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In this issue, we recap significant developments in the Delaware courts affecting corporations, their boards and their management teams.

## New Day, New Rules: Five Key Aspects of Amended DGCL Section 144 and Section 220

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In spring 2025, there was significant debate over Delaware's Senate Bill 21 (SB21), which offered new Delaware amendments addressing controller and board conflicts, as well as access to books and records. These amendments, codified in amended Section 144 and Section 220, were enacted to provide greater predictability but also to limit excessive litigation.

- **Amended Section 144** established statutory safe harbors for conflicted transactions involving the board or controlling stockholders.
- **Amended Section 220** was designed to curtail broad stockholder inspection rights.

In general, these provisions were heralded by the corporate bar as a stabilizing measure for corporate practitioners, offering greater clarity and certainty for books and records demands and transactions involving conflicts, and helping to avoid incessant and unnecessary litigation costs in every transaction.

So why haven't we seen many significant opinions involving these new, crucial provisions? Because the provisions were the subject of a lengthy appeal challenging amended Section 144.<sup>1</sup> The good news is that the Delaware Supreme Court declared these provisions fully constitutional.

In other words, amended Sections 144 and 220 are fully operational and ready to be incorporated into corporate transactions and decision-making.

There's a clean slate right now, and these statutory provisions can be utilized the way the drafters intended and should have an immediate impact on corporate transactions

<sup>1</sup> The Section 220 amendments were not challenged on appeal. See *Rutledge v. Clearway Energy Grp. LLC*, -- A.3d --, 2026 WL 548504, at \*5 (Del. Feb. 27, 2026) ("The amendments to § 220, which governs stockholder inspections of corporate books and records, are not implicated by the questions the Court of Chancery certified to us.").

and litigation. Delaware expects these new provisions will be a central part of corporate planning and litigation for years to come.

This article provides a starting point for those who have been watching the reincorporation debate this past year with a keen eye or are somewhat aware of these new provisions but haven't paid much attention to the details.

Below, we outline five crucial aspects of the new statutory provisions that may not be fully appreciated.

## 1. Perks of Being a 'Disinterested Director'

Prior to new Section 144, determining whether a public company director was "disinterested" was left entirely to common law tests and judicial determination. Under amended Section 144(d)(2), directors of public companies who meet stockholder exchange criteria for independence are now statutorily presumed to be independent if they are not involved in the transaction, or even if the director was named to the board by a person who is interested in the transaction.

Qualifying disinterested directors benefit from a statutory presumption that is "heightened" and can only be rebutted by "substantial and particularized facts," such as a "material interest" in the transaction or a "material relationship" with an interested party that could reasonably impair the objectivity of the director's judgment in connection with the transaction.

The bottom line is that the amendments make it much harder to challenge the independence of directors on weak grounds. This change was reinforced in a recent, novel decision where Vice Chancellor Lori Will interpreted Section 144 on this very topic and ruled that:

- Section 144(d)(2) should apply broadly.
- It is not limited only to Section 144.

- "By requiring both 'substantial and particularized facts' ... [it] suggests a legislative intent to strengthen the presumption beyond the Rule 23.1 standard."<sup>2</sup>

## 2. Clarity of Control

The Section 144 amendments also clarified what constitutes a "controller" or "control group" with less than a majority control position — an issue that vexed many companies in the Delaware courts under the common law.

The new provisions define a "controlling stockholder" or "control group" as one who:

- owns or controls at least 33.3% of the voting power, and
- has the capacity to exercise managerial authority of the business and affairs of the company.

The overall goal of these changes is to provide greater clarity as to when a controlling stockholder or control group has "control" and to reduce litigation activity in light of clear statutory definitions. Moreover, the Section 144 amendments clarify that both controlling stockholders and control groups — in their capacity as such — are shielded from monetary damages for breaches of the duty of care. This brings controllers in line with other fiduciaries that are statutorily permitted to be exculpated for money damages based on care violations.

