IN RE ORACLE CORPORATION DERIVATIVE LITIGATION:
HAS A NEW SPECIES OF DIRECTOR INDEPENDENCE BEEN UNCOVERED?

ABSTRACT

This comment analyzes the Delaware Court of Chancery's decision in In re Oracle Corporation Derivative Litigation. In particular, the court's analysis of the independence of directors in the special litigation committee context is examined to determine whether the court is adopting a new standard of director independence or merely taking a fresh look at the existing rule under Zapata Corp. v. Maldonado. The role of stockholder derivative actions and special litigation committees in corporate governance is reviewed and evaluated, as well as the Delaware Supreme Court's test for the independence of directors, and the Delaware Court of Chancery's role in reviewing the decisions of special litigation committees to dismiss stockholder derivative suits. Noting that the court's decision in Oracle purportedly does not adopt a new rule of director independence, it is concluded that in actuality In re Oracle broadens the determination of director independence to include additional and original factors. Additionally, the court clearly avoids prior case law in looking beyond "domination and control" as the central question of independence and focuses on the contextual nature of the inquiry. As a result, the court has ensured that Delaware corporations will at a minimum look beyond pecuniary interests in making independence determinations, perhaps a necessary step toward rebuilding stockholder confidence and trust, while at the same time sustaining the robustness of Delaware corporate law.

TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. INTRODUCTION .............................................. 850</td>
</tr>
<tr>
<td>II. BACKGROUND .................................................. 851</td>
</tr>
<tr>
<td>A. Stockholders' Derivative Actions and the Role of Special Litigation Committees 852</td>
</tr>
<tr>
<td>B. The Delaware Supreme Court's Independence Test 854</td>
</tr>
<tr>
<td>1. Zapata v. Maldonado and Its Progeny 854</td>
</tr>
<tr>
<td>2. The Role of the Delaware Court of Chancery 855</td>
</tr>
<tr>
<td>III. ANALYSIS ...................................................... 857</td>
</tr>
<tr>
<td>A. The Facts and Procedural Posture of Oracle 857</td>
</tr>
<tr>
<td>B. The Delaware Court of Chancery's Analysis 859</td>
</tr>
<tr>
<td>1. More than &quot;Domination and Control&quot; 859</td>
</tr>
</tbody>
</table>

849
The corporate world is facing new challenges in order to satisfy governance requirements that have intensified in the wake of highly publicized corporate scandals of recent years such as Enron and WorldCom. Appropriately, the independence of directors has become the focus of the majority of corporate governance modification. Before these incidents, courts were much more likely to give great deference to the business judgment of directors, including the decisions of special litigation committees to dismiss litigation against the corporation by stockholders.  

In *In re Oracle Corp. Derivative Litigation*, Vice Chancellor Leo E. Strine Jr