ample precedent that tort claimants are creditors within the meaning of Section 3536.²³³ And, the fact that Plaintiffs were family members of the alleged tortfeasor did not entitle them to an exception to spendthrift law in the way "support obligations" may.²³⁴

The Master further explained that Delaware law also does not recognize an exception to spendthrift clauses for repeated acts of wrongdoing.²³⁵

As to Plaintiffs' argument that they were entitled to impound the individual trustee's interest in his trust, the Master found that even if impoundment is available as a remedy in Delaware, which did not need to be decided, it would not be applicable because the trusts at issue are separate trusts, not shared interests under a single trust, and its application would violate Section 3536. (In any event, it would be "legally impossible" because the individual trustee had no identifiable share in his separate trust).²³⁶ For all those reasons, the Master recommended granting the individual trustee's motion for summary judgment.²³⁷

229. *See id.*

230. *See id.* at 9.

231. *Id.*

232. *See id.* at 13.

233. *See id.* at 11, 13-14.

234. *See id.* at 12.

235. *See id.* at 16.

236. *See id.* at 17-20.

237. *See id.* at 21.

THE E-DISCOVERY PROMISED LAND: THE USE OF E-NEUTRALS TO AID THE COURT, COUNSEL, AND PARTIES

Ryan P. Newell*

*I've done my best to live the right way
I get up every morning and go to work each day
But your eyes go blind and your blood runs cold
Sometimes I feel so weak I just want to explode¹*

Just across the New Jersey state line in 1978, Bruce Springsteen first sang the lyrics above. Both the song, “The Promised Land,” and the album it is on, *Darkness on the Edge of Town*, epitomize the young Springsteen’s angst. Even if it eluded him at the time, Springsteen believed there had to be a better way of living — a promised land.

In 2014, the same lyrics could very well represent the feelings among the judiciary, the bar, and parties when it comes to electronic discovery (“e-discovery”). Changes in recent years to both Federal and Delaware rules, along with default standards and helpful guidelines from the courts, have laid the groundwork for a better way to deal with electronically stored information (“ESI”) in litigation. Still, discovery disputes and increasing volumes of ESI are enough to make our collective eyes go blind and blood run cold.

Before we explode and give up hope, the use of “e-neutrals” may be the path to the e-discovery promised land. Whether appointed by court order as special discovery masters, or by agreement of the parties as mediators, e-neutrals can aid in the just, speedy, and inexpensive determination of e-discovery issues in litigation. After describing the burdens that e-discovery imposes on judges, lawyers, and parties, this article addresses how e-neutrals can be utilized and the potential benefits of such use.

I. E-DISCOVERY IMPOSES BURDENS ON THE COURT, COUNSEL, AND PARTIES

A. Busy Dockets Of The Courts

It is no secret that the judiciary is dealing with bloated case loads. While well known, the actual numbers are staggering.

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The Delaware Supreme Court appointed Mr. Newell to the Commission on Law and Technology. He is the chair of the Commission’s e-discovery working group. He is also on the executive committee of the Richard K. Herrmann Technology Inn of Court. In addition, he regularly speaks on issues concerning e-discovery, in particular at the Delaware Supreme Court’s Pre-Admission Conference.

1. BRUCE SPRINGSTEEN, *The Promised Land*, on DARKNESS ON THE EDGE OF TOWN (Columbia 1978).

1. The U.S. District Court For The District Of Delaware

In 2013, the U.S. District Court for the District of Delaware had 2,374 filings — an increase of 16 percent from the prior year.² During that year, the District Court had 2,823 pending matters, up 10.9 percent from the year before.³ On average, each District Court judge handled 706 pending cases, 19 trials, 549 civil filings, 38 criminal felony filings, and 7 supervised release hearings in 2013.⁴ With a per judge average of 594 filings, each judge's already busy docket was further weighed down with nearly 100 more filings than had been handled on average by each judge in 2012.⁵

2. The Delaware State Trial Courts

Like their Federal Court counterparts, the Delaware state trial court judges are faced with a daunting case load. According to statistical information collected for the 2013 annual report for the Delaware judiciary: (1) the Delaware Court of Chancery had 1,064 civil case filings, 2,476 estates filings, and 615 miscellaneous matters filings; (2) the Delaware Superior Court had 11,726 civil case filings and 8,671 criminal case filings; (3) the Delaware Family Court had 40,511 civil case filings, 4,331 adult criminal case filings, and 5,522 juvenile delinquency case filings; and (4) the Delaware Court of Common Pleas had 9,748 civil case filings and 112,004 criminal case filings.⁶ Aggregate filings per each court were down slightly in 2013 from 2012, except for the Delaware Court of Common Pleas, which had 11,916 more filings — representing a 10.8 percent increase.⁷ With the boost in filings in the Delaware Court of Common Pleas, the combined filings in the foregoing four Delaware state courts saw a 5.6 percent increase year-over-year.

Even a slight decrease in filings in 2013 in three of these courts hardly alleviated the burden on Delaware state court judges. Based on 2013's data and broken down by judge (not including masters or commissioners), the approximate annual workload consists of: (1) 831 case filings per member of the Delaware Court of Chancery; (2) 971 case filings per Delaware Superior Court judge; (3) 2,963 case filings per Delaware Family Court judge; and (4) 13,528 case filings per Delaware Court of Common Pleas judge.

3. ESI Issues In Every Type Of Case

While e-discovery was once associated only with large complex civil cases, the current reality is that ESI is implicated in nearly every case in every court. For proof, we need to look no further than the Delaware Supreme Court's

2. Federal Court Management Statistics, <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourt-ManagementStatistics/2013/district-fcms-profiles-december-2013.pdf&page=14> (last visited May 28, 2014).

3. *Id.*

4. *Id.*

5. *Id.*

6. *2013 Annual Report and Statistical Information For the Delaware Judiciary*, <http://courts.delaware.gov/AOC/Annual-Reports/fy13/2013-Statistical-Report.pdf> (last visited May 28, 2014).

7. *Id.* Chief Judge Alex J. Smalls in his annual report on the Delaware Court of Common Pleas noted that “the complexity of the case load and the number of cases proceeding forward to trial continue to increase, placing an ever growing demand on Court and Judicial Resources.” *Id.*

decision to form the Commission on Law and Technology (“the Commission”), the first of its kind in the country.⁸ Among the issues the Commission will consider are best practices in e-discovery. The range of experience of the persons whom the Delaware Supreme Court chose to serve on the Commission suggests that the Court recognizes that ESI is an issue in every court and practice. The Commission is comprised of a judicial representative from the Delaware Supreme Court, the Delaware Court of Chancery, the Delaware Superior Court, the Delaware Family Court, and the Delaware Court of Common Pleas.⁹ In addition, the Commission includes attorneys from large law firms (fifty or more attorneys), medium-sized law firms (twenty-five to forty-nine attorneys), small law firms (ten to twenty-four attorneys), very small law firms (one to nine attorneys), the Delaware Department of Justice, an in-house attorney from a Delaware corporation, and chief information officers from various law firms.¹⁰ This diverse group will bring to bear its varied experiences as the Commission considers e-discovery best practices.

Other Delaware courts have also been leaders in recognizing the impact of e-discovery on litigation. The District Court has default standards for e-discovery and access to source code.¹¹ The Delaware Court of Chancery has issued comprehensive guidelines, which provide, among other things, guidance on preservation and collection of documents.¹² The Delaware Superior Court’s Complex Commercial Litigation Division has sample e-Discovery Plan Guidelines for litigants.¹³ And with portable electronic devices and home computers resulting in a proliferation of ESI in personal disputes, it is no surprise that the Delaware Family Court recently completed its third training session on ESI-related issues.¹⁴

With busy dockets and the expansion of e-discovery in all courts, the Honorable Shira A. Scheindlin of the United States District Court for the Southern District of New York has identified several factors for judges to consider when deciding to appoint an e-neutral.¹⁵

8. *Delaware Supreme Court Creates New Arm of Court — Commission on Law and Technology*, <http://courts.delaware.gov/forms/download.aspx?id=69618> (last visited May 28, 2014).

9. *Id.*

10. *Id.*

11. *Default Standard for Discovery, Including Discovery of Electronically Stored Information (“ESI”)*, <http://www.ded.uscourts.gov/sites/default/files/Chambers/SLR/Misc/EDiscov.pdf> (last visited May 28, 2014); *Default Standard for Access to Source Code*, <http://www.ded.uscourts.gov/sites/default/files/Chambers/SLR/Misc/DefStdAccess.pdf> (last visited May 28, 2014).

12. *Guidelines for Persons Litigating in the Court of Chancery*, <http://courts.delaware.gov/Chancery/guidelines.stm> (last visited May 28, 2014).

13. *E-Discovery Plan Guidelines*, http://courts.delaware.gov/Superior/pdf/cclld_appendix_b.pdf (last visited May 28, 2014).

14. *Family Court Hosts Prominent Faculty for Technology Training*, DELAWARE DOCKET, <http://courts.delaware.gov/AOC/Docket/Fall2013/technology.stm> (last visited May 28, 2014).

15. The Honorable Shira A. Scheindlin, *We Need Help: The Increasing Use of Special Masters in Federal Court*, 58 DEPAUL L. REV. 479, 481-86 (2009). This article is an edited transcript of Judge Scheindlin’s remarks at the DePaul University College of Law’s Fourteenth Annual Clifford Symposium on Tort Law and Social Policy titled “The Challenge of 2020: Preparing a Civil Justice Reform Agenda for the Coming Decade.” Judge Scheindlin is well-known for her e-discovery opinions, including the quintet of decisions in *Zubulake v. UBS Warburg* (S.D.N.Y.) and *The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities LLC, et al.*, No. 05 Civ. 9016 (SAS), 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010). See also *Zubulake I*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Zubulake II*, 230 F.R.D. 290 (S.D.N.Y. 2003); *Zubulake III*, 216 F.R.D. 280 (S.D.N.Y. 2003); *Zubulake IV*, 220 F.R.D. 212 (S.D.N.Y. 2003); *Zubulake V*, 229 F.R.D. 422 (S.D.N.Y. 2004).

One consideration is time commitment.¹⁶ Even with support staff such as law clerks and interns, regularly occurring tasks such as the *in camera* review of large amounts of documents for privilege analysis can consume precious amounts of judicial resources.¹⁷

Another consideration is whether the e-discovery dispute requires specialized knowledge or expertise.¹⁸ For example, issues concerning data storage — either in large multinational companies or in the deep recesses of the cell phone that rests in the palm of your hand — are often highly technical yet not legally complex.¹⁹ An e-discovery neutral may have such expertise and, if not, may have ready access to the talent needed to sift through such issues.

Finally, a court may consider what resources it has at its disposal and where they are best utilized.²⁰ Some e-discovery matters are layered with issues concerning computer science, in general, and the specific implications concerning the subject matter or industry at hand. For example, discovery concerning financial institutions may entail both the complicated manner in which specific banks store documents and the regulations affecting preservation, collection, and disclosure of the same. Judge Scheindlin suggests an e-neutral can serve as a “general contractor” to marshal a “panoply of professionals . . . working together, or at least in a coordinated manner, to gather information in the hope of formulating the best possible outcome. On such occasions, the court’s appointment of [an e-neutral] that can act as a general contractor and pull together the talents and resources of these various disciplines makes a lot of sense.”²¹

B. Problems Facing Counsel And Parties

Like the judiciary, litigants and their counsel must grapple with various issues related to ESI. In addition to time constraints, four other issues pose challenges to attorneys and parties.

1. The Abundance Of ESI

The first issue is the sheer abundance of ESI — it is estimated that 95 percent of records are created or stored electronically, making e-discovery the primary form of discovery.²² With every key stroke on a computer, every text message sent, every photocopy made, and with nearly every interaction involving an electronic device, the digital footprint each person creates every day is probably best described as a digital stampede.²³

16. Scheindlin, *supra* note 15, at 481.

17. *Id.* at 481-82.

18. *Id.* at 482.

19. *See id.* at 482-85.

20. *Id.* at 485.

21. *Id.* Judge Scheindlin also suggests neutrality as a fourth consideration. Because it is not the author’s place to comment on the neutrality of the judiciary, readers are pointed to Judge Scheindlin’s article for her thoughts on the issue.

22. The Honorable Shira A. Scheindlin and Jonathan M. Redgrave, *Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure*, 30 CARDOZO L. REV. 347, 355 (2008).

23. It is not uncommon to hear practitioners speak of e-discovery as if it is distinct from “regular discovery.” Once a novel development, given the proliferation of ESI, e-discovery is in reality a subset of “regular discovery” — a subset that dwarfs other forms of discovery in quantity.

2. Ineffectiveness Of Meet And Confers

Second, while parties are expected to meet and confer to resolve discovery disputes and craft a discovery plan, such conferences are frequently ineffective. The Honorable Nora Barry Fischer of the United States District Court for the Western District of Pennsylvania and Richard N. Lettieri, Esquire, point to three reasons why.²⁴ First, the sad reality is that litigation, in general, and discovery disputes, specifically, are “too contentious for the parties to exert the minimal cooperation required to share the information necessary to reach resolution of key ESI issues.”²⁵ Second, due to strategy or leverage, a party may choose not to resolve ESI issues at the meet and confer stage.²⁶ Finally, due to lack of skill or knowledge,²⁷ counsel may be unable to address and resolve an ESI dispute.²⁸

3. Cost Of E-Discovery Disputes

Third, discovery without dispute is already expensive — discovery disputes only add to the client’s bill. As an initial matter, there are the costs spent getting a court up to speed in briefing on the nitty-gritty e-discovery disputes that

24. The Honorable Nora Barry Fischer and Richard N. Lettieri, *Creating the Criteria and the Process for Selection of E-Discovery Special Masters in Federal Court*, THE FEDERAL LAWYER, Feb. 2011 at 36. Judge Fischer, a member of the United States District Court for the Western District of Pennsylvania, was instrumental in the Court’s 2010 decision to approve the establishment of a list of attorneys to serve as “Electronic Discovery Special Masters.” *In re: Establishment of a Panel of Special Masters for Electronic Discovery*, http://www.pawd.uscourts.gov/Applications/pawd_edsm/Documents/special_master_order.pdf (last visited May 28, 2014).

To be listed as an Electronic Discovery Special Master in the Western District of Pennsylvania, an attorney must have: (1) an active bar admission; (2) litigation experience; (3) experience with e-discovery; and (4) experience or training in mediation or other dispute resolution. *Id.* In 2011, the Court authorized the use of Electronic Discovery Special Masters in its bankruptcy court, which otherwise lacked authority to appoint special masters. *In re: Use of Special Masters for Electronic Discovery by United States Bankruptcy Judges*, http://www.pawd.uscourts.gov/Applications/pawd_edsm/Documents/UseOfSpecialMastersForElectronicDiscovery.pdf (last visited May 28, 2014).

In establishing the use of Electronic Discovery Special Masters, the Court stated, “[t]he mission of the United States District Court for the Western District of Pennsylvania is to preserve and enhance the rule of law while providing an impartial and accessible forum for the just, timely and economical resolution of legal proceedings within the court’s jurisdiction, so as to protect individual rights and liberties, promote public trust and confidence in the judicial system, and to maintain judicial independence. One critical challenge to achieving this mission is posed by the need to effectively address issues presented by the preservation, collection and production of relevant Electronically Stored Information (‘ESI’) during the litigation process.

“In 2006, the discovery rules in the Federal Rules of Civil Procedure were revised. Although the revised Rules provide guidance, issues and disputes related to the preservation, collection and production of ESI have continued to confront litigants and the Court, sometimes threatening to overshadow the substantive issues in dispute. Based on this experience, this Court determined that litigants in this District may benefit from the appointment of Electronic Discovery Special Masters (‘EDSMs’) in appropriate cases, in order to assist in addressing ESI issues that may arise during the litigation. Accordingly, on November 16, 2010, the Board of Judges approved the establishment of a list of qualified attorneys to serve as EDSMs.” *Electronic Discovery Special Masters*, <http://www.pawd.uscourts.gov/Pages/ediscovery.htm> (last visited May 28, 2014).