## 3. The 'Votes Cast' Ratification Standard

Another perk for companies of the Section 144 amendments is an enhanced voting standard under the safe harbors. Under

<sup>2</sup> See *Ayers v. Foley*, 2026 WL 1723538, at \*10 (Del. Ch. June 15, 2026). ("The General Assembly's focus on materiality indicates that the facts must be significant enough to evidence a disabling conflict ... [and] a plaintiff must plead specific, non-conclusory facts of sufficient qualitative significance to support a reasonable inference of a material interest or relationship that would impair the director's objective judgment.")

the common law, obtaining the protection of a majority-of-the-minority stockholder vote could be incredibly difficult, given voting standards that require a majority of the outstanding shares rather than just those voting.

Under Section 144, the voting standard has shifted to an informed, uncoerced, affirmative vote of a majority of the “votes cast” by “disinterested stockholders” who do not have a material interest in the transaction or a material relationship with the controlling stockholder or control group, or with any other materially interested person.

This makes securing cleansing votes significantly more feasible for public companies, particularly those that may not have a track record of stockholders showing up at the ballot box.

#### 4. Statutory Safe Harbors

Historically, navigating transactions with conflicted fiduciaries required significant thought and planning based on hundreds of cases issued over decades. The applicable standards left significant discretion to the courts around nearly every aspect of judicial challenges in controller or conflicted board situations.

Amended Section 144 was designed specifically to establish bright-line, statutory safe harbors for transactions involving conflicted boards and controlling stockholders, with the goal of providing clear guidelines that, if followed, would result in less litigation burden and expense.

In most instances, where the interests of a controlling stockholder, control group or conflicted board diverge from those of other stockholders, the safe harbors provide a more streamlined process. Under the statute, the transaction can be cleansed if:

- the transaction is approved or recommended in good faith by a majority of directors on a committee with at least two disinterested directors, or

- the deal is approved by a majority of votes cast by informed and disinterested stockholders.

As for controlling stockholder “go-private” transactions, the standard for the safe harbor is a higher bar but still comparatively much easier to navigate than before. Specifically, the statute requires that such a transaction must be approved by:

- a majority of the disinterested directors, acting in good faith, serving on a committee, and
- a majority of votes cast by informed, disinterested stockholders.

Ultimately, the goal of these innovative statutory “safe harbor” provisions is to make transaction outcomes more predictable and generate less stockholder litigation in nearly every matter involving a controller or conflicted board. This is a welcome change for companies.

#### 5. Revamped Books and Records Demands

Stockholders frequently seek books and records under Delaware law before filing complaints. But Section 220 demands often became protracted affairs taking months to resolve, particularly when the requests were focused less on board-level materials and more on emails and texts, akin to civil litigation discovery.

Such demands also led to a significant uptick in expedited litigation over books and records that weighed down the Court of Chancery’s dockets.

The new Section 220 amendments provide a much-needed modern overhaul. Specifically, the statute now identifies a limited, itemized list of document categories that can be accessed by a stockholder that satisfies the statutory formalities and requirements.

This includes, among other specific categories, a company’s:

- Charter.
- Bylaws.
- Minutes of board and committee meetings.
- Director independence questionnaires.
- Annual financial statements.
- Certain contracts with stockholders.

The statute also permits companies to “impose reasonable restrictions on confidentiality, use or distribution” of documents, states that information in the books and records are “deemed incorporated by reference in any complaint” filed by a stockholder in relation to the subject matter referenced in the demand, and that the company may “redact portions of any books and records” that “are not specifically related to the stockholder’s purpose.”

Another feature beyond the itemized list of categories and restrictions is that a stockholder seeking access to emails and other written communications must meet a higher burden to obtain them. To access these additional documents, stockholders must prove a “compelling need” for the extra documents and demonstrate this need with “clear and convincing evidence.”

Ultimately, the changes are intended to:

- Provide more streamlined access to board-level materials.

- Reduce the burden on companies facing drawn-out, invasive demands for informal communications.
- Avoid litigation expense at this stage of the proceedings.