25. Fischer and Lettieri, *supra* note 24, at 36.

26. *Id.*

27. See, e.g., *In re A&M Florida Props. II, Bankruptcy No. 09–15173 (AJG)*, 2010 WL 1418861, at *6-7 (Bankr. S.D.N.Y. Apr. 7, 2010) (awarding monetary sanctions for production deficiencies where counsel “simply did not understand the technical depths to which electronic discovery can sometimes go.”).

28. Fischer and Lettieri, *supra* note 24, at 36.

have played out off the docket and beyond the court's radar. But, there is also the potential cost of an adverse discovery ruling.²⁹ According to an article in *Inside Counsel*, “[t]he risk that a misguided ruling on a discovery motion may impose undue burden, expense and business disruption on your company is an ever-present concern for most general counsel, and yet too many litigants make the ‘penny-wise, pound foolish’ decision to forego the relatively modest investment in a special master.”³⁰ The risk, albeit perhaps on a smaller scale, is just as applicable to individual litigants as it is to corporate parties.

4. Fear Or Disinterest In ESI

Finally, it comes as no surprise that many lawyers and parties have an aversion to e-discovery. For some, it arises out of a lack of familiarity with technology — a problem compounded by the rate at which technology advances. For others, it arises out of disinterest. E-discovery is the parsley that cannot be discarded quickly enough before getting to the entrée. Regardless of the practice area, not many attorneys aspired as law students or currently aspire to litigate ESI issues. Instead, they want to get to the merits that are the cornerstone of their practice. As a result, ESI is often delegated to a younger or more technologically savvy colleague, or otherwise given a quick back of the hand — until the inevitable discovery dispute arises that throws a wrench into the litigation.

II. THE PATH TO THE E-DISCOVERY PROMISED LAND: THE E-NEUTRAL AS A REMEDY

A. Authority To Appoint E-Neutrals Exists In Court Rules, Statutes, And By Agreement

As a preliminary matter, the mechanism to appoint an e-neutral already exists. Under Rule 53 of the Federal Rules of Civil Procedure, District Courts may appoint an e-neutral when: (1) there is agreement by the parties; (2) when an exceptional condition or need warrants a special master to hold trial proceedings and make or recommend findings of fact on issues to be decided in the absence of a jury; or (3) to “address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.”³¹

Delaware state courts have similar flexibility. Pursuant to Delaware Court of Chancery Rule 135 and 10 *Del. C.* §372, the Delaware Court of Chancery may appoint and remove in any matter a master to serve at the pleasure of the Court.³² Likewise, Delaware Superior Court Civil Rule 113 and 10 *Del. C.* §567 afford the Delaware Superior Court the

29. See, e.g., *Logtale Ltd.v. IKOR, Inc.*, No. C-11-05452 CW (DMR), 2013 WL 3967750, at *3-4 (N.D. Cal. July 31, 2013) (awarding monetary sanctions for failing to timely respond to discovery and putting defendants on notice “that if there are continuing problems with their document productions, the court will order them to retain the services of an e-discovery vendor and order the parties to submit sworn, detailed declarations regarding their document preservation and collection efforts.”); *Peerless Indus., Inc. v. Crimson AV, LLC*, No. 1:11-cv-1768, 2013 WL 85378, at *3-4 (N.D. Ill. Jan. 8, 2013) (awarding monetary sanctions due to “hands-off approach” to document collection and production; “Defendants cannot place the burden of compliance on an outside vendor and have no knowledge, or claim no control, over the process.”).

30. Matthew Prewitt, *E-discovery: Consider retaining a special master*, INSIDE COUNSEL, June 26, 2012, available at <http://www.insidecounsel.com/2012/06/26/e-discovery-consider-retaining-a-special-master>.

31. FED. R. CIV. P. 53(A).

32. DEL. CT. CH. R. 135; DEL. CODE ANN. TIT. 10 §372 (1999).

authority to appoint masters.³³ Delaware Family Court Civil Rule 53, Criminal Rule 49, and 10 *Del. C.* §913 give the Chief Judge of the Delaware Family Court the discretion to appoint masters to serve at the Chief Judge's pleasure.³⁴ The Delaware Family Court rules provide that masters may hear any matters directed from the Chief Judge and that such findings and recommendations represent the judgment of the Delaware Family Court.³⁵ Finally, the Delaware Court of Common Pleas through its Civil Rule 113 may appoint masters.³⁶

Notwithstanding the authority of the courts, parties are able to stipulate to the use of e-neutrals. Of course, having the imprimatur of a court will help assure that the e-neutral is vested with the appropriate amount of authority and respect from the parties.

B. The Flexible Roles Of The E-Neutral

Where e-neutrals have been used, the scope of their appointment has varied from opining on discovery disputes to overseeing document production to reviewing documents for privilege.³⁷ Based on Judge Scheindlin and Jonathan M. Redgrave's research, e-neutrals serve in four basic roles.³⁸

1. E-Discovery Facilitator

The first role is that of an e-discovery facilitator. Whether appointed to handle discovery matters, in general, or to resolve specific e-discovery issues, Judge Scheindlin and Mr. Redgrave identify seven ways in which e-neutrals have been used to facilitate the e-discovery process:

- (1) assisting with the [Federal] Rule 26(f) conference discussions; (2) developing preservation protocols; (3) developing processes to identify locations and sources of potentially relevant documents and ESI; (4) assisting the parties to develop protocols for the identification and depositions of knowledgeable witnesses regarding ESI issues (including guidelines for the scope of pre-trial examinations); (5) developing protective orders to address privilege and privacy protection concerns; (6) addressing search and retrieval issues (such as negotiating search terms); and (7) agreeing upon form of production issues.³⁹

33. DEL. SUPER. CT. CIV. R. 113; DEL. CODE ANN. TIT. 10 §567 (1999); *see, e.g.*, *Mine Safety Appliances Co. v. AIU Insur. Co.*, C.A. No. N10C-07-241 (MMJ) (Del. Super. Ct. Dec. 5, 2012) (order of reference to special master appointing Matthew F. Boyer as Special Master and authorizing Special Master Boyer to employ the support of Ryan P. Newell, Esquire).

34. DEL. FAM. CT. CIV. R. 53(A); DEL. FAM. CT. CRIM. R. 49(A); DEL. CODE ANN. TIT. 10 §913 (1999).

35. DEL. FAM. CT. CIV. R. 53(B)(1-2); DEL. FAM. CT. CRIM. R. 49(B)(1-2).

36. DEL. CT. COM. PL. CIV. R. 113; *see also* DEL. CODE ANN. TIT. 10 §1316(b)(2) (1999) ("A judge may also designate a Commissioner to serve as a special master or master pro hac vice pursuant to the applicable provisions of the Court of Common Pleas Civil Rules of Procedure.").

37. Scheindlin and Redgrave, *supra* note 22, at 350-51.

38. *Id.* at 374.

39. *Id.* at 374-76, 383-84.

Even though Rule 26(f) of the Federal Rules of Civil Procedure (“Rule 26(f)”) has not been fully adopted by Delaware state courts, it nonetheless serves as a good benchmark for how parties should conduct meet and confers and how e-neutrals can improve that process. Under Rule 26, and because the meet and confer should occur more than 21 days before the Rule 16 scheduling conference, parties are expected to address a number of issues:

- The nature and basis of claims and defenses;
- The possibilities of resolving the case through settlement;
- Initial disclosures providing: (1) identification of individuals likely to have discoverable information and the subject matter of that information; (2) a copy or description by category and location of documents (including ESI) that support claims or defenses; (3) computation of damages and supporting documents; and (4) any insurance agreements that could be used to satisfy a judgment;
- Issues concerning the preservation of discoverable information; and
- A proposed discovery plan encompassing, among other things: (1) how initial disclosures will be made; (2) the subject matter of discovery; (3) timeline for discovery; (4) whether discovery should be phased; (5) form of production for ESI; (6) privilege and work product claims; and (7) any limitations on discovery.⁴⁰

Depending on the case, counsel may have a difficult task in gathering enough information before a meet and confer to allow for a good faith discussion of the foregoing. Because a meet and confer should occur early in litigation, counsel often has not had much time to get the lay of the land as to all these issues. And rare is the client that wants to roll up its sleeves with counsel, expending time and money, to get to the bottom of such seemingly ancillary issues. Making matters worse, parties often serve discovery requests and responses before meeting and conferring, staking out positions from which they are reluctant to retreat. Instead of meeting and conferring to determine the scope of discoverable ESI, the parties open the proverbial barn door by prematurely engaging in discovery. As a result, meet and confers typically are given lip service with the parties willing to punt such issues to a later date via discovery motions.

But through the use of an e-neutral, the problems identified by Judge Fischer and Mr. Lettieri, *supra*, can be eradicated. An e-neutral can help achieve the objectives of the meet and confer and allow the litigation to commence in an efficient manner. If matters are too contentious, an e-neutral vested with the appropriate authority can cajole the parties to cooperate. For example, with the right authority, an e-neutral can require a pre-meet and confer report from each party,⁴¹ can compel the attendance of an e-discovery liaison at the meet and confer, and can craft a discovery plan based on the information at the e-neutral’s disposal after the meet and confer.⁴² Likewise, an e-neutral can help break down any

40. FED. R. CIV. P. 26(F); *see also* FED. R. CIV. P. 26(A).

41. Prewitt, *supra* note 30.

42. *See, e.g.*, Allison O. Skinner, *The Role of Mediation for ESI Disputes*, THE ALABAMA LAWYER, Nov. 2009, at 427 (recommending that in the context of ESI mediation, that the mediator issue a mediator’s report describing the outcome of the mediation). For a helpful article on preparing for e-mediation, see Ms. Skinner’s article *How to Prepare an E-Mediation Statement for Resolving E-Discovery Disputes*, at <http://smu-ecommerce.gardere.com/allison%20skinner%20preparing%20for%20e-mediation%20discovery.pdf>. Ms. Skinner is one of the co-founders of the American College of e-Neutrals. For more information, please see <http://www.acesin.com/>.

unwillingness to resolve issues because of strategy or leverage by assuring that the meet and confer process results in an effective discovery plan. Such a plan allows litigation to proceed in an orderly manner and help reduce the risk of unnecessary e-discovery motion practice. Finally, an e-neutral experienced in ESI issues can help identify at this early stage the critical issues that less experienced counsel may miss. For example, an e-neutral can help parties assess issues such as the accessibility of ESI, the need for mirror-imaging of hard drives, the benefits of sampling and phasing discovery, the use of search terms, and the costs associated with collection and production (and whether cost shifting should be employed).⁴³

2. Discovery Compliance Monitor

A second use of e-neutrals has been to monitor compliance with discovery obligations.⁴⁴ In this capacity, an e-neutral could hold regular discovery conferences, review reports concerning the status of discovery, or examine discovery requests and responses.⁴⁵ Much like a referee in sports, the e-neutral could aid in the efficient progression of discovery through regular monitoring and, when necessary, opining on disputes.

3. Adjudicator Of ESI Disputes

In contrast to the regular monitoring of discovery, e-neutrals can be utilized in isolated instances to resolve disputes related to ESI.⁴⁶ The resolution of privilege disputes is perhaps the most common use of an e-neutral as an adjudicator of ESI disputes.⁴⁷ An e-neutral may also determine whether collection and production of ESI is unduly burdensome or costly.⁴⁸ Likewise, an e-neutral may be best suited to wade into the highly factual and, at times, speculative issues around spoliation claims, including the culpability of the responding party and any prejudice to the party requesting the documents.⁴⁹ Other ripe areas for the use of an e-neutral to rule on ESI issues include: (1) opining on the validity of discovery responses and objections; (2) determining the scope of discovery to nonparties; (3) ruling on form of production disputes (i.e., native versus image; what types of metadata, if any, need be produced); and (4) resolving disputes at depositions.⁵⁰

4. Technical Aid

Finally, when cases entail highly technical ESI issues, an e-neutral can be called upon to provide the specialized knowledge needed to assist the court.⁵¹ In patent litigation, an e-neutral may assist in source code review to help couch

43. Scheindlin and Redgrave, *supra* note 22, at 384.

44. *Id.* at 376-77, 384.

45. *Id.* at 384.

46. *Id.* at 377-79, 384-87.

47. *Id.* at 377.

48. *Id.* at 386.

49. *Id.*

50. *Id.* at 384-85.

51. *Id.* at 379-82, 387.

the outer bounds of discovery.⁵² Where authentication is at issue, a qualified e-neutral could be called upon to forensically analyze legacy systems, discarded hard drives, or complicated server structures.⁵³ When large amounts of ESI exist that warrant the use of sampling, a court can defer to an e-neutral to test the statistical validity of such samples.⁵⁴

C. Timing: Proactive Versus Reactive Use of E-Neutrals

As their many roles indicate, e-neutrals may utilize their skills and knowledge in a variety of ways. With that variety comes flexibility in terms of the best time to seek an e-neutral's aid.

In large cases with significant amounts of money at stake or in matters that are very likely to be highly contentious, the proactive approach is best. By retaining an e-neutral before discovery gets underway, via court order or agreement of the parties, the parties can be best positioned to avoid unnecessary discovery disputes. A vigilant e-neutral will shepherd the discovery process. When disputes arise, the e-neutral will be intimately familiar with the status of discovery, the substantive legal issues affecting discovery, and the parties' relative positions. The parties should be able to spend less time and money briefing the issues, the court will be spared the time catching up on discovery disputes and instead focus on the other issues on its plate, and the informed e-neutral will be in a position to render a ruling swiftly.⁵⁵

Nonetheless, not every litigant can afford early and often involvement of an e-neutral. Still, where an e-discovery dispute has festered, parties can turn to an e-neutral on an ad hoc basis as an alternative to motion practice. In presenting the matter to an e-neutral, the parties may agree to a truncated briefing schedule. Likewise, the parties may choose to retain an e-neutral who agrees to issue a decision in a matter of days. Court orders may also provide for light briefing and expedited decisions from an e-neutral.⁵⁶ While not as ideal as the proactive model, the reactive model nonetheless gives the court and parties many of the same benefits and allows an e-neutral's role to be specially tailored to that particular litigation.

III. CONCLUSION: THE E-DISCOVERY PROMISED LAND THROUGH E-NEUTRALS

In "The Promised Land," Springsteen warns of a dark cloud rising, forming into a havoc-wreaking twister.⁵⁷ Recognizing the pending doom and wanting to find a better life in the promised land, he takes action, packs his bags, and heads into the storm en route to the promised land.

52. *Id.* at 387.

53. *Id.*

54. *Id.*

55. Despite having players talented enough to win ten NCAA championships, the first lesson legendary UCLA basketball coach John Wooden would teach his team was the proper way to put on athletic socks. See George Vecsey, *Wooden as a Teacher: The First Lesson Was Shoelaces*, N.Y. Times, June 4, 2010, available at http://www.nytimes.com/2010/06/05/sports/ncaabasketball/05wizard.html?_r=0. In Wooden's estimation, not paying proper mind to this preliminary, but very important, task could result in blisters that hampered or even completely thwarted the player's performance. A proactive e-discovery approach, by analogy, encourages parties to be mindful of e-discovery issues as early as possible, as the manner in which e-discovery is conducted may have significant impact on litigation.

56. See, e.g., *Mine Safety Appliances Co.*, C.A. No. N10C-07-241 (MMJ) (order requiring Special Master to issue written decision within ten business days of receipt of the transcript of oral argument on the motion at issue).

57. BRUCE SPRINGSTEEN, *The Promised Land*, on *Darkness on the Edge of Town* (Columbia 1978) ("The dogs on Main Street howl / 'Cause they understand / If I could take one moment into my hands / Mister, I ain't a boy, no I'm a man / And I believe in a promised land / There's a dark cloud rising from the desert floor / I packed my bags and I'm heading straight into the storm / Gonna be a twister to blow everything down / That ain't got the faith to stand it's ground").

In many ways, the dark cloud of e-discovery has already arrived. But there are no signs that the volume of ESI is doing anything except increasing exponentially. The use of an e-neutral may not always be advisable, but it should always be considered as a tool to be utilized by the courts, counsel, and parties for efficiently addressing e-discovery. As Judge Fischer and Mr. Lettieri note:

By providing the necessary legal, technical, and facilitation skills needed to identify issues, offer an assessment of each, suggest options, and generally facilitate agreement, the court's expectation is that [e-neutrals] will help resolve ESI issues in a timely fashion and at a significant reduction in costs, because early resolution of these issues will help avoid a later and more costly "war of e-discovery motions."⁵⁸

Having seeped into every crevice of litigation, e-discovery and the problems it causes have surely caused judges, attorneys, and litigants alike to yearn for a better way despite the improvements seen through new rules, default standards, and guidelines. Perhaps the next time that the dark cloud of e-discovery comes twisting through town, those involved will not run from it but instead face the storm head-on and head to the e-discovery promised land through the use of an e-neutral.

58. Fischer and Lettieri, *supra* note 24, at 39.

RECENT DEVELOPMENTS CONCERNING ENFORCEMENT OF ADR PROVISIONS

Suzanne H. Holly and Margaret E. Juliano*

Changes in courts' interpretations of Alternative Dispute Resolutions (ADR) provisions affect the predictability and use of those provisions. With the rise of mediation and the potential decrease in the use of arbitration it is also important to consider enforcement and use of mediation provisions. This article will address recent developments concerning mediation and arbitration provisions, principles applied by courts with regard to the enforcement of ADR provisions, and recent changes to model provisions and rules by the American Arbitration Association.

I. ENFORCEMENT OF MEDIATION AND OTHER NON-ARBITRATION ADR PROVISIONS

Although parties have begun to disfavor arbitration provisions, choosing other types of ADR provisions instead, there is a relative paucity of law instructing parties concerning the enforceability of such provisions. Unlike arbitration provisions, there is no statutory framework for analyzing mediation provisions,¹ nor is there as much case law addressing the specific issue of enforcement of mediation provisions.²

The relative lack of litigation over the enforcement of such provisions could be based on a variety of reasons. One reason is that a party that otherwise would wish to enforce a mediation provision does not see the utility in doing so because the other party refuses to participate, and mediation requires a willingness to settle.³ Another reason could be the availability of mediation required by statute or court rule either before or during the pendency of a lawsuit, which will provide additional opportunities to mediate disputes.⁴ Finally, although there has been a trend toward ADR provisions other than those involving only arbitration, historically, fewer contracts contain mediation provisions.

A. Recent Departure By Corporations Away From Arbitration Provisions

There has been a general shift by corporations away from litigation and towards ADR.⁵ While corporations dealing with corporate/commercial, consumer and employment law litigation adopted arbitration with glee in the late

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1. There are statutes requiring mediation; however, there is no statute comparable to the Federal Arbitration Act, which mandates enforcement of arbitration provisions.

2. Although this section applies primarily to mediation provisions, the same type of analysis applies to other forms of non-arbitration ADR provisions.

3. Sarah R. Cole, *et al.* (2013), 1 mediation: law, policy and practice § 6:2.

4. There are a number of reasons why a party desirous of mediation in accordance with an ADR provision might file suit. For example, that party might need to file to (i) avoid the expiration of a statute of limitations; or (ii) determine whether the court has subject matter jurisdiction over the dispute (i.e. determine whether their dispute fits within the scope of the mediation clause). *See generally*, Cole, *supra*, at § 612.

5. Stipanowich, Thomas and Lamare, J. Ryan, *Living with 'ADR': Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations* (2013). 19 Harvard Negotiation Law Review 1; Pepperdine University Legal Studies Research Paper No. 2013/16. Available at SSRN: <http://ssrn.com/abstract=2221471> or <http://dx.doi.org/10.2139/ssrn.2221471>.

1990s, they now have turned towards mediation in nearly every area of law.⁶ The only area reporting an increase in the use of arbitration is that of consumer disputes, notably in product liability cases where the use of arbitration jumped from 23.3% to 41.5%.⁷ Almost half of all companies surveyed in the particular study stated that they use ADR in corporate and commercial disputes because of a contractual provision, indicating that contract drafting is vital.⁸

B. Mediation Provisions Are Likely To Be Interpreted In A Manner Consistent With Well-Settled Contract Interpretation Principles

The existing case law concerning mediation provisions indicates that courts typically enforce mediation provisions, and do so in a manner consistent with well-settled contract interpretation principles. While courts nationwide apply somewhat disparate approaches to enforce (and provide remedies for breach of) mediation provisions, Delaware courts follow the majority trend of analyzing mediation provisions under standard contract law.⁹ Although it is not a very recent case, *Qwest Communications International Inc. v. National Union Fire Insurance Company of Pittsburgh, PA, et al.*,¹⁰ provides a meaningful example of the approach Delaware courts are likely to take with regard to enforcement of mediation provisions. In that case, the Court of Chancery examined an ADR provision in the context of Qwest's action to enjoin its insurance carriers from maintaining an arbitration action.¹¹ The policy at issue allowed Qwest to reject its insurers' choice of ADR at any time prior to the commencement of that ADR process, and permitted Qwest to choose either mediation or arbitration. After a dispute arose, the insurers demanded arbitration. Qwest rejected the insurers' choice, and selected mediation instead. The insurers refused to withdraw their arbitration demand or participate in mediation. The Court of Chancery applied standard contract interpretation principles, found that Qwest was entitled to relief based on the unambiguous language of the policy, and ordered the insurers to withdraw or dismiss their demands for arbitration and submit to mediation.

6. *Id.* at [need pinpoint]. Corporate in-house counsel is not relying only on mediation. Surveys showed that they are placing emphasis now on early neutral evaluation, early case assessment, and other approaches aimed at deliberate management of conflicts, to control costs as well as time. *Id.* at [need pinpoint].

7. *Id.* at [need pinpoint].

8. *Id.* at [need pinpoint].

9. See Cole, *supra* at note 4 at § 6.1.; *Qwest Commc'ns Int'l Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, et al.*, 821 A.2d 323, 328-29 (Del. Ch. 2002) (enforcing insured party's request to mediate under insurance policy provision allowing for choice of ADR method); *Tekmen & Co. v. Southern Builders, Inc.*, C.A. No. 04C-3007-RFS, 2005 WL 1249035, *5-6 (Del. Super. Ct. May 25, 2005) (noting that contract contained a provision expressly stating that mediation was a condition precedent to arbitration or litigation and that parties might have waived that condition precedent by conduct, but finding that court lacked jurisdiction to decide the question of whether arbitration had been triggered because this was a question for an arbitrator to decide); *SC & A Construction Inc. v. Potter*, C.A. No. 12L-09-22-FSS, 2012 WL 6930317, *2 (Del. Super. Ct. Dec. 21, 2012) (noting that an agreement unambiguously required mediation followed by compulsory arbitration of disputes, when parties already were engaged in mediation and court was deciding issues relating to what claims and counterclaims had to be submitted to arbitration); *Commonwealth Construction Co. v. Cornerstone Fellowship Baptist Church, Inc.*, C.A. No. 04L-10-101-RRC, 2006 WL 2567916, *22 (holding that failure to first submit claim to architect prior to filing suit was a material breach of contract, but finding that filing mechanics' lien claim prior to submitting to mediation was not a breach of agreement because agreement permitted filing of mechanics' lien claims prior to mediation).

10. 821 A.2d 323 (Del. Ch. 2000).

11. The Court of Chancery examined the ADR provision following a final hearing on the merits of Qwest's claims.

II. ENFORCEMENT OF ARBITRATION PROVISIONS

A. Applicable Sources Of Law

There are both state and federal statutes that apply to questions arising in Delaware concerning the enforceability of arbitration provisions. First, there is the Federal Arbitration Act (“FAA”),¹² which has broad application to arbitration provisions,¹³ and will preempt conflicting state laws.¹⁴ Second, Delaware has enacted the Delaware Uniform Arbitration Act (“DUAA”), which explicitly proclaims the enforceability of arbitration provisions under Delaware law.¹⁵ The DUAA provides for the Court of Chancery to have jurisdiction over arbitration-related disputes.¹⁶ It also provides specific procedural rules that will apply only if parties to a contract explicitly incorporate them in their contract.¹⁷ Otherwise, the DUAA expressly provides that disputes must be decided in a manner conforming to the FAA.¹⁸ Finally, there is both federal and state case law that addresses enforcement of arbitration provisions.

B. Arbitration Provisions Will Be Rigorously Enforced As Drafted

It is both federal and Delaware law that arbitration provisions will be “rigorously enforced” as drafted.¹⁹ The FAA’s primary substantive provision requires that an arbitration provision “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”²⁰ Much like the FAA, the DUAA

12. 9 U.S.C.A. §§ 1, *et seq.*

13. See *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277 and 281 (1995) (interpreting § 2 as applying to any transaction “affecting commerce,” and, if “the transaction in fact involve[d] interstate commerce, even if the parties did not contemplate an interstate commerce connection.”) (quotations and editing in original omitted); see also, *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 80 (Del. 2006) (citing *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273-74 (1995)) (“Because the LLC Agreement involves interstate commerce, the Federal Arbitration Act (FAA) governs.”); *McLaughlin v. McCann*, 942 A.2d 616, 621 (Del. Ch. 2008) (citing *James & Jackson*, 906 A.2d at 80)) (“Because the Purchase Agreement involves interstate commerce, calls for arbitration in Pennsylvania and is not subject to the Delaware Uniform Arbitration Act, the Federal Arbitration Act (“FAA”) governs my consideration of this case.”).

14. *Allied-Bruce*, 513 U.S. at 269.

15. 10 Del. C. § 5701, *et seq.*

16. *Id.* at § 5701.

17. *Id.* at § 5702(a) and (c).

18. *Id.* at § 5702(c).

19. See *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (“courts must ‘rigorously enforce’ arbitration agreements according to their terms.”) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)); see also *Medtronic Vascular, Inc. v. NanoMed Sys., Inc.*, C.A. No. 8888, 2014 WL 795077, *3 (Del. Ch. Jan. 27, 2014) (citing *Am. Express Co.*, 133 S. Ct. at 2309); *DMS Props.-First, Inc. v. P.W. Scott Assoc., Inc.*, 748 A.2d 389, 391 (Del. 2000) (“This Court has recognized that the public policy of Delaware favors arbitration.”) (citing *SBC Interactive, Inc. v. Corp. Media Partners*, 714 A.2d 758, 761 (Del. 1998)).

20. 9 U.S.C. § 2.

provides that contractual arbitration provisions are, “valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract....”²¹

There are several vital overarching principles applicable to enforcement of arbitration clauses under the FAA. Of central importance is that, “arbitration ‘is a matter of consent, not coercion.’”²² Further, the central “purpose of the FAA is to ensure that ‘private agreements to arbitrate are enforced according to their terms.’”²³ “Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must ‘give effect to the contractual rights and expectations of the parties,’”²⁴ and, “[a]s with any other contract, the parties’ intentions control.”²⁵ “This is because an arbitrator derives his or her powers from the parties’ agreement to forgo the legal process and submit their disputes to private dispute resolution.”²⁶

1. Recent Supreme Court Decisions Highlight The Tension Between Rigorous Enforcement Of Arbitration Provisions With Other Important Policy Considerations

One recent example of the rigorous enforcement of arbitration provisions is found in the U.S. Supreme Court’s decisions concerning the availability of class action arbitration when an arbitration provision is silent as to its availability or in the case of a consumer contract that waives the right. Prior to 2013, these issues already had been addressed in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*²⁷ and *AT&T Mobility LLC v. Concepcion*.²⁸ The decisions in these cases

21. 10 *Del. C.* § 5701.

22. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 681 (2010) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

23. *Id.* at 682 (quoting *Volt*, 489 U.S. at 479, other citations omitted).

24. *Id.* at 682 (quoting *Volt*, 489 U.S. at 479).

25. *Id.* at 682 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)).

26. *Id.* at 682-83 (citing *AT&T Techs., Inc. v. Commc’ns Workers*, 475 U.S. 643, 648-49 (1986)).

27. 559 U.S. 662 (2010). The Supreme Court’s decision in *Stolt-Nielsen* arose in the context of a review of an arbitration panel’s decision to allow class arbitration in spite of a stipulation by the parties that their agreement was *silent* with regard to the issue of class arbitration. The Supreme Court vacated the arbitration panel’s decision on the basis that the panel failed to construe the parties’ agreement, instead relying on policy judgments. The Supreme Court then reached the issue of whether the agreement at issue could in any way be interpreted as allowing class arbitration, and held that it could not. The Supreme Court reasoned that because, “class-action arbitration changes the nature of arbitration to such a degree [,] it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.” *Id.* at 685. According to the Court, “[i]n bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.” *Id.* . Class action arbitration would not necessarily provide the same benefits, thereby, “giving reason to doubt the parties’ mutual consent to resolve disputes through class-wide arbitration.” *Id.* at 685-86. Thus, the language of the agreement at issue in *Stolt-Nielsen* did not provide a basis to find that the parties had agreed to class action arbitration.

28. 131 S. Ct. 1740 (2011). In *AT & T Mobility LLC v. Concepcion*, the Supreme Court considered the enforceability of an arbitration clause that explicitly forbade arbitrators from consolidating more than one claim or presiding over any form of a representative or class proceeding. In that case, the lower court based its decision to deny a motion to compel individual arbitration of a consolidated consumer fraud case based on California Supreme Court precedent (the “*Discovery Bank Rule*”), finding that the class action prohibition was unconscionable because AT&T had failed to show that bilateral arbitration adequately substituted for the deterrent effects of

left unresolved questions, however. For instance, *Stolt-Nielsen* left doubt as to whether an ADR provision could ever be interpreted as allowing class action procedures unless it explicitly authorizes them. Additionally, *Concepcion* left doubt as to whether courts could adopt any rules regarding the conscionability of class action arbitration waivers in consumer contracts without running afoul of Supreme Court precedent. Indeed, in *Concepcion*, the Supreme Court briefly addressed the need for some plaintiffs to enjoy the cost-sharing of class actions, but rejected that policy as insufficient to overcome the policies underlying the FAA.

In 2013, the Supreme Court published two opinions that further addressed the interplay between the goals of the FAA and the availability of class action arbitration to plaintiffs. In *Oxford Health Plans LLC v. Sutter*,²⁹ the Supreme Court reviewed an arbitrator's decision that class action was permitted under an arbitration provision. In that case, the parties agreed that the arbitrator would decide the issue of whether the contract at issue authorized class arbitration. The arbitrator determined that it did, focusing his determination on a construction of the parties' agreement. During the arbitration proceeding, the Supreme Court published *Stolt-Nielsen*. Based on this new precedent, Oxford asked the arbitrator to reconsider his decision. The arbitrator issued a new decision, holding that *Stolt-Nielsen* had no effect on the case because in that case, there was no dispute that the arbitration provision did not authorize class arbitration. The Supreme Court granted certiorari, "to address a circuit split on whether § 10(a)(4) [of the FAA] allows a court to vacate an arbitral award in similar circumstances," and held that it does not.³⁰

The Supreme Court distinguished its earlier decision in *Stolt-Nielsen*, explaining that, "[t]he parties in *Stolt-Nielsen* had entered into an unusual stipulation that they had never reached an agreement on class arbitration," and, based on that stipulation, the arbitration panel exceeded its authority when it compelled class arbitration on policy-based reasoning.³¹ In contrast, the arbitrator in *Oxford* looked directly to the parties' contract to reach his finding. Thus, the Supreme Court in *Oxford* clarified that an arbitrator could find that an agreement provides for class arbitration, so long as the arbitrator bases the finding on an interpretation of the contract language at issue.