## Conclusion

In short, the new Delaware statutory provisions are beneficial to Delaware companies, which now have statutory guideposts and definitions that should provide clarity and increased protection when engaging in transactions. The goal of amended Sections 144 and 220 is to provide more certainty and predictability in corporate planning and litigation outcomes. Moreover, reduced overall litigation burden and cost allows for greater value to be generated for all constituents involved.

Stockholders, who undoubtedly will continue to challenge transactions, will do so within the context of the statutory provisions. The first novel ruling interpreting Section 144’s “disinterested director” standard has already been issued in *Ayers*. Similar rulings interpreting other aspects of amended Sections 144 and 220 will follow.

As these rulings are issued, if the amendments in real world practice require tweaks or additional amendments, the Delaware General Assembly is expected to be responsive to those needs.

# Hindsight Is 20/20?: The Delaware Supreme Court Issues a 3-2 Split Decision Allowing Post-Demand Evidence to Be Admissible in Section 220 Actions

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There have been several notable split decisions over the years in the Delaware Supreme Court, but it is a *rara avis* to see the justices split 3-2 over an issue involving access to books and records.

On March 25, 2026, a divided Delaware Supreme Court majority held that in exceptional circumstances, the Court of Chancery may consider post-demand evidence in the Section 220 context when analyzing whether a stockholder had a credible basis to suspect wrongdoing.

Justice Gary F. Traynor authored the majority's opinion, ruling, among other things, that "nothing in [8 *Del. C.*] Section 220's text prohibits the consideration of post-demand evidence," and that a blanket prohibition could result in inefficiencies such as a repetitive process of updated demands and complaints.<sup>1</sup>

Chief Justice Collins J. Seitz, Jr. and Justice Karen L. Valihura dissented, arguing that, from a policy standpoint, a bright-line rule barring post-demand evidence would "discourage a premature race to the courthouse to attempt to gain a foothold for later merits-based litigation" and also would respect the intended summary nature of Section 220 proceedings.

## The Demand and Lower Court Decisions

The case arose in connection with the sales process of Paramount Global. Shari Redstone, through National Amusements Incorporated, held a majority of Paramount's voting shares. In 2023 and 2024, media outlets reported on efforts to sell National Amusements and possible bids for Paramount itself. Some reports suggested that Redstone, acting as Paramount's controller, blocked full company sales in favor of selling only National Amusements' controlling stake.

A Paramount stockholder sought to investigate the company's books and records for potential corporate wrongdoing, including the usurpation of a corporate opportunity.

A Delaware Court of Chancery magistrate presided over a Section 220 trial where the stockholder sought to compel production of the company's books and records and relied, in part, on post-demand news articles to establish it had a credible basis.

The magistrate declined to consider post-demand evidence and recommended that judgment be entered for Paramount. The stockholder took exceptions, and the Court of Chancery, conducting a *de novo* review, rejected the magistrate's recommendation.

Vice Chancellor J. Travis Laster considered **both** pre- and post-demand evidence, including confidentially sourced news reports, and found that stockholder plaintiff had established a credible basis to infer possible wrongdoing, stating that "there are settings when a stockholder can legitimately rely at trial on post-demand evidence."<sup>2</sup>

<sup>1</sup> *Paramount Glob. v. State of Rhode Island Off. of the Gen. Treasurer, on behalf of the Emps.' Ret. System of Rhode Island*, -- A.3d --, 2026 WL 820647, at \*7 (Del. 2026).

<sup>2</sup> *State of Rhode Island Off. of Gen. Treasurer on Behalf of Emps.' Ret. Sys. of Rhode Island v. Paramount Glob.*, 331 A.3d 179, 192 (Del. Ch. 2025).

Vice Chancellor Laster ultimately certified two questions for interlocutory appeal to the Delaware Supreme Court:

1. Whether post-demand evidence can be used to establish a proper purpose.
2. Whether confidentially sourced reporting can be used to demonstrate a credible basis for books and records purposes.<sup>3</sup>

## The Delaware Supreme Court's Analysis

On appeal, the majority court addressed Paramount's three-fold argument that a stockholder should not be permitted to use post-demand evidence to establish a credible basis.