Ten days after issuing its opinion in *Oxford*, the Supreme Court decided a case involving the enforceability of a class action waiver in an arbitration provision. In *American Express Co. v. Italian Colors Restaurant*,³² Italian Colors

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class actions. After the Court of Appeals for the Ninth Circuit affirmed, also finding the waiver unconscionable, the Supreme Court reversed and remanded on preemption grounds. The Supreme Court concluded that although the *Discovery Bank* Rule was not directly in conflict with the FAA, it caused the doctrine of conscionability to be applied in a fashion that disfavored arbitration, and, "[stood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," as expressed in the FAA. *Id.* at 1753. According to the Supreme Court's reasoning, while not requiring class arbitration, the *Discovery Bank* rule essentially allowed, "any party to a consumer contract to demand [class arbitration] *ex post*," even if it was not initially agreed to. This result was contrary to, "[t]he 'principal purpose' of the FAA[, which] is to 'ensur[e] that private arbitration agreements are enforced according to their terms,'" and a secondary purpose of the FAA, which is "efficient and speedy dispute resolution." *Id.* at 1749-50. The Supreme Court further elucidated its views on the profound differences between bilateral and class arbitration, stating its belief that class arbitration was more formal, slower and more costly than individual arbitration, as well as greatly increasing the risk to defendants in that the review available of arbitrators' decisions is so limited. *Id.* at 1750-52.

29. 133 S. Ct 2064 (2013).

30. 133 S. Ct. at 2068.

31. 133 S. Ct. at 2069-70.

32. 133 S. Ct. 2304 (2013).

brought a class action against American Express for alleged antitrust violations. After a somewhat involved history, which included a prior grant of certiorari,³³ the Supreme Court accepted certiorari again to consider the question: “[w]hether the Federal Arbitration Act permits courts . . . to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal law claim.”³⁴

The Supreme Court held that it does not. The Supreme Court stated that the FAA,

[R]eflects the overarching principle that arbitration is a matter of contract. . . . And consistent with [the FAA], courts must “rigorously enforce” arbitration agreements according to their terms. . . . including terms that “specify *with whom* [the parties] choose to arbitrate their disputes,” . . . and “the rules under which that arbitration will be conducted,” . . . That holds true for claims that allege a violation of a federal statute, unless the FAA’s mandate has been “overridden by a contrary congressional command.”³⁵

The Supreme Court then discussed two key arguments by Italian Colors. First, Italian Colors argued that requiring individual litigation of its claims—even though it had contractually agreed to it—would contravene the policies underlying antitrust laws. The Court rejected this argument, reasoning that the underlying policy of the antitrust laws did not guarantee an affordable procedural path to the vindication of every claim.³⁶ The Supreme Court thus held that the antitrust laws do not evince a Congressional intent to preclude waiver of class action arbitration procedure.³⁷

Second, Italian Colors argued that the lower court’s ruling served to harmonize competing federal policies by allowing courts to invalidate agreements that prevent the “effective vindication” of a federal statutory right.³⁸ The Supreme

33. In the lower court, American Express filed a motion to compel individual arbitration based on an arbitration provision that waived any right to class arbitration. In spite of Italian Colors’ presentation of an economist’s estimate of the cost to prepare a report to prove the antitrust claims, and assertion that it could not bear the exorbitant cost alone, the district court granted American Express’ motion and dismissed the lawsuits. The Second Circuit reversed and remanded, holding that the waiver of class arbitration was unenforceable and the arbitration could not proceed because Italian Colors had established that, “they would incur prohibitive costs if compelled to arbitrate under the class action waiver.” 133 S. Ct. at 2308.

The Supreme Court vacated the judgment, and remanded for further consideration in light of the then newly-decided *Stolt-Nielsen*, “which held that a party may not be compelled to submit to a class arbitration, absent an agreement to do so.” *Id.* The Second Circuit reconsidered its decision following *Stolt-Nielsen*, and maintained its reversal of the lower court on the basis that its earlier ruling did not *compel* class arbitration. It then *sua sponte* reconsidered its ruling again on the in light of additional new precedent, *Concepcion*. The Court of Appeals upheld its reversal again, finding *Concepcion* distinguishable because it dealt with preemption principles.

34. 133 S. Ct. at 2308.

35. 133 S. Ct. at 2309.

36. Congress had taken measures to facilitate antitrust litigation by, for example, enacting multiplied damages remedies. Simply because Congress demonstrated a willingness to go beyond the normal limits of law in that regard in order to advance the policies underlying antitrust laws, such willingness did not mean that Congress intended to allow for *any* departure whatsoever from the normal limits of the law in order to advance the policies underlying the antitrust laws.

37. In connection with this holding, the Supreme Court also rejected the argument that Congress’s enactment of Rule 23 indicated an intent to preclude contractual waivers of class action litigation of federal antitrust laws.

38. The “effective vindication” exception arose out of prior Supreme Court precedent, in which the Court held that arbitration agreements that operated as a “prospective waiver of a party’s right to pursue statutory remedies” could be invalidated on public policy grounds. *See, e.g., Mitsubishi Motors Corp.*, 473 U.S. 614; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Vimar Securos v. Reasegueros v. M/V Sky Reefer*, 515 U.S. 528 (1995); *14 Penn Plaza v. Pyett*, 556 U.S. 247 (2009); *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

Court rejected the “effective vindication” argument because the class action waiver was not a waiver of the right to *pursue* statutory remedies. Italian Colors still had the right under the arbitration provision to pursue its antitrust claims, just not by way of class action.³⁹ Finally, the Supreme Court noted that failing to enforce the class action waiver provision had the potential to undermine the prospect of efficient and speedy dispute resolution that arbitration - and bilateral arbitration in particular - was meant to secure.

In rejecting Italian Colors’ arguments concerning effective vindication based on hardship, the U.S. Supreme Court made abundantly clear the supremacy of the goals of the FAA, and that courts must “rigorously enforce” arbitration agreements *as written*, regardless of harsh results. Justice Kagan disagreed with the majority’s rejection of Italian Colors’ assertion of the effective vindication exception. She noted that the effective vindication exception applies to situations where the proceedings will be “...so gravely difficult’ that the claimant ‘will for all practical purposes be deprived of his day in court.’”⁴⁰ She further noted that the case in *Italian Colors* differed from cases such as *Concepcion*, or *Green Tree Financial Corp. –Ala. v. Randolph*,⁴¹ in that the contract barred not only class procedures, but also cost-sharing, and the plaintiff in *Italian Colors* offered proof that litigation without cost-sharing was prohibitively expensive: a cost estimate from a prospective economic expert. Justice Kagan opined that *Italian Colors* is not necessarily to be read as a case broadening the right to arbitration or protecting the enforceability of arbitration provisions, but rather as another battle in the war against class actions.⁴²

2. Recent Pushback To The Supreme Court’s Rigorous Enforcement Of Arbitration Provisions Under Faa Principles To The Exclusion Of Public Policy Considerations

The issues raised by *Italian Colors* have not gone unnoticed.⁴³ Senator Al Franken introduced the Arbitration Fairness Act of 2013, which would significantly restrict the breadth of the FAA as described by the Supreme Court cases above.⁴⁴ On December 17, 2013, Senator Franken convened hearings before the Judiciary Committee concerning the

39. The Supreme Court noted also that this right solely to bilateral litigation of the antitrust laws was actually consistent with the rights of parties prior to the enactment of Rule 23.

40. *Am. Express Co.*, 133 S. Ct. at 2314.

41. 521 U.S. 79 (2000). In *Green Tree*, the Supreme Court held that if a case was prohibitively expensive, the effective vindication exception could apply. The plaintiff in that case, however, had not shown that a case was actually prohibitively expensive and thus failed to meet her burden of proof.

42. *Am. Express Co.*, 133 S.Ct. at 2020. This is also expressed by commentators such as Nicole Flatow, In Major Blow to Consumers, Supreme Court Protects Mega-Corporations From Liability, THINK PROGRESS, June 20, 2013, available at <http://think-progression.org/justice/2013/06/20/2189061/even-small-businesses-cant-shake-mega-corporations-chokehold-on-access-to-the-courts/> (last visited January 23, 2014).

43. Not only does the decision in *Italian Colors* raise concerns about the effective vindication of consumers’ ability to assert their rights in antitrust suits, but its effect is broader and applies in other contexts. See, e.g., *Porreca v. Rose Group*, C.A. No. 13-1674, 2013 WL 6498392 (E.D. Pa. Dec. 11, 2013) (grudgingly granting motion to compel individual arbitration and rejecting unconscionability challenge in Fair Labor and Standards Act case Supreme Court precedent).

44. Specifically, the proposed bill amends the FAA to invalidate arbitration agreements if they involve employment, consumer, antitrust, or civil rights disputes. Senator Franken’s position is that mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitration decisions. It also removes the jurisdiction from the arbitral panel to determine whether the issue is properly before them, and places that into federal (not state) courts. However, the proposed amendment leaves in place collective-bargaining arbitration agreements.

potential effects of the case in support of his proposed legislation. The title of the hearing evidences the concerns of congress: “The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?” Testimony by witnesses at this hearing further highlights the tension between enforcement of arbitration provisions and the practical effect of this case in the consumer context.⁴⁵

Delaware legislators also seem to have responded to the *Italian Colors* decision. HB 230, introduced by Representative Keeley and Senators Peterson, McBride and Townsend, entitled “An Act to Amend Title 6 of the Delaware Code Relating to Consumer Protection,” would prohibit consumer contracts⁴⁶ from containing waivers of the right to a jury trial, if applicable to any action brought by or against the consumer.⁴⁷ One of the effects of this provision would be to prevent the kind of decision rendered in *Concepcion*, whereby a consumer agrees to a boilerplate/shrinkwrap contract with a national business and in so doing is required to arbitrate even where doing so has the effect of denying his ability to make his case.

HB 230 would also address an issue raised by the decision in *Italian Colors* in that it would prevent “any aspect of a resolution of a dispute between the parties to the agreement to be kept confidential.”⁴⁸ The inability to create a joint defense, noted by Justice Kagan, had the effect of keeping *Italian Colors* from trying their case as they could not create a joint expert report that would be a shared cost across several consumers.

C. Disputes Over Substantive Arbitrability

Disputes often arise concerning whether (1) the parties have entered into a valid arbitration agreement, or (2) a valid agreement applies to a specific controversy. These types of disputes are categorized as disputes over the substantive arbitrability.⁴⁹ Recent case law focuses primarily on questions relating to who — the court or an arbitrator — will decide disputes over substantive arbitrability.

45. At the hearing, the Committee heard testimony from witnesses concerning the potential effects of the *Italian Colors* decision as creating undue hardships on small businesses, including the plaintiff in *Italian Colors*, Alan S. Carlson. In contrast to testimony from small business owners, Professor Peter Rutledge provided an overview of his various statistical studies of the effect of arbitration. He stated that his research, “has vindicated arbitration – it has shown that arbitration yields results far faster than the civil litigation system; it has also shown that arbitration often achieves fair results for employees and consumers, at least as good as those in the civil litigation system; and it has shown that arbitration clauses typically do not contain the sorts of nefarious procedural provisions for which they were at one time roundly criticized.” [CITE?] Professor Rutledge also addressed the concerns about the Supreme Court cases on the substance of arbitration provisions. He stated that *Concepcion* had little to no effect on the overall use of class action limiting clauses. “...The use of arbitration clauses following *Concepcion* increased only from 40.3% to 44.8%.... The use of class waivers in arbitration clauses has risen over time: from 51.6% in 1999 to 77.8% in 2011 (immediately before *Concepcion*) to 86.7% in 2013.” The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?: Hearing Before the Senate Committee on the Judiciary, 113 Congress (2013) December 17, 2013, Testimony of Peter Rutledge.

46. Consumer contracts are defined in the bill as a writing between a business and a consumer involving goods and services, including credit or financial services, primarily for personal, family, or household purposes, which contract has been drafted by the business for use with more than one consumer, unless a second consumer is the spouse of the first consumer. Section 2403D(b). House of Representatives HB 230, 147th General Assembly (Del. Jan. 23, 2014).

47. Section 2404D(e)(3). House of Representatives HB 230, 147th General Assembly (Del. Jan. 23, 2014).

48. Section 2404D(e)(7). House of Representatives HB 230, 147th General Assembly (Del. Jan. 23, 2014). This section does not prevent the parties from agreeing to keep trade secrets confidential.

49. *James & Jackson*, 906 A.2d at 79 (substantive arbitrability refers to the scope of an arbitration provision and its application to a particular dispute) (discussing and quoting from *Howsam v. Dean Witter*, 539 U.S. 79 (2002)); see also *Legend Natural Gas II Holdings, LP v. Hargis*, C.A. No. 7213-VCP, 2012 WL 4481303, *4 (Del. Ch. Sept. 28, 2012). Procedural questions affecting the arbitration (such as those concerning waiver, delay, or the procedural prerequisites to arbitration) are for arbitrators to decide. *Langlais v. Pennmont Ben. Services, Inc.*, 527 Fed. Appx. 215, 218 (3d Cir. 2013).

1. Who Decides Issues Concerning Whether The Parties Have Entered Into A Valid Arbitration Agreement?

A court must determine whether there is a valid agreement to arbitrate prior to making a final determination concerning the substantive arbitrability of an issue.⁵⁰ There is a distinction, however, as to what challenges are to the validity of the parties' agreement to arbitrate, as opposed to the validity of the agreement as a whole, or the formation of the agreement. These distinctions are important, as challenges to the validity of the agreement to arbitrate must be decided by a court, but challenges to the validity of the agreement as a whole are for an arbitrator to decide.⁵¹ Finally, challenges to the formation of the contract also must be decided by the courts.⁵²

In *SBRMCOA, LLC v. Bayside Resort, Inc.*,⁵³ the Third Circuit clarified how courts must distinguish between challenges to a contract's formation or validity for purposes of determining whether a court or an arbitrator would decide the issue. Before the *SBRMCOA* decision, there had been some confusion over the continued viability of the Third Circuit's decision in *Sandvik AB v. Advent Int'l Corp.*,⁵⁴ which made the determination concerning jurisdiction based on state law

50. The FAA requires U.S. District Courts make the determination before making the final ruling regarding the arbitrability of a particular dispute, and specifically provides in § 4 that: "The court shall hear the parties, and *upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue*, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C.A. § 4 (emphasis added); *see also* *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 771 (3d Cir. 2013) (the FAA, "enables the enforcement of a contract to arbitrate, but requires that a court be 'satisfied that the making of the agreement for arbitration...is not in issue' before it orders arbitration."). If the making of the arbitration agreement is in issue, then, "the court shall proceed summarily to the trial thereof," and a party may demand a jury trial of the issue. 9 U.S.C.A. § 4; *Guidotti*, 716 F. 3d at 771.

51. *SBRMCOA, LLC v. Bayside Resort, Inc.*, 707 F.3d 267, 271 (3d Cir. 2013) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967)).

52. *SBRMCOA*, 707 F.3d at 271 (quoting *Granite Rock Co. v. Int'l Bhd. Of Teamsters*, ___ U.S. ___, 130 S.Ct. 2847, 2855-56, 177 L.Ed.2d 267 (2010) and citing *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 444 n. 1 (2006)).

53. 707 F.3d 267 (3d Cir. 2013). In *SBRMCOA*, a condominium association filed suit in the U.S. District Court for the District of the Virgin Islands against its original sponsor, and its creditors. The condominium association asserted claims for, among other things, breach of contract and declaratory judgment, seeking to void the contract on the grounds that the condominium association's board lacked authority to enter into the contract (referred to by the Third Circuit as the "*ultra vires* argument"), and that the contract was procured by the creditor defendants' coercion of the condominium association's board.

The District Court made two disparate determinations regarding the arbitrability of the *ultra vires* argument. With regard to the application of the *ultra vires* argument to the breach of contract claim, the District Court considered the *ultra vires* argument on its merits and rejected it without leave for discovery. With regard to the application of the *ultra vires* argument to the declaratory judgment claim, the District Court found that the *ultra vires* argument was arbitrable. It also found that the coercion argument was subject to arbitration. The Third Circuit vacated the District Court's rulings concerning the *ultra vires* argument, holding that the District Court should have decided the *ultra vires* argument as to both claims to which it applied.

54. 22 F.3d 99, 100-01 (3d Cir. 2000). In *Sandvik*, a plaintiff sued a defendant for, among other claims, breach of contract. The defendant denied that it was bound by the agreement because its agent purportedly lacked authority to execute it. In an unusual move considering its position that it was not bound by the contract, the defendant moved in the U.S. District Court for the District of Delaware to compel arbitration pursuant to an arbitration provision in the contract. The defendant argued that the arbitration provision was severable from the rest of the agreement, and because it did not contest the agreement to arbitration (as opposed to the validity of the arbitration provision), then the arbitration provision could be enforced. The District Court denied the motion to compel arbitration, holding that the Court first had to consider whether the defendant was bound by the contract. The Third Circuit affirmed, and in so doing, espoused the approach of examining whether a challenge to a contract would result in it being void or voidable. The Third Circuit ultimately held that the defendant's argument concerning its agent lacking authority to enter into the agreement was one to the formation of the contract, and therefore, was to be determined by the district court, not an arbitrator.

principles of void versus voidable agreements. In *Buckeye Check Cashing, Inc. v. Cardegna*,⁵⁵ the Supreme Court rejected a lower court's application of state law principles concerning the distinction between void and voidable contracts instead of applying principles of federal arbitration law. The Supreme Court had expressly distinguished *Sandvik* in a footnote, thereby leaving unresolved the continuing application of the reasoning in *Sandvik* to certain disputes.

While addressing the question of whether a coercion argument was arbitrable, the Third Circuit explained, “[t]he question is not so straightforward, however, because it is unclear whether the void/voidable distinction noted in *Sandvik* survived the Supreme Court's subsequent decision in *Buckeye Check Cashing*.” The Third Circuit concluded, however, that, “the relevant distinction is between challenges to a contract's validity, which are arbitrable, and challenges to a contract's formation, which generally are not,” as opposed to state law principles of whether a contract would be void or voidable. The Third Circuit thus held that the coercion claim was arbitrable, because it dealt with a challenge to an agreement, not to its formation.

2. Who Decides Issues Relating To Whether A Particular Agreement To Arbitrate Applies To A Particular Controversy?

In general, unless there is clear and unmistakable evidence that the parties intended otherwise, courts — not arbitrators — determine whether a dispute is substantively arbitrable.⁵⁶ The Delaware Supreme Court has set out a two-prong test for arbitrability: that if an arbitration provision (1) generally provides for arbitration of all disputes; and (2) incorporates a set of arbitration rules that empowers arbitrators to decide arbitrability,⁵⁷ then it may be decided by an arbitrator (this test is commonly referred to as the “*Willie Gary Test*”). Although it has not yet been affirmed by the Delaware Supreme Court, Delaware courts have been applying what could be called a third prong to the *Willie Gary Test*: that if a party meets the *Willie Gary Test*, then a court must still make a preliminary evaluation of whether the party opposing arbitration has made a clear showing that its adversary has offered no non-frivolous argument that the claims are arbitrable.⁵⁸

55. 126 S. Ct. 1204 (2006). In *Buckeye*, the Supreme Court decided the issue of, “whether a court or an arbitrator should consider the claim that a contract containing an arbitration provision is void for illegality.” The Supreme Court held that the arbitrator should decide that issue because it was a challenge to the agreement itself, not specifically the arbitration provision, and the arbitration provision was enforceable apart from the remainder of the contract. In reaching this decision, the Supreme Court stated that its prior decisions had established three propositions: (1) “as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract”; (2) “unless a challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance”; and (3) “this arbitration law applies in state as well as federal courts.” *Id.* at 1209. Thus, when the Florida Supreme Court relied on state law principles concerning the distinction between void and voidable contracts, and state law rules regarding severability, it erred because it should have applied the foregoing principles of federal arbitration law.

56. *Langlais*, 527 Fed. at 217-18 (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2001)); *Granite Rock Co. v. Int'l Bro. of Teamsters*, 130 S. Ct. 2847, 2856 (2010) (citing same); *First Options of Chicago, Inc. v. Kaplan*, 574 U.S. 938, 945 (1995) (citation omitted).

57. See *James & Jackson*, 906 A.2d 76. In that case, Willie Gary filed suit in the Court of Chancery, seeking injunctive relief, specific performance, and, in the alternative, dissolution. *James & Jackson* filed a demand for arbitration, and then a motion to dismiss or stay in favor of arbitration. The Court of Chancery denied the motion to dismiss, holding that Willie Gary did not have to arbitrate its claims. The Delaware Supreme Court affirmed the Court of Chancery's holding, but did not affirm in its entirety the Court of Chancery's reasoning.

58. See, e.g., *Legend Natural Gas II Holdings, LP*, 2012 WL 4481303; *McLaughlin v. McCan*, 942 A.2d 616 (Del. Ch. 2008); *Julian v. Julian*, 2009 WL 2937121 (Del. Ch. Sept. 9, 2009).

For example, in *Li v. Standard Fiber, LLC*,⁵⁹ Li filed suit against Standard Fiber for indemnification and advancement of fees incurred in connection with an arbitration in California in which several other agreements between the parties were at issue pursuant to an indemnification agreement. Standard Fiber moved to dismiss Li's complaint based on arbitration clauses in the agreements at issue in the California arbitration, but which were not at issue in Li's complaint. The Court of Chancery discussed the modification to the *Willie Gary* Test stating:

Delaware courts have held that, even if the *Willie Gary* test is satisfied, a court must still "make a preliminary evaluation of whether the party seeking to avoid arbitration of arbitrability has made a clear showing that its adversary has made 'essentially no non-frivolous argument about substantive arbitrability.'...[T]his step was added to avoid situations in which the *Willie Gary* test is technically satisfied but there is no non-frivolous argument that the arbitration clause covers the underlying dispute."⁶⁰

The Court reviewed the arbitration clauses at issue, and found that they met the *Willie Gary* test, in that they contained broad language concerning the disputes that would be arbitrated, and incorporated the rules of the Judicial Arbitration and Mediation Services ("JAMS"), which specifically empower arbitrators to decide issues of substantive arbitrability. Li argued that the indemnification agreement under which he sued contained an integration clause, and therefore, the arbitration clauses in the other agreements (executed prior to the indemnification agreement) were barred from consideration. The Court acknowledged that the *Willie Gary* test would not be satisfied if its review was limited solely to the indemnification agreement. The Court rejected Li's argument, however, because he had not made a clear showing that Standard Fiber had no colorable argument concerning substantive arbitration. The Court reasoned that, "[i]n the context of the limited inquiry permitted under *Willie Gary* and its progeny," the integration clause did not conclusively establish the termination of the valid arbitration clauses in the other agreements.⁶¹ Under Delaware law, an integration clause provides only a *presumption* of integration, and there was authority in other jurisdictions that a standard integration clause in a later agreement without an arbitration clause did not overcome an earlier agreement that contained a valid arbitration provision. Thus, without deciding the ultimate issue, the Court could not find that the integration clause barred consideration of the arbitration provision in the arbitration agreement.

Li also argued that a review of other portions of the indemnification agreement weighed against arbitrability of the dispute. The Court rejected this argument, because it invited the type of review prohibited by *Willie Gary* in that, "Li subtly asserts that the claims asserted in the complaint do not relate to the prior agreements. Although he ultimately may be right, his reasoning essentially invites the Court to resolve the first-order issue of substantive arbitrability at the outset, contravening a central tenet of *Willie Gary*."⁶² The Court found that Li's complaint would not have been filed but for the existence of the parties' prior agreements. In that sense, there was at least a colorable argument that the earlier agreements were implicated.

The Delaware Superior Court also recognized the so-called third prong to the *Willie Gary* Test in *Behm v. American International Group, Inc., et al.*⁶³ There, Behm sued Ernst & Young for gross negligence and accounting malpractice

59. C.A. No. 8191-VCN, 2013 WL 1286202 (Del. Ch. Mar. 28, 2013).

60. 2013 WL 1286202, at *5.

61. 2013 WL 1286202, at *7.

62. 2013 WL 1286202, at *7.

63. C.A. No. N10C-10-013-MJB, 2013 WL 3981663 (Del. Super. Ct. July 30, 2013).

in connection with the preparation and filing of US and Japanese tax returns. Ernst & Young moved to dismiss Behm's complaint based on arbitration provisions in two contracts executed on August 21, 2009, and March 27, 2010. The Superior Court held that, to the extent that they arose after the execution of the first Terms of Service Agreement, the substantive arbitrability dispute should be submitted to an arbitrator.

Both agreements contained an ADR provision, requiring voluntary mediation first, and then binding arbitration, to be conducted in accordance with the Rules for Non-Administered Arbitration of the International Institute for Conflict Prevention and Resolution. The Court found that the ADR provisions satisfied the prongs of the *Willie Gary* test, and explained:

[I]n the developing case law since *Willie Gary* had been decided, a third factor, or prong had been added. Courts had addressed "a preliminary question of whether or not there is a colorable basis for the court to conclude that the dispute is related to the agreement." The *Legend* Court further noted a similar approach was reached in *McLaughlin v. McCann*, where "[t]he Court suggested that: [A]bsent a clear showing that the party desiring arbitration has essentially non *non-frivolous* argument about substantive arbitrability, to make before the arbitrator, the court should require the signatory to address its argument against arbitrability to the arbitrator." In line with these decisions, the *Legend* Court held that if the party seeking arbitration has presented a colorable, "non-frivolous argument that the underlying dispute is arbitrable," then the party seeking to avoid arbitration "must submit questions of substantive arbitrability to an arbitrator." The Court of Chancery called this a "low threshold."⁶⁴

Following this discussion, the Superior Court found that Ernst & Young had a colorable, non-frivolous argument that Behm's claims were arbitrable based on the relationship between Behm's claims and the arbitration provisions.

In another Superior Court decision, the Court decided the question of who should determine the substantive arbitrability of a dispute without specific reference to the *Willie Gary* Test or the developing third prong to the test. In *Vituli v. Carrols Corp.*,⁶⁵ the former CEO of Carrols Corporation for breach of an amended and restated employment contract. Carrols Corporation sought to dismiss the complaint and compel arbitration based on a mandatory arbitration program subjecting all employees' claims to arbitration. The arbitration program first was implemented by memo in prior to the execution of Vituli's contract, and after its implementation, all newly-hired employees were required to sign an "Agreement for Resolution of Disputes Pursuant to Binding Arbitration Between Carrols Corporation and [Employee]." Vituli never signed such an agreement. Moreover, Vituli's contract neither referred to the mandatory arbitration program, nor did it contain a separate arbitration clause. The contract contained in integration clause.

Carrols Corporation argued that the mandatory arbitration program constituted a "valid, written agreement to arbitrate" thereby requiring the case to be sent to arbitration. Carrols Corporation further argued that the substantive arbitrability of the parties' dispute should be submitted to an arbitrator. The Superior Court there was absolutely nothing to demonstrate that Vituli was bound by the mandatory arbitration policy. Although the Court did not explicitly apply the *Willie Gary* test or the burgeoning "no non-frivolous argument" prong, it appears that not only did the mandatory arbitration policy in question not meet the second prong of the *Willie Gary* test, the court implicitly found that Carrols Corporation could not make even a colorable argument in favor of submission of the substantive arbitrability issue to an arbitrator.

64. 2013 WL 3981663, at *8.

65. C.A. No. 12C-08-224-FSS, 2013 WL 2423091 (Del. Super. Ct. Mar. 28, 2013).

3. Courts Will Apply Standard Rules Of Contract Interpretation To Determine The Ultimate Question Of The Substantive Arbitrability Of A Dispute.

Courts apply standard rules of contract interpretation in order to make the substantive arbitrability determination. The court first must determine whether the arbitration clause at issue is broad or narrow in scope.⁶⁶ Then, the court must apply the relevant scope of the provision to the asserted legal claim to determine whether the claim falls within the scope of the contractual provisions that require arbitration.⁶⁷ If an arbitration provision is narrow in scope, the court will determine whether the asserted legal claim is directly related to a right in the contract.⁶⁸ If the arbitration provision is broad, the court will defer to arbitration any issues that touch on a contract right or performance.⁶⁹

For example, in *Medicis Pharmaceutical Corp. v. Anacor Pharmaceuticals, Inc.*,⁷⁰ the Court of Chancery construed an arbitration provision providing for arbitration of disputes, “arising under this Agreement,” as narrow because it also provided for several exceptions, including one that allowed the parties to seek equitable relief in the courts. In *Medicis*, the plaintiff filed suit seeking specific performance and injunctive relief approximately two weeks following the defendant’s initiation of arbitration proceedings concerning the same breaches of the parties’ agreement. The defendant argued, among other things, that the language of the carve-out for equitable relief applied only to disputes arising under the arbitration provision. The Court found that the carve-out was broad enough to permit plaintiff to proceed. While the Court noted that the result was not “optimal” but to conclude otherwise would require a departure from the rules of standard contract interpretation.⁷¹

4 Recent Changes To The AAA Rules Reflect Changing Attitudes Toward Arbitration Andmediation

In Fall 2013, the American Arbitration Association (“AAA”) released two new sets of rules that change the arbitration landscape in dramatic ways. Of greatest import are the Optional Appellate Arbitration Rules (“Appellate Rules”), which became effective on November 1, 2013 and are available at www.adr.org. The Appellate Rules likely respond to the mounting disfavor towards arbitration among commercial lawyers and litigators.

Prior to the creation of the Appellate Rules, there were only two methods for setting aside or modifying an arbitration award. The first, under Delaware law, is to request that the arbitrator modify or correct the award, or to clarify it.⁷² The only grounds to modify or correct an award, are that there was an evident miscalculation of figures or an evident

66. *Medicis Pharmaceutical Corp. v. Anacor Pharmas., Inc.*, C.A. No. 8095-VCP, 2013 WL 4509652, *4 (Del. Ch. Aug. 12, 2013) (quoting *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149 (Del. 2002)).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Compare with* *Shareholder Representative Svcs. LLC v. ExlService Holdings, Inc.*, C.A. No. 8367-VCN, 2013 WL 4535651 (Del. Ch. Aug. 27, 2013) (Court of Chancery determined that carve-out for equitable relief did not apply in a given case because although the plaintiff had styled the complaint as one for equitable relief, its claims were, in fact, legal in nature).

72. DEL. CODE ANN. tit. 10, § 5711.

mistake in the description of any person, thing or property, the arbitrators ruled on a matter not submitted to them or that the award is imperfect in form, in a way that does not affect the merits of the controversy.⁷³ An award may be vacated, but only if the award was procured by fraud or corruption, there was “evident partiality by an arbitrator, the arbitrator exceeded their powers or executed them so poorly that a final and definite award was not made, or conducted the hearing in a way that substantially prejudiced the rights of a party.”⁷⁴

Similar to Delaware law, the FAA provides that an award may be vacated when (1) the award was procured by fraud or corruption or (2) there was evident partiality or corruption in the arbitrator’s actions. However, the FAA also adds that (3) an award may be vacated when the arbitrators are guilty of misconduct in refusing to postpone the hearing, or refusing to hear evidence pertinent and material to the controversy or engaged in behavior that prejudiced the rights of a party or when (4) the arbitrators exceeded their powers or imperfectly executed them such that a mutual, final and definitive award was not made.⁷⁵

The Appellate Rules provide that parties may now rely on an appellate arbitral panel but only under certain conditions. The first of these circumstances is that the parties must have agreed in advance to use the Appellate Rules.⁷⁶ As the Appellate Rules state “[t]he right to appeal an arbitration proceeding is a matter of contract. A party may not unilaterally appeal an arbitration award under these rules absent agreement with the other party(s).”⁷⁷ The Appellate Rules suggest sample language for use in contracts with arbitration clauses which names, specifically, the Appellate Rules, provides that the underlying award will not be final until the time for filing the notice of appeal has passed (30 days) and that the decision rendered by the appeal tribunal may be entered by any court having proper jurisdiction.⁷⁸ It’s also worth noting that the Appellate Rules allow for use of the appeals process if the parties agree to that procedure by stipulation, yet provide no guidance as to the timing of that stipulation.