**First**, the court rejected Paramount's argument that Section 220(c) requires that a stockholder "first establish" a proper purpose based on what was known at the time the demand was made. The court opined that the term "first establish" means what a stockholder **must prove** to obtain a court order compelling inspection, which **occurs after** the demand is made.

The court further noted that there is nothing in the Section 220 statute that prohibits the consideration of post-demand evidence.

**Second**, while Paramount pointed to several transcript rulings in which the Court of Chancery had declined to consider post-demand evidence, the Delaware Supreme Court distinguished those cases, finding that the exclusion was based on the nature of the evidence. The court also pointed to its own recent precedent that considered post-demand evidence.<sup>4</sup>

**Third**, the Delaware Supreme Court held that judicial officers should exercise their discretion on a case-by-case basis in determining whether to permit post-demand evidence. The court

rejected Paramount's policy concerns "that a ruling permitting consideration of post-demand evidence will unleash a wave of premature and baseless demands by stockholders who are merely hopeful that a credible basis will arise before trial."<sup>5</sup>

The court viewed "the policy considerations as cutting both ways" — on the one hand, stockholders may serve thinly supported demands. But on the other hand, categorically barring post-demand evidence would create potential unavoidable inefficiencies with iterative demands.

The Delaware Supreme Court adopted the Court of Chancery's general rule that "when a stockholder seeks relief under § 220, it will be limited to evidence identified in the demand." However, "under exceptional circumstances," the Court of Chancery may exercise its discretion to "consider post-demand evidence that is material to the court's credible-basis inquiry and not prejudicial to the corporation."

Moreover, the Delaware Supreme Court found Paramount was not prejudiced by the post-demand evidence because:

- It related to the company's own conduct.
- The parties stipulated to admissibility of certain post-demand evidence.
- It did not object to the use of evidence before trial.

## The Dissent

Chief Justice Seitz and Justice Valihura dissented and opposed the majority's holding that post-demand evidence may be used at trial to determine whether a stockholder has established a credible basis. In their view, the court should adopt a bright-line rule barring post-demand evidence rather than a case-by-case assessment.

<sup>3</sup> *Paramount Global*, 2026 WL 820647, at \*5.

<sup>4</sup> See *Wong Leung Revocable Tr. v. Amazon.com, Inc.*, 345 A.3d 965, 978 (Del. 2025).

<sup>5</sup> *Paramount Global*, 2026 WL 820647, at \*6.

The dissent raised several policy concerns in support of this position:

**First**, a blanket bar on post-demand evidence would discourage stockholders from rushing to the courthouse prematurely in an effort to establish a foothold for later merits-based litigation.

**Second**, limiting stockholders to evidence that existed at the time of their demand would deter Section 220 actions filed without a concrete basis.

**Third**, the dissent cautioned that applying a “materiality” standard to post-demand evidence would introduce unnecessary complexity into what should be a prompt, streamlined and narrow summary proceeding.

### Subsequent Opinion Applying Post-Demand Evidence

Shortly after the Delaware Supreme Court’s *Paramount* decision was issued, another *Paramount*-related books and records action was resolved by a Court of Chancery magistrate, who held that stockholders may use post-demand evidence — specifically, a *New York Times* article — as “admissible hearsay evidence to support Plaintiffs’ credible basis inquiry.”<sup>6</sup> The magistrate determined that the stockholder was entitled to informal board materials because the formal board minutes were contradicted by the article.

In his analysis, the magistrate cited to the analysis set forth by the majority court in *Paramount* and found that the *New York Times* article was “material because it directly addresses the central issue raised here” and is credible because it was “deeply reported.”

The magistrate noted the reputation and reliability of *The New York Times* and that the “use of anonymous sources in news reporting is routine and unremarkable.”