The grounds on which an arbitration award may be appealed are limited to only: (1) an error of law that is material and prejudicial; or (2) determinations of fact that are clearly erroneous.⁷⁹ A party cannot raise an issue or evidence that was not raised during the arbitration proceeding.⁸⁰

The Appellate Rules are lengthy, weighing in at approximately 13 pages for just appeal information. A review of these rules notes a few key points. First, the appeal process does not change the rules related to modification, discussed above.⁸¹ Second, the time for filing an appeal from the underlying award is limited to 30 days with a notice of cross appeal by the other parties limited to seven days.⁸²

73. DEL. CODE ANN. tit. 10, § 5715.

74. DEL. CODE ANN. tit. 10, § 5714.

75. 9 U.S.C.A. § 10(a).

76. Optional Appellate Arbitration Rules (“Appellate Rules”) page 3, available for download at: <http://go.adr.org/AppellateRules> (last viewed Jan. 6, 2014).

77. *Id.*

78. *Id.* at 3-4.

79. *Id.* at 8; Rule A-10.

80. *Id.* at 10; Rule A-16.

81. *Id.* at 5; Rule A-2(b).

82. *Id.* at 5-6; Rules A-3(a)(i) and (c).

Third, the appellate process is not without its costs, which are assessed to the losing party.⁸³ Additionally, an appellant must pay a deposit to cover any anticipated fees and expenses. Failure to pay the deposit will automatically hold the appeal in abeyance for seven days.⁸⁴ In addition to these fees, there is a \$6,000 administrative fee that has to be paid to the AAA, and does not include fees and expenses for AAA costs of hearing rooms or other additional costs.⁸⁵

Unless otherwise requested, all appeals will be based on written documents.⁸⁶ Those written documents can include excerpts of the transcript of the arbitration hearing, expert reports, deposition transcripts or any other documentary evidence.⁸⁷

The second set of new rules the AAA released in Fall 2013 were the updated Commercial Rules. The key change to those rules include, and are discussed below, the addition of a mediation step to arbitration, as well as allowing for discovery methods, a pre-trial process, emergency measures, access to dispositive motions, and sanctions. AAA explained that they sought to create a “more streamlined, cost-effective, and tightly-managed arbitration process...”⁸⁸

In addition to the Appellate Rules, the AAA has set forth specifics on the new various procedures to be added to arbitration in the updated Commercial Rules (“Updated Rules”). The Updated Rules now provide a method for mediating any case, valued at \$75,000 or greater, provided that any party has the right to opt out of the mediation.⁸⁹ Unlike with the new appellate procedure, the mediation option does not require an additional filing fee.⁹⁰ However, as with the appellate procedure, the mediation option should be including in contract provisions addressing ADR or via stipulation at some other time.⁹¹ The new rules provide that this mediation should take place concurrently within the arbitration process.⁹² They further provide that unless agreed to by all parties, the individual used to mediate the case shall not be appointed as an arbitrator in the case.⁹³

Parties to an AAA arbitration now also shall have a pretrial-like hearing, called a Preliminary Hearing, where the parties agree to the conduct of the arbitration and procedures for exchanging documents will be set.⁹⁴ This pretrial hearing

83. *Id.* at 9; Rule A-11.

84. *Id.*; Rule A-12.

85. *Id.* at 13, “Administrative Fee Schedule.”

86. *Id.* at 10; Rule A-15.

87. *Id.*; Rule A-16.

88. American Arbitration Association (“AAA”) News Alert, dated September 9, 2013, available at: <http://www.adr.org/aaa/ShowPDF?doc=ADRSTAGE2016416> (last visited January 6, 2014).

89. AAA Commercial Rules, at 8, available at http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased (last viewed Jan. 6, 2014).

90. *Id.* at 9.

91. *Id.*

92. *Id.* at 14, R-9.

93. *Id.*

94. AAA Commercial Rules, *supra*, note 91 at 18-19; Rule R-21.

also includes discussing the possibility of mediation.⁹⁵ Other matters to be discussed at the pretrial hearing include: whether all necessary parties have been included; whether any party will seek a more detailed statement of claims; whether there are any anticipated amendments to claims; discovery exchanges; confidentiality requests; and identification of witnesses; and whether there are any threshold or dispositive issues that could be decided without considering the entire case.⁹⁶

While the new rules allow for hearing dispositive motions, they are subject to the discretion of the arbitrator who may decide to hear them if “they are likely to succeed and dispose of or narrow the issues in the case.”⁹⁷

The Updated Rules also now provide for what they term emergency measures. In the past, arbitrators could take whatever interim measures they deemed necessary including injunctive relief to preserve or protect party property.⁹⁸ The new Emergency Measures provide that they apply only to agreements entered *after October 1, 2013*.⁹⁹ They require notice to the AAA and all parties, after which the AAA will appoint a single arbitrator within one day. That arbitrator then, within two days, sets a schedule for hearing from the parties, either live or by other means, including telephone and video conferencing or based only on written submissions.¹⁰⁰ The arbitrator may award relief based upon a showing of immediate and irreparable loss or damage.¹⁰¹ That award may be modified if circumstances change.¹⁰² The emergency arbitrator can be named as a panel, but only on request of the parties.¹⁰³

Finally, the Updated Rules also provide that upon request, with evidence and a legal argument, an arbitrator can issue sanctions for failure to comply with the obligations set out in the arbitration agreement.¹⁰⁴ These sanctions cannot amount to default judgment, and there must be an opportunity for the opposing party to respond.¹⁰⁵

95. *Id.* at 31, P-2.

96. *Id.*

97. *Id.* at 22; Rule R-33.

98. *Id.* at 23; Rule R-37.

99. AAA Commercial Rules, *supra*, note 91 at 24; Rule R-38(a).

100. *Id.*; Rule R-38(b)-(d).

101. *Id.*; Rule R-38(e).

102. *Id.*; Rule R-38(f).

103. *Id.*

104. AAA Commercial Rules, *supra*, note 91 at 30, Rule R-58.

105. *Id.*

THE CAUSATION STANDARD FOR RETALIATION CLAIMS UNDER EMPLOYMENT DISCRIMINATION STATUTES: AMBIGUITY OF “CENTRAL IMPORTANCE”

Timothy M. Holly*

The United States Supreme Court noted in a recent decision that the proper interpretation and implementation of statutory causation standards in retaliation suits is a matter of “central importance to the fair and responsible allocation of resources in the judicial and litigation systems.”¹ Nevertheless, both Delaware and federal law remain unclear on this vital issue. Unless Delaware’s Discrimination in Employment Act (the “DDEA”)² is either amended to resolve this ambiguity, or the Delaware Supreme Court resolves the ambiguity by judicial opinion, Delaware’s statutory causation standards will remain subject to significantly different interpretations and potentially-inconsistent implementation. This article discusses retaliation claims, identifies ambiguities that make this issue of central importance unclear and ripe for legislative clarification, and proposes a resolution.

I. THE GROWTH AND POTENTIAL ABUSE OF RETALIATION CLAIMS

Generally speaking, a retaliation claim under employment discrimination statutes arises when an employer takes an adverse employment action against an employee because the employee has engaged in a protected activity.³ Protected activity includes complaining internally to an employer about a perceived violation of the applicable statute (*i.e.*, opposition activity), complaining externally about such issues to an administrative agency such as the Delaware Department

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1. *University of Tex. Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2531 (2013). The *Nassar* Court vacated and remanded the Fifth Circuit’s affirmance of a damage award on Title VII retaliation claims following a jury trial. The Fifth Circuit thereafter (in a non-precedential opinion) vacated the district court’s judgment in its entirety and remanded for further proceedings consistent with the opinion of the Supreme Court. *Nassar*, 537 F. App’x 525 (5th Cir. 2013).

2. DEL. CODE ANN. tit. 19 § 711 *et seq.*

3. Specifically, to establish a *prima facie* claim for retaliation under Title VII, a plaintiff must show that: (1) she engaged in a protected activity; (2) the employer took an adverse employment action after or contemporaneous with the protected activity; and (3) the protected activity and the adverse employment action were causally linked. *Moore v. Phila.*, 461 F.3d 331, 340–41 (3d Cir. 2006) (explaining that “‘opposition’ to unlawful discrimination must not be ‘equivocal’ and that protected activity does not include objective reporting of existence of discrimination or attempting to serve as a neutral intermediary”); *Wellman v. DuPont Dow Elastomers, L.L.C.*, 414 F. App’x 386, 389 (3d Cir. 2011) (granting summary judgment for employer and finding that even if a reasonable jury could conclude that plaintiff subjectively found work environment to be hostile and abusive, plaintiff’s allegations failed to give rise to a claim when viewed objectively).

of Labor or Equal Employment Opportunity Commission, or certain involvement in such complaints (*i.e.*, participation activity). As a threshold matter, just as not all “harassment” or “hostile work environments” is unlawful, not all “retaliation” is unlawful.⁴ For a claim of retaliation to be legally cognizable, the activity causing the adverse employment action must be protected, and a complaint is not cloaked with protected status merely by including the words “harassment” or “hostile work environment.”⁵ In the Third Circuit, whether activity is opposition activity or participation activity, an employee must hold an objectively reasonable belief, in good faith, that the activity at issue is unlawful under the operative statute.⁶ Claims can be dismissed due to the absence of a protected activity.⁷ Thus, the issue of “protected activity” should be considered carefully when analyzing a claim of retaliation. This article, however, assumes the existence of protected activity and an adverse employment action and focuses on the issue of causation.

While employers would be prudent to give all complaining employees the benefit of the doubt as to their good faith when addressing a complaint, it is common enough for employees to make an unfounded charge of racial, sexual or religious discrimination to forestall a sometimes lawful action (*e.g.*, being fired, given a lower pay grade, or transferred to a different assignment or location) and allege discrimination, that the United States Supreme Court identified that abuse of the laws.⁸ The Supreme Court found it to be contrary to Congressional intent to allow an employee to prevent the undesired change in employment circumstances by vesting that employee with a cognizable legal claim simply through evidence upon which a jury might reasonably believe that retaliation was a motivating factor in the action.

The Court recognized that a lessened causation standard could contribute to the filing of frivolous claims, which in turn would siphon resources from efforts by employers, administrative agencies, and courts to combat workplace harass-

4. *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130 (3d Cir. 2006); *Stingley v. Den-Mar, Inc.*, 2008 WL 4185828, at *4 (N.D. Tex. Sept. 10, 2008) (granting summary judgment in favor of employer where complaint of “hostile environment” was not complaint of unlawful hostile environment but rather generally about “rude, aggressive tone” and other rude conduct); *Aryain v. Wal-Mart Stores Tex. LP*, 534 F.3d 473, 484-85 (5th Cir. 2008) (no protected activity when complaint was about “petty slights, minor annoyances, and simple lack of good manners”); *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348-49 (5th Cir. 2007) (email and statements to supervisor that failed to mention unlawful employment practice not protected activity); *Harris-Childs v. Medco Health Solutions, Inc.*, 169 F. App’x 913, 916 (5th Cir. 2006) (complaint to employer of general harassment not protected activity); *Evans v. Texas Dept. of Transp.*, 547 F.Supp.2d 626, 654-55 (E.D. Tex. 2007) (complaint of hostile work environment based on rude behavior of supervisor, with no mention of Title VII-protected characteristic, not protected activity).

5. *Jacques-Scott v. Sears Holding Corp.*, 2013 WL 2897427, at *4 n.69, *9 (D. Del. June 13, 2013) (granting summary judgment for employer and explaining that complaint of “hostile work environment” is not necessarily protected); *Curay-Cramer*, 450 F.3d at 135 (affirming summary judgment for employer and stating, “[a] general complaint of unfair treatment is insufficient to establish protected activity under Title VII”); *Barber v. CSX Distribution Servs.*, 68 F. 3d 694, 701-02 (3d Cir. 2006) (affirming judgment for employer on retaliation claim where letter to human resources department neither “explicitly or implicitly” alleged protected characteristic and, therefore, was unprotected as a matter of law).

6. *Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006); *Clark County v. Breen*, 532 U.S. 268, 271 (2001) (*per curiam*) (rejecting retaliation claim where “[n]o reasonable person could have believed that” the underlying incident complained about “violated Title VII’s standard” for unlawful discrimination); *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1085 (3d Cir.1996) (retaliation plaintiff must “act [] under a good faith, reasonable belief that a violation existed”); *Rumanek v. Independent School Management, Inc.*, 2014 WL 104966, at *6 (D. Del. Jan. 10, 2014).

7. *Jacques-Scott*, 2013 WL 2897427, at *4 n.69, *9 (granting summary judgment for employer and explaining that complaint of “hostile work environment” is not necessarily protected); *Rumanek*, 2014 WL 104966, at *5 (granting partial summary judgment due to absence of protected activity). The claims surviving summary judgment in the *Rumanek* case (*i.e.*, a retaliation claim under Title VII and a retaliation claim under the DDEA) failed upon a unanimous jury verdict in favor of Independent School Management, Inc.

8. *Nassar*, 133 S. Ct. at 2532.

ment.⁹ Moreover, as claims of retaliation are filed with ever-increasing frequency, the issue of causation takes the front stage in deciphering meritorious cases. Indeed, the number of retaliation claims filed with the EEOC nearly doubled, from just over 16,000 in 1997 to over 31,000 in 2012; and in 2013 it surpassed all other discrimination claims except race.¹⁰ With this reality as a backdrop, the causation standard in retaliation claims has undergone a significant overhaul recently, favoring employers (or rather disfavoring what the Court determined to be unintended abuse of employment laws by employees).

Federal law includes two statutes that serve as the primary source of potential liability for private employers when it comes to age, race or color, national origin, and sex.¹¹ Age issues are addressed in the Age Discrimination in Employment Act of 1967 (“ADEA”).¹² Most other protected classes are addressed in Title VII of the Civil Rights Act of 1964 (“Title VII”).¹³ Both the ADEA and Title VII prohibit retaliation; and give private causes of action for unlawful retaliation. Both statutes require proof (by a preponderance of the evidence) of causation. The question has emerged as to what level of causation is required – a motivating factor or a “but-for” factor; and, where a “but-for” factor, what exactly does that mean?

II. HEIGHTENED CAUSATION STANDARD FOR FEDERAL AGE DISCRIMINATION AND RETALIATION CLAIMS

The ADEA provides that “[i]t shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s age.”¹⁴ In analyzing the meaning of “because of”, the Supreme Court in *Gross* stated that the ordinary meaning of “because of” is “by reason of” or “on account of.”¹⁵ Thus, the “requirement

9. *Id.* at 2531-32.

10. *Id.* (citing EEOC, Charge Statistics FY 1997 Through FY 2012, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>).

11. For example, race claims can also be brought under federal law that prohibits race discrimination in contracting. 42 U.S.C. § 1981. Such claims can be brought by both employees and independent contractors. *Brown v. J. Kaz, Inc.*, 581 F.3d 175 (3d Cir. 2009). Section 1981 encompasses retaliation claims. *Solomon v. Philadelphia Newspapers, Inc.*, 2009 WL 215340, at *2 (3d Cir. Jan. 30, 2009) (citing *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1961 (2008)).

12. 29 U.S.C. § 621 *et seq.*

13. 42 U.S.C. § 2000e *et seq.* Other statutes also provide protection against actions that amount to retaliation – including the Americans with Disabilities Act. 42 U.S.C. § 12203(a). The Family and Medical Leave Act also prohibits “retaliation” (although the claim is styled as “discrimination” and there can be multiple types of “retaliation” – including a brand of claim called “interference”). 29 U.S.C. § 2615(a)(2); *Callison v. City of Philadelphia*, 430 F.3d 117, 119 (3d Cir. 2005); *Ross v. Continental Tire of Americas, LLC*, 2013 WL 1628193, at *5 (E.D. Pa. Apr. 16, 2013) (granting employer’s motion for summary judgment on FMLA claims and explaining that “retaliation” analysis – not “interference” analysis – applies when leave is granted and claim is that employer retaliated for having taken and returned from leave).

14. 557 U.S. at 176 (quoting § 623(a)(1); emphasis in original).

15. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176 (2009) (citing 1 *Webster’s Third New International Dictionary* 194 (1966); 1 *Oxford English Dictionary* 746 (1933); *The Random House Dictionary of the English Language* 132 (1966)) (emphasis in original).

that an employer took adverse action ‘because of’ age [meant] that age was the ‘reason’ that the employer decided to act,” or, in other words, that “age was the ‘but-for’ cause of the employer’s adverse decision.”¹⁶

In reaching this decision, the Supreme Court noted that in 1991, Title VII was amended¹⁷ to add a lessened causation standard to claims of discrimination under Title VII, through § 2000e-2(m), which states, “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”¹⁸ Noting in *Gross* that the ADEA was not amended to add this lessened causation standard, the Court stated that regardless of whether a claim is for age discrimination or for retaliation based on some age-based protected activity, there must be proof that the prohibited criterion was “the but-for cause” of the employer’s prohibited conduct.¹⁹ “The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.”²⁰ The Court reaffirmed this view in its June 2013 decision in *Nassar*.²¹

This but-for causation standard can be juxtaposed with the causation standard applicable to non-age discrimination claims, in which causation can be established when the complaining party demonstrates protected status was a “motivating factor for any employment practice, even though other factors also motivated the practice.”²² As the Supreme Court stated, “[t]his, of course, is a lessened causation standard.”²³

III. HEIGHTENED CAUSATION STANDARD FOR TITLE VII RETALIATION CLAIMS

Even though the “motivating factor” standard governs Title VII claims based on race, color, religion, sex, or national origin discrimination, the Supreme Court in *Nassar* adopted the higher, but-for standard for Title VII retaliation claims, holding, “[g]iven the lack of any meaningful textual difference between [the Title VII retaliation provision] and [the ADEA discrimination/retaliation provision], the proper conclusion is that Title VII retaliation claims require

16. 557 U.S. at 176. *See also* *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 63–64 & n.14 (2007) (noting that “because of” means “based on” and that “‘based on’ indicates a but-for causal relationship”); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265–266 (1992) (equating “by reason of” with “‘but for’ cause”).

17. 105 Stat. 1071.

18. 42 U.S.C.A. §2000e-2(m) (emphasis added). Even under this lessened causation standard, if an employee meets the burden of showing that race, color, religion, sex, or nationality was “a motivating factor in the employment action”, an employer who can prove that it would still have taken the same employment action will be saved from monetary damages and a reinstatement order. *See Nassar*, 133 S.Ct. at 2526.

19. *Gross*, 557 U.S. at 167-68.

20. *Gross*, 557 U.S. at 180.

21. *Nassar*, 133 S.Ct. at 2523.

22. 42 U.S.C. §2000e-2(m).

23. *Nassar*, 133 S.Ct. at 2526.

proof that the desire to retaliate was the but-for cause of the challenged employment action.”²⁴ Stated differently, a Title VII retaliation claim requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.²⁵ As noted in the *Nassar* case, this standard may not be met even where the employer expresses consternation in response to the protected activity.²⁶ But if the adverse employment action would not have been taken in the absence of the protected activity, the standard is met.

On January 27, 2014, the United States Supreme Court, citing *Nassar* and *Gross*, further analyzed the meaning of “because of” and clarified that “but-for causality” means both more than “contributing” and more than “substantial”; and that it was insufficient to establish a “material element and a substantial factor in bringing” about the conduct.²⁷ The Court stated, however, that where retaliatory animus is the “straw that broke the camel’s back”, but-for causation exists.²⁸ Using a sports analogy, the Court described the but-for causation standard as follows:

Consider a baseball game in which the visiting team’s leadoff batter hits a home run in the top of the first inning. If the visiting team goes on to win by a score of 1 to 0, every person competent in the English language and familiar with the American pastime would agree that the victory resulted from the home run. This is so because it is natural to say that one event is the outcome or consequence of another when the former would not have occurred but for the latter. It is beside the point that the victory also resulted from a host of *other* necessary causes, such as skillful pitching, the coach’s decision to put the leadoff batter in the lineup, and the league’s decision to schedule the game. By contrast, it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the event. If the visiting team wound up winning 5 to 2 rather than 1 to 0, one would be surprised to read in the sports page that the victory resulted from the leadoff batter’s early, non-dispositive home run.²⁹

Underscoring that the causation issue is no small point and is intended to be significant in litigation, the Supreme Court expressed concern that a “lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage,” which would be “inconsistent with the structure and operation of Title VII.”³⁰

24 *Id.* at 2521. Although the *Nassar* Court repeatedly used the word “the” in articulating “the but-for” standard, the *Nassar* Court also referred to the standard as “a but-for cause” of the alleged adverse action by the employer. *Id.* at 2534. Thus, too much should not be read into the use of the word “the” (versus “a”).

25. *Id.*

26. *Id.* at 2524 (despite vacating and remanding employee verdict, noting that employee’s supervisor “expressed consternation” at employee’s complaints about alleged harassment). The *Nassar* Court rejected that application of the but-for standard entitled the employer to judgment as a matter of law. The Court concluded that the issue was “better suited to resolution by courts closer to the facts of this case.”

27. *Burrage v. United States*, 2014 WL 273243, ____ U.S. ____ (Jan. 27, 2014). The *Burrage* case is not an ADEA or Title VII case even though the *Gross* and *Nassar* cases and the but-for standard articulated in those cases was discussed. The concurrence in *Burrage* (like the dissent in *Nassar*) understood (or at least characterized) the Court’s reading of “because” to amount to “solely because of.”

28. *Burrage*, 2014 WL 273243, ____ U.S. _____. The *Burrage* Court repeatedly referred to the standard as “a but-for cause” (not “the” but-for cause).

29. *Id.*

30. *Id.* at 2532.

IV. CONTINUING AMBIGUITY ABOUT CAUSATION STANDARD UNDER FEDERAL LAW

Both before and after *Nassar*, courts within the Third Circuit have analyzed retaliation claims under a three-step burden-shifting framework known as the “*McDonnell Douglas* framework.”³¹ Under this analysis, if an employee establishes a *prima facie* case of retaliation, the employer has the burden to articulate some legitimate, nondiscriminatory reason for its challenged action. The burden then shifts back to the employee to establish pretext.³² Discrimination claims can proceed differently where there is direct evidence; but courts within the Third Circuit have held that direct evidence does not alter retaliation analysis after the holding in *Nassar*.³³

At the *prima facie* level of analysis, even prior to *Nassar*, the issue of the employer’s proffered reason for its actions should be irrelevant; only becoming relevant if and after the employee meets the standard at the *prima facie* level, because the burden of production does not shift until the employee first meets the burdens at the *prima facie* level.³⁴ The Third Circuit has stated that the *Nassar* standard applies at the *prima facie* level of a plaintiff’s case, at the third of three elements – *i.e.*, the causation prong.³⁵ Similarly, in January 2014, the United States District Court for the District of Delaware stated that a plaintiff alleging Title VII retaliation must establish that “protected activity must be the ‘but-for’ cause of the [employer’s] alleged retaliatory action under the causation prong of the *prima facie* case.”³⁶

At the pretext level, prior to *Nassar*, a plaintiff could meet the requisite burden by submitting evidence sufficient to cause a jury either (a) to disbelieve the employer’s articulated legitimate reasons or (b) to believe that the allegedly-unlawful reason was more likely than not a “motivating or determinative cause” of the employer’s action.³⁷ Under the first alternative, courts prior to *Nassar* held that pretext could be established through the demonstration of “such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its actions that a reasonable fact finder could rationally find them unworthy of credence.”³⁸ Following *Nassar*, most district

31. *Rumanek*, 2014 WL 104966, at *4.

32. *Id.*

33. *Id.* at *4 n.4. *See also* *Davis v. Pittsburgh Public Schools*, 930 F. Supp. 2d 570, 598-99 (W.D. Pa. 2013); *Mensah v. Cambridge Sec., SVS*, 2014 WL 197898, at *4 (D.N.J. Jan. 14, 2014).

34. *See generally* *Hubbell v. World Kitchen, LLC*, 688 F. Supp. 2d 401, 434 n.14 (W.D. Pa. 2010) (noting “burden of production does not shift to the defendant ... unless the plaintiff is able to establish a *prima facie* case”).

35. *Verma v. University of Pennsylvania*, 533 F. App’x 115, 119 (3d Cir. Aug. 7, 2013). *See also* *Stone v. New Jersey Admin. Off. of the Courts*, 2014 WL 260291, at * 2 (3d Cir. Jan. 24, 2014) (applying but-for standard under ADA); *Bush v. Donahoe*, 2013 WL 4045785, at *18 (W.D. Pa. Aug. 8, 2013) (stating, “under the third prong of the *prima facie* case, Plaintiff’s protected activity must be the “but-for” cause of Defendant’s alleged retaliatory action”); *Muldowney v. K-Mart Corp.*, 2013 WL 6061563, at *10 (M.D. Pa. Nov. 18, 2013); *Crawford v. George & Lynch, Inc.*, 2013 WL 6504635, at *12 (D. Del. Dec. 9, 2013) (stating, “protected activity must be the ‘but-for’ cause of [employer’s] alleged retaliatory action under the causation prong of the *prima facie* case”).

36. *Rumanek*, 2014 WL 104966, at *5. *See also* *Taylor v. Harrisburg Area Comm. College*, 2014 WL 347036, at *15 (M.D. Pa. Jan. 30, 2014).

37. *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994).

38. *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1108 (3d Cir. 1997).

courts have stated that the second alternative for establishing pretext has been modified such that employees now must establish that but-for the employer's retaliatory bias, the employer would not have taken the adverse employment action.³⁹

There appears to be less agreement about application of *Nassar* at the *prima facie* level than at the pretext level. Unlike the Third Circuit, the Second Circuit has recently rejected application of *Nassar* at the *prima facie* level of analysis and placed it only in the pretext level.⁴⁰ Thus, the circuits are now split. Differing views on whether *Nassar* applies at the *prima facie* level of analysis will result in differing outcomes in cases on various important issues. For example, pre-*Nassar*, courts appeared generally to agree that timing (especially "unusually suggestive" timing) can be sufficient to establish causation at the *prima facie* level of analysis. Predictably, courts that appear to not apply *Nassar* at the *prima facie* level but only at the pretext level have already found that a *prima facie* case can still be made where there is "close temporal proximity" but that it is insufficient to establish pretext.⁴¹ However, at least one court has *sua sponte* (in context of FMLA claims) raised without answer the question of whether, after *Nassar*, *prima facie* causation can still be established where timing between protected activity and adverse employment action is "unusually suggestive".⁴² For the same reasons why close temporal proximity is insufficient to establish pretext where but-for causation must be shown (*i.e.*, because establishing but-for causation requires more than the creation of an inference, which is all that temporal proximity shows), it would seem that close temporal proximity should be insufficient to establish causation at the *prima facie* level if but-for causation must be shown. Because rulings on issues like this may vary between jurisdictions that apply *Nassar* differently under the *McDonnell Douglas* framework, practitioners should exercise great care in applying cases that make sense under one approach (*e.g.*, where *Nassar* does not apply at the *prima facie* level) but which arguably no longer make sense under the other approach (*e.g.*, where *Nassar* does apply at the *prima facie* level).

It seems that the decision to apply *Nassar* at the *prima facie* level of analysis has the potential to alter dramatically the entire burden-shifting paradigm in retaliation cases – although not even those courts purporting to apply *Nassar* at the *prima facie* level have made that ruling yet. In sum, where the *Nassar* but-for standard is applied at both the third element of the *prima facie* case and the second alternative of the pretext standard, it is difficult to see how any case surviving analysis of the third prong of the *prima facie* case could ever fail at the pretext level; or why a pretext analysis would even be necessary (or appropriate). Simply put, an employee who establishes the *Nassar* but-for causation as part of the *prima facie* case will necessarily be able to establish pretext, because *Nassar* but-for causation is one of the two ways of establishing pretext (the other, traditionally, being by submitting evidence sufficient to cause a jury to disbelieve the employer's articulated legitimate reasons). On the other hand, an employee who cannot establish the *Nassar* but-for causation as part of the *prima facie* case will never (or should never) reach the question of pretext because the burden would not (or should not) shift – thus making irrelevant the question of whether there is evidence sufficient to cause a jury to disbelieve the employer's articulated legitimate reasons. Therefore, in those courts where the *Nassar* but-for standard applies at the *prima facie* level of analysis, an argument exists that it is unnecessary to explore pretext at all – including especially the

39. *Rumanek*, 2014 WL 104966, at *5; *Lasalle v. Port Authority of New York & New Jersey*, 2013 WL 6094339, at *6 n.7 (D.N.J. Nov. 19, 2013).

40. *Zahn Kwan v. Andalex Group, LLC*, 737 F.3d 834, 846 n.5 (2d Cir. 2013) (explaining Second Circuit's application of *Nassar* at the pretext phase rather than the *prima facie* phase). The dissent in the *Zahn Kwan* decision further illuminates the Second Circuit's application of *Nassar* at the pretext level. *Id.* at 849-50.

41. See *e.g.*, *E.E.O.C. v. New Breed Logistics*, 2013 WL 4495114, at *16-17 (W.D. Tenn. Aug. 23, 2013); *Moore v. Kingsbrook Jewish Medical Center*, 2013 WL 3968748, at *19-20, n.32, 33 (E.D.N.Y. July 30, 2013).

42. *Clark v. Jackson Hospital & Clinic, Inc.*, 2013 WL 5347450, at *5 n.3 (M.D. Ala. Sept. 23, 2013).

first alternative of the pretext standard, which involves the question of whether the employee can show “such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them ‘unworthy of credence’”.⁴³

In *Rumanek v. Independent School Management, Inc.*, the District of Delaware recently held that the *Nassar* standard applies at both the *prima facie* and pretext levels of analysis in permitting two retaliation claims to survive a motion for summary judgment.⁴⁴ The court stated:

[a] plaintiff may prove that retaliation was a but-for cause of an adverse employment action by demonstrating weaknesses, implausibilities, inconsistencies, or contradictions in the employer’s proffered legitimate, nonretaliatory reasons for its actions. From such discrepancies, a reasonable juror could conclude that the explanations were a pretext for a prohibited reason.⁴⁵

However, this analysis falls squarely in the post-*Nassar* first alternative of the pretext standard — essentially melding the two alternative approaches to establishing pretext and skipping the application of *Nassar* at the *prima facie* level. Indeed, although the court began its causation analysis as if analyzing the *prima facie* case, the analysis of the claims permitted to go forward dealt only with pretext issues, which perhaps is understood best by the fact that the court’s causation analysis on the claims surviving summary judgment is premised on recent Second Circuit law.⁴⁶

As discussed above, unlike the Third Circuit, the Second Circuit rejects application of the *Nassar* standard at the *prima facie* level — making it much more likely (and more analytically logical — although not necessarily more desirable or consistent with Congressional intent) that pretext will become an issue.⁴⁷ The Second Circuit also interprets *Nassar* to mean that “a plaintiff’s injury can have multiple ‘but-for’ causes, each one of which may be sufficient to support liability.”⁴⁸ Under the Second Circuit’s standard, where the parties have put forward several alleged causes of the plaintiff’s

43. *Landmesser v. Hazleton Area School Dist.*, 2013 WL 6002171, at *10 (M.D. Pa. Nov. 12, 2013) (citing *Fuentes*, 32 F.3d 759, 765 (3d Cir. 1994)).