### Impact of Post-Demand Evidence on Amended Section 220

Both *Paramount* decisions were decided under the earlier version of Section 220, not the current version that was significantly amended and modernized in 2025.

The 2025 amendments reflect the Delaware General Assembly’s intent to keep books and records demands and proceedings narrow and streamlined. For instance, the statute now explicitly defines which documents qualify as “books and records,” giving companies greater clarity about what they must produce. (See our article “New Day, New Rules: Five Key Aspects of Amended DGCL Section 144 and Section 220,” in this issue of the newsletter, for more on the amendments.)

The amendments also specify the circumstances — and impose a heightened evidentiary burden — under which a stockholder may obtain documents beyond those defined as “books and records.”

That said, the amendments have been interpreted as primarily focusing on narrowing the scope of available documents while leaving the proper purpose requirement and credible basis standard largely intact. As a result, although the Delaware Supreme Court analyzed *Paramount* under the pre-amendment statute, its holding concerning post-demand evidence will likely remain relevant under the amended statute.

But the magistrate’s more recent analysis — which pre-dates the 2025 amendments and blanketly permitted the production of documents beyond normal “books and records” — may result in a different outcome under the amended statute’s heightened standard for seeking documents beyond the itemized categories in Section 220(a).

<sup>6</sup> *Metro. Water Reclamation Dist. Ret. Fund v. Paramount Glob.*, 2026 WL 1623142, at \*9 (Del. Ch. June 5, 2026).

## Takeaways

- The majority decision in *Paramount* makes clear that the stockholders will be limited to evidence identified in their demand and information available at the time of demand, and that post-demand evidence will only be permitted in “exceptional circumstances” where it is “material” to the credible-basis inquiry and not prejudicial to the corporation.
- That said, there was a strong dissent from Chief Justice Seitz and Justice Valihura against using any post-demand evidence for books and records purposes. Given the divided 3-2 split decision, and if post-demand evidence becomes a more prominent issue at the Court of Chancery, it’s possible that the Delaware Supreme Court may revisit the *Paramount* decision.
- Despite the split decision, the *Paramount* court unanimously agreed that a court may rely on hearsay in news articles in its credible basis inquiry provided the news outlet is reputable and the court has engaged in a sufficient analysis of that news outlet’s reputation.
- After *Paramount*, it remains to be seen whether disputes over what qualifies as “material” and “not prejudicial” may add a new layer of complexity to what are supposed to be summary proceedings.
- Companies should also be mindful of waiver and preserving prejudice arguments. The majority court noted that *Paramount* was not prejudiced, partly because it stipulated to admissibility of certain post-demand evidence, did not object before trial and offered its own post-demand evidence. This serves as an important reminder that, even at the summary proceeding stage, corporations litigating against a Section 220 demand have the ability to make trial-level objections and take legal or factual positions that may be preserved and raised on appeal.

# Waiting Is the Hardest Part: Delaware Supreme Court Rejects Activist Stockholders' 'As Applied' Challenges to Advance Notice Bylaws With No Live Proxy Contest

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Delaware courts are no stranger to resolving lawsuits brought by activist stockholders. These disputes often arise from a challenge to advanced notice bylaws, which are used as a defensive mechanism that provides a board of directors with notice of director nominations in advance of a stockholder meeting.

These bylaws are “twice-tested” by Delaware courts and, under *Kellner v. AIM ImmunoTech, Inc.*, courts consider whether:

- The bylaws are consistent with the charter, not prohibited by law and address a proper subject matter.
- The board’s adoption, amendment or application was equitable.

The former assesses “facial” challenges to the bylaw, the latter “as applied” challenges. Delaware courts, however, have made it clear that an activist’s challenge to an advanced notice bylaw must be a ripe controversy.

In *In re The AES Corporation and Owens Corning*, two stockholders (the Challenging Stockholders) — who neither intended to run a proxy contest nor identified a stockholder who was chilled from doing so — attempted an “as applied” challenge to advanced notice bylaws. The Delaware Supreme Court, affirming the Delaware Court of Chancery’s dismissal of the action, explained that there was no “genuine, extant controversy” that was ripe for the court to resolve due to the lack of a concrete nomination dispute.

Moreover, the Delaware Supreme Court stated that “fiduciary review must await the posture in which Delaware courts can assess actual operation and consequences rather than hypothetical future applications.”

## Background

After the Securities and Exchange Commission adopted the universal proxy rule, AES and Owens Corning (the Companies) amended their bylaws, believing that the universal proxy rule would lower barriers for activist stockholders.

The bylaw amendments included provisions stating that:

- “[C]ompliance with the advance notice provisions is the exclusive means by which stockholders may nominate directors.”
- “[T]he chair or presiding officer [could] disregard nominations that do not comply with the notice requirements.”
- The term “acting in concert” would include “conduct knowingly undertaken in parallel with another person toward a common goal, and each set of challenged bylaws includes a ‘daisy-chain’ provision deeming a person acting in concert with one actor also to be acting in concert with any third party who is acting in concert with that actor.”
- A stockholder must make disclosures relating to substantial ownerships and relationships, “including disclosures concerning derivative interests, legal proceedings, certain contracts or relationships, and performance-based fees.”

Following books and records demands, the Challenging Stockholders filed complaints alleging that the bylaws were facially invalid and that the directors of the Companies breached their fiduciary duties by adopting these bylaws. Then, on July 11, 2024, the Delaware Supreme Court issued its decision in *Kellner*, holding that the facial validity of a bylaw turns on “whether the bylaw is contrary to law or the certificate of incorporation and addresses a proper subject matter[.]”

Consequently, the Challenging Stockholders amended their complaints, alleging only equitable challenges.

The Companies moved to dismiss for lack of subject matter jurisdiction. The Court of Chancery dismissed these complaints because there was no “genuine, extant controversy” since the Challenging Stockholders “could not ‘identify a stockholder who either intends to run a proxy contest’ or is ‘chilled,’ and ‘absent any proxy contest threat’ the bylaws’ adoption was ‘not the kind of circumstance’ that would trigger equitable review under *Kellner*.”

The Challenging Stockholders appealed and posited that:

- The adoption of the bylaws was ripe for review, and enhanced scrutiny can apply even when there was no proxy fight.
- The ripeness question is intertwined with the merits, so the court should have reviewed under Rule 12(b)(6).

The cases were consolidated on appeal.

## Legal Analysis

The Delaware Supreme Court held that the Challenging Stockholders’ claims involving “equitable challenges” were unripe. Relying on *Kellner*, the court explained that advance notice bylaws are “twice tested[.]” and a stockholder’s challenge to a bylaw under the first inquiry is a legal question that is “answerable from the face of the governing documents[.]”

For example, the court in *Kellner* found that a 1,099-word bylaw, which the trial court explained “would choke a horse[.]” was facially invalid for being “indecipherable.” But an “as applied” challenge “typically proceeds on a developed, adversarial record where the challenged action has immediate consequences, not on conjecture about how bylaws might operate in future contests.”

Applying these principles, the court determined that “[t]he Challenging Stockholders’ central problem is the absence of a would-be nominator” and that an “as applied” challenge is justiciable “only when a real nomination controversy exists — *i.e.*, when a stockholder has stepped forward to nominate, or credibly threatened to do so, and the court can assess the bylaw’s operation on a concrete record rather than in the abstract.”

This requirement for an actual nomination controversy, the court explained, was consistent with prior Court of Chancery decisions in *In re Allergan, Inc. Stockholder Litigation and Openwave Systems, Inc. v. Harbinger Capital Partners Master Fund I, Ltd.*

The court also rejected the Challenging Stockholders’ argument that the adoption was a “trigger for ripeness” because the bylaw was so chilling that a stockholder would never engage in a proxy contest. The court explained that this premise was difficult to square with *Kellner*. Moreover, the court said, the circumstances would not create a “concrete nomination setting” that would show “who would be swept into an acting-in-concert group, what disclosures would actually be triggered, whether compliance would be feasible on the facts presented, or whether the company would in fact reject a nomination.”