44. *Rumanek*, 2014 WL 104966, at *12. The case was resolved in favor of the employer after a jury trial.

45. *Rumanek*, 2014 WL 104966, at *7 (quoting *Zann Kwan v. Andalex Group LLC*, 737 F. 3d 834, 846 (2d Cir. 2013) (internal citations omitted)). The *Zann Kwan* Court relied exclusively on Second Circuit precedent predating both *Gross* and *Nassar* for that proposition.

46. The *Rumanek* Court found that “inconsistent explanations” for the employee’s termination “must be resolved by the finder of fact before a determination can be made as to whether [allegedly-protected activity] was a but-for cause of her termination.” *Id.*

47. *Zann Kwan*, 737 F. 3d at 846 n.5, 849-50.

48. *Id.* at 846 (citing 4 *Fowler V. Harper et al., Harper, James and Gray on Torts* § 20.2, at 100–101 (3d ed. 2007) (“Probably it cannot be said of any event that it has a single causal antecedent . . .”) (collecting cases); W. Page Keeton et al., *Prosser and Keeton on Torts* § 41, at 264–66 (5th ed. 1984)). The Second Circuit stated that, “[r]equiring proof that a prohibited consideration was a ‘but-for’ cause of an adverse action does not equate to a burden to show that such consideration was the ‘sole’ cause.” *Id.* (citing *Fagan v. U.S. Carpet Installation, Inc.*, 770 F. Supp. 2d 490, 496 (E.D.N.Y. 2011) (explaining that under the Age Discrimination in Employment Act “[t]he condition that a plaintiff’s age must be the ‘but for’ cause of the adverse employment action is not equivalent to a requirement that age was the employer’s *only* consideration, but rather that the adverse employment actions would not have occurred without it.”) (citation omitted)). Although the *Nassar* Court did not state that there could be only one but-for cause, disagreeing about Congressional intent, the dissent stated that it was “lost on the Court” that Congress had “considered and rejected an amendment that would have

termination (e.g., retaliation, unsuitability of skills, poor performance, and inappropriate behavior), the determination of whether retaliation was a “but-for” cause will likely be found “particularly poorly suited to disposition by summary judgment, because it requires weighing of the disputed facts, rather than a determination that there is no genuine dispute as to any material fact” and the task put to a jury to “determine whether the plaintiff has proved by a preponderance of the evidence that she did in fact complain about discrimination and that she would not have been terminated if she had not complained about discrimination.”⁴⁹ Under the Second Circuit’s approach, it appears much more likely that cases will survive summary judgment than when *Nassar* is applied at the *prima facie* level.

It remains to be seen if the Third Circuit will find that application of the Second Circuit’s standard amounts to a “lessened causation standard” that makes it “far more difficult to dismiss dubious claims at the summary judgment stage,” which (as the United States Supreme Court stated in *Nassar*) would be “inconsistent with the structure and operation of Title VII.” If so, the Third Circuit might reject application of the Second Circuit’s standard. If not, it remains to be seen how the Third Circuit will modify Second Circuit law so that it makes sense at the *prima facie* level of analysis. Perhaps the Third Circuit will retreat from its holding that *Nassar* applies at the *prima facie* level of analysis and join the Second Circuit to find that *Nassar* applies only at the pretext level. Perhaps the Supreme Court will weigh in on this circuit split. For now, the causation standard under federal law remains unclear.

V. THE CAUSATION STANDARD FOR DISCRIMINATION AND RETALIATION CLAIMS UNDER THE DELAWARE DISCRIMINATION IN EMPLOYMENT ACT

The DDEA is the Delaware law most closely paralleling matters raised in the ADEA and Title VII.⁵⁰ Unlike federal law, which has a separate statute for age only, the DDEA addresses age together with the other categories addressed in Title VII.⁵¹ DDEA also covers a number of categories not addressed under the ADEA or Title VII, including marital

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placed the word ‘solely’ before protected classes in the discrimination provision; and that a prime sponsor of Title VII commented that a “sole cause” standard would render the Act “totally nugatory.” *Nassar*, 133 S. Ct. at 2547. At least one Court in the Third Circuit has interpreted *Nassar* to mean “the sole basis”, although other courts have disagreed. *Burton v. Pennsylvania State Police*, 2014 WL 29009, at *22 (M.D. Pa. Jan. 2, 2014) (“the mere fact that Plaintiff is asserting both discrimination and retaliation claims as to the Supervisor’s Notation is fatal to his retaliation claim as the *prima facie* case of retaliation requires the plaintiff to show that the desire to retaliate was the *sole* basis, or the but-for cause, of the challenged employment action”). *See also Sparks v. Sunshine Mills, Inc.*, 2013 WL 4760964, at *17 n.4 (N.D. Ala. Sept. 4, 2013) (“the plain meaning of the word ‘because’ means that the employee’s action was the **sole** reason, or but-for cause, of the employer’s discrimination”) (emphasis added). *But see Little v. Technical Specialty Products LLC*, 2013 WL 5755333, at *5 (E.D. Tex. Oct. 23, 2013) (“*Nassar* did not hold that ‘but-for’ causation requires that a plaintiff prove that retaliation was the sole reason for the adverse action, and Defendants cite no case law indicating that ‘but-for’ causation means “sole reason”); *Shumate v. Selma City Bd. of Educ.*, 2013 WL 5758699, at *3 (S.D. Ala. Oct. 24, 2013) (calling it an “axiomatic premise” that the but-for standard adopted by the Court in *Nassar* is not the “sole cause” standard).

49. *Id.*

50. DDEA covers more entities than ADEA or Title VII, because it applies to those employing four or more employees rather than 20 and 15 for ADEA and Title VII respectively. DEL. CODE ANN. tit. 19 § 710(6).

51. DEL. CODE ANN. tit. 19 § 711 *et seq.* Delaware does not have a statute like the FMLA. However, like federal law, Delaware does have a separate statute addressing disability claims. DEL. CODE ANN. tit. 19 § 720 *et seq.* Although still often referred to as the “Handicapped Persons Employment Protections Act” (perhaps because it is listed that way on Delaware Code Online), the short title is “Persons With Disabilities Employment Protections Act” (the “DPDEPA”); and words and phrases using the word “handicap”

status and genetic information. In recent years new protected classes have been added including sexual orientation and gender identity.⁵² In September 2013, DDEA added “volunteer emergency responders”, which means a volunteer firefighter, a member of a ladies’ auxiliary of a volunteer fire company, volunteer emergency medical technician, and/or a volunteer fire police officer.⁵³

Like the ADEA and Title VII, the DDEA has both anti-discrimination and anti-retaliation provisions. As to discrimination, the DDEA makes it an unlawful employment practice for an employer to “[f]ail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of such individual’s race, marital status, genetic information, color, age, religion, sex, sexual orientation, gender identity, or national origin.”⁵⁴ As to retaliation, the DDEA makes it an unlawful employment practice for any employer (or various other defined groups) to, “discharge, refuse to hire or otherwise discriminate against any individual or applicant for employment or membership on the basis of such person’s race, marital status, color, age, religion, sex, sexual orientation, gender identity, or national origin, because such person has opposed any practice prohibited by this subchapter or because such person has testified, assisted or participated in any manner in an investigation, proceeding, or hearing to enforce the provisions of this subchapter.”⁵⁵ Thus, unlike federal law, the Delaware causation language is not different for age and other protected classes on the issue of discrimination; and the causation language for retaliation claims is not materially different from the language applicable to discrimination claims.

In light of the decisions in *Gross* and *Nassar*, and the tendency of Delaware courts to apply the DDEA in ways consistent with federal employment statutes, several important questions arise as to the application of the DDEA’s “because of” standard for claims of discrimination and retaliation: (1) what standard applies to age discrimination claims under the DDEA — the heightened “determinative factor”/“but-for factor” standard or the lessened “motivating factor” standard;⁵⁶ (2) what standard should apply for non-age-based discrimination claims under the DDEA; (3) what should be the standard for retaliation claims; and (4) if different causation standards are to apply to these different claims despite the statutory language providing no basis for the different treatment, what is the justification?

The statutory textual reasons that the United States Supreme Court identified for treating retaliation claims and age discrimination claims differently from other protected status discrimination claims arguably do not apply to the DDEA. Legislative action by Congress may well be telling of what Congress intended through subsequent legislation inaction

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were amended in August 2011 in favor of the word “disability”. The DPDEPA has a separate “retaliation prohibited” provision that states, “It shall be an unlawful employment practice for any employer to discharge, refuse to hire or otherwise discriminate against any person or applicant for employment, or any employment agency to discriminate against any person or any labor organization to discriminate against any member or applicant for membership because such person has opposed any practice prohibited by this subchapter or because such person has testified, assisted or participated in any manner in proceedings to enforce the provisions of this subchapter.” *Id.* (emphasis added).

52. DEL. CODE ANN. tit. 19 § 711.

53. DEL. CODE ANN. tit. 19 § 719A.

54. DEL. CODE ANN. tit. 19 § 711(a)(1) (emphasis added).

55. DEL. CODE ANN. tit. 19 § 711(f) (emphasis added).

56. This issue arose in at least one case. *See Huey v. Walgreen Co.*, 2010 WL 3825676, at *9 (D. Del. Sept. 23, 2010). However, the *Huey* Court determined that it need not reach the issue of whether the “but-for” analysis applied to age discrimination claims under the DDEA. *Id.*

regarding similar laws or provisions of the same law. However, the action/inaction of Congress is far less indicative of the General Assembly's intent. Indeed, the General Assembly could have incorporated into the DDEA a "motivating factor" standard during its post-*Nassar* amendments if it had desired for it to apply to any discrimination claims to (as Congress did with Title VII). The language of the DDEA more closely resembles that of the ADEA than it does that of Title VII's discrimination provisions. Therefore, arguably Delaware law should be read to apply the heightened but-for cause test to all discrimination and retaliation claims. On the other hand, the Delaware Supreme Court and other courts have applied federal law to Delaware's analog statute for more than 30 years; and the General Assembly has never sought to amend the causation standard in the DDEA to deviate from federal law.⁵⁷ It is unclear, however, why different causation standards would apply to different claims under the DDEA despite the causation standard being worded the same.

The General Assembly could address many of these issues by, for example, separating age from the other protected classes in the DDEA or by creating a new law just for age that mirrors the ADEA except, perhaps (like the DDEA) defining "employer" to cover employers having fewer employees than required by the ADEA. Further, the General Assembly could improve upon the ADEA by including a "burden of proof" provision (perhaps similar to the Delaware Whistleblowers' Protection Act) that makes clearer the desired causation standard.⁵⁸ Whether or not age is kept in the DDEA, the General Assembly could include a "burden of proof" provision in its law(s) and, with respect to the DDEA, include one subsection stating the causation standard for status-based discrimination claims (perhaps distinguishing between classes if a different standard is meant to apply, for example, to age claims) and another subsection stating the causation standard for retaliation claims (if the standards are intended to be different). The General Assembly could go even further by statutorily clarifying how claims of various types should be analyzed (*e.g.*, assuming the General Assembly intends for but-for causation to apply to retaliation claims, by explaining whether but-for causation should be analyzed as part of a *prima facie* case and, if so, how that impacts any burden shifting). Clarification of the DDEA would likely be welcome news to one group but unwelcome to another (*i.e.*, employers/employees), because it would make claims either harder or

57. *Giles v. Family Court*, 411 A.2d 599, 601 (Del. 1980). The *Giles* Court applied federal law to a DDEA claim based on its finding that "the language of the Delaware statute is substantially the same as the Title VII language defining an unlawful employment practice." *Id.* at 602. The *Giles* case, however, obviously predates the 1991 amendment to Title VII. Cases subsequent to 1991 also have applied federal law to DDEA national origin/race claims. *See Shah v. Bank of Am.*, 598 F. Supp. 2d 596, 602 n.6 (D. Del. 2009). Although the *Shah* case is from the same year as the *Gross* decision, it predates the *Gross* decision. Even since the *Gross* decision, courts have held that "[g]enerally, the same evidence required to prevail on a claim under the ADEA is required to prevail on a claim of age discrimination brought under the DDEA." *Alred v. Eli Lilly and Co.*, 771 F. Supp. 2d 356, 266 (D. Del. 2011) (involving DDEA age discrimination and retaliation theories). However, in the *Alred* case, the court found that the employee's evidence was sufficient to meet the ADEA standard and thus was enough to meet the DDEA standard. Therefore, the question was not raised as to whether if the ADEA standard could not be met whether the DDEA standard nonetheless could be met. The *Alred* case is further significant because it reversed prior Delaware law that prohibited employees from bringing ADEA and DDEA claims together in a single forum. *Id.* at 368.

58. DEL. CODE ANN. tit. 19 § 1708. The Delaware Whistleblowers' Protection Act ("DWPA") states, "The burden of proof in any action brought under this chapter shall be upon the employee to show that the primary basis for the discharge, threats, or discrimination alleged to be in violation of this chapter was that the employee undertook an act protected pursuant to § 1703 of this title." *Id.* (emphasis added). Even this "the primary basis" standard is subject to debate. While it seems clear that there can be only one "primary basis", there could be debate about how determinative the basis must be (*e.g.*, arguably the basis could be less than 51% of the reason and still the "primary" basis if there were at least two other reasons that also were bases). The DWPA has other undesirable ambiguity too (*e.g.*, the definition of "violation" is unclear). *Id.* at 1702(6). The definition of "public body" might be unclear too, in that the term includes "an elected official of a county, city, or school district or employee of them" but "city" is not defined; and at least one municipality has argued that it is not covered because it is not a "city". *See Schaffer v. Topping*, 2012 WL 4148692, at *1 (Del. Super. Ct. Sept. 14, 2012). That issue is likely to be resolved (at least by the Superior Court) near the time this article is published.

easier to prove depending on the substance of the clarification. Such amendment, however, would do much to promote a fundamental principle of good law – clarity.⁵⁹

VI. CONCLUSION

A question of central importance under federal law remains unclear — at what point in the established framework for analyzing retaliation claims should the *Nassar* but-for standard apply and how should that impact the remainder of the analytical framework and methods of establishing the causation element(s) of the applicable framework? Those same questions and more apply to Delaware law – including to which, if any, DDEA claims the *Gross/Nassar* standard applies? Will Delaware law break away from federal law as these questions are considered? Perhaps the General Assembly will amend the DDEA to resolve these ambiguities. Perhaps federal law will continue to evolve – to codify or abrogate *Gross* and *Nassar*.⁶⁰ What is clear is that much is unclear about discrimination and retaliation law (under both Federal and Delaware law); and the law is likely to get more confusing before it gets any clearer as litigants and their counsel (and thus the courts) consider these issues.

59. If a but-for causation standard was made to apply to status-based discrimination claims (in addition to age discrimination claims) under the DDEA, an employee litigant would have good reason to choose to file claims under federal law rather than Delaware law because the claims would be easier to prove under federal law. If a motivating factor standard was made to apply to age discrimination or retaliation claims under the DDEA, an employee litigant would have good reason to choose to file claims under Delaware law rather than federal law because the claims would be easier to prove under Delaware law.

60. The dissent in *Nassar* disagreed with the majority's conclusions about what Congress intended, stating, "Congress had no such goal in mind" and stated that the decision "should prompt yet another Civil Rights Restoration Act." *Nassar*, 133 S. Ct. at 2547.