This decision, however, “does not insulate ‘clear day’ bylaws from scrutiny[.]” but emphasizes “that fiduciary review must await the posture in which Delaware

courts can assess actual operation and consequences rather than hypothetical future applications.”

The Delaware Supreme Court ultimately held that a Rule 12(b)(1) dismissal was appropriate because there is no “genuine,

extant controversy” as a result of the Challenging Stockholders’ failure to plead an actual or threatened nomination controversy. Thus, “the ripeness defect here is antecedent to the merits, not intertwined with them[.]”

## Takeaways

- The Delaware Supreme Court continues to rely on the “twice-tested” framework in the advance notice bylaw context. As a result, stockholders are limited in challenging the bylaw on its face (*e.g.*, the “indecipherable” bylaw in *Kellner*) or, during a concrete nomination controversy, challenging the triggered bylaw for equitable review.
- It appears that the Supreme Court took a potential arrow from the activist’s quiver in the “as applied” context, by effectively declaring the issue unripe and refusing to allow a hypothetical challenge to how a bylaw might be applied. Indeed, the court set a high bar for stockholders to make an “as applied” challenge, requiring a “genuine, extant controversy” and the need for a “concrete nomination setting,” rather than speculation over how a bylaw should operate.
- The Supreme Court also acknowledged that stockholders are not powerless to respond to bylaws that they dislike. Stockholders still retain the power to vote against directors, propose new bylaws, and seek books and records to investigate the directors’ conduct.

# 'Setting the Standard': Analyzing the Delaware Supreme Court's Zantac Ruling on Expert Testimony Admissibility and the Potential Impact in the Delaware Courts

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Experts often assist the Delaware courts, including the Court of Chancery and the Superior Court Complex Commercial Litigation Division, in establishing damages and other areas of expertise. Recently, the Delaware Supreme Court's opinion, *In re Zantac (Ranitidine) Litigation*, issued a new twist to the typical standard on expert testimony admissibility.

## The Delaware Supreme Court's Analysis

In general, expert testimony or opinion must be grounded in "scientific, technical or other specialized knowledge" that helps "the trier of fact to understand the evidence or to determine a fact in issue[.]"<sup>1</sup>

In *Zantac*, the Delaware Supreme Court explained that, under Delaware Rules of Evidence (DRE) 702 and the seminal U.S. Supreme Court case, *Daubert*,<sup>2</sup> the proponent of an expert opinion must establish that "the opinion is based on sufficient facts or data and on dependable principles and methods that are reliably applied to the facts of the case."<sup>3</sup>

The Delaware Supreme Court also examined DRE 702's analogous federal rule, which was amended in 2023. After considering DRE 702, the court explained that the federal amendment did not change substance but rather made explicit that the proponents of expert testimony must prove "admissibility by a preponderance of the evidence." The purpose of this amendment was to discourage trial courts from deciding a challenge to expert testimony by applying a presumption of admissibility.

Ultimately, the Delaware Supreme Court applied this reasoning to reverse the lower court's decision. In the case below, approximately 75,000 plaintiffs — each diagnosed with one of 10 types of cancer — sought to present expert testimony that their ingestion of Zantac caused their disease.

The defendants disputed the reliability of the experts' methodologies on myriad grounds. But the lower court did not credit those arguments for several reasons, including because it:

- Considered "any argument regarding the experts' application of methodology as going to weight rather than admissibility."
- Concluded that Delaware law embraced a "'liberal thrust' or presumption favoring admissibility."

The Supreme Court held that by refusing to credit the defendants' arguments, the Superior Court had "abdicated its gatekeeping role[.]" passing "crucial questions of sufficiency and reliability" to the jury rather than resolving them itself. In short, the Supreme Court ruled that the plaintiffs failed to prove the admissibility of their experts' testimony by a preponderance of the evidence.

<sup>1</sup> D.R.E. 702(a).

<sup>2</sup> *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

<sup>3</sup> *In re Zantac (Ranitidine) Litig.*, 342 A.3d 1131, 1143-44 (Del. 2025).

## Application to Trial Courts

A potential consequence of the *Zantac* decision is that trial courts may shift in favor of granting more motions to exclude expert testimony. But its effect may be felt differently depending on the court overseeing the matter. Clearly, the *Zantac* ruling is most obviously applicable to the Superior Court because the Superior Court's gatekeeping function exists precisely to prevent juries from being exposed to unreliable expert evidence.

But what is the impact of *Zantac* in the Court of Chancery, which conducts only bench trials? At present, motions to exclude expert testimony in the Court of Chancery are often denied, on the theory that the court will assess the weight of the expert evidence after trial. And bench trials may be different enough from jury trials to render *Zantac* distinguishable in the Court of Chancery.

Whether *Zantac* takes hold in the Court of Chancery will likely depend on practical incentives as much as doctrine. The Court of Chancery described this very difference in the 2009 *Beard Research* opinion. There, it issued an expert admissibility ruling that provided that, "although it is critical in a jury trial for a court to exercise its gatekeeper function in advance of allowing an expert to testify, the importance of addressing issues raised under *Daubert* and

Rule 702 before an expert testifies is more attenuated in a bench trial."<sup>4</sup>

The court subsequently admitted the testimony, explaining that because it was a bench trial, the court could assess the proper weight to assign such testimony, especially upon hearing cross-examination.

*Beard Research* likely has staying power. Currently, something that approaches a presumption of admissibility for expert testimony survives in the Court of Chancery.<sup>5</sup> And given that no Court of Chancery opinion has cited to *Zantac* in the months since its publication, *Beard Research* and its progeny will likely continue to govern expert testimony in the Court of Chancery.

In sum, while there's a possibility that *Zantac* may have the potential to influence the Court of Chancery's approach to assessing admissible expert testimony, it is more likely that *Zantac*'s effects will predominantly be felt in the Superior Court.

<sup>4</sup> *Beard Rsch., Inc. v. Kates*, 2009 WL 7409282, at \*7 (Del. Ch. Mar. 31, 2009).

<sup>5</sup> See, e.g., *Fortis Advisors LLC v. Johnson & Johnson*, C.A. No. 2020-0881-LWW, trans. at 39-42 (Del. Ch. Jan. 8, 2024); *GB-SP Hldgs., LLC v. Walker*, C.A. No. 9413-VCF, trans. at 32 (Del. Ch. Jan. 4, 2022). But see *In re Columbia Pipeline Group, Inc. Merger Litig.*, 2022 WL 2902769, at \*1-2, 6 (Del. Ch. July 14, 2022) (expert improperly presented some testimony as legal conclusions); *S'holder Representative Servs. LLC v. Alexion Pharms., Inc.*, C.A. No. 2020-1069-MTZ, at 2 (Del. Ch. June 26, 2023) (Order) (expert untimely disclosed).

## Takeaways

- The Delaware Supreme Court's *Zantac* decision clarifies that the proponent of expert testimony must prove admissibility under D.R.E. 702 by a preponderance of the evidence, reflecting the 2023 amendments to the analogous federal rule and rejecting any presumption of admissibility.
- The Supreme Court reversed the Superior Court for failing to conduct its gatekeeping role, holding that trial judges must decide questions of the sufficiency and reliability of expert opinions rather than relegating them to questions of weight to be determined by the jury.
- The opinion implies a greater likelihood that motions to exclude unreliable expert testimony will be granted to prevent juries from hearing the testimony. This effect will be mostly felt in the Superior Court, including its Complex Commercial Litigation Division, where jury trials are common.
- By contrast, *Zantac*'s influence may be limited in the Court of Chancery because the Court does not have juries but instead conducts bench trials and often admits expert testimony and assigns it weight at or after trial.

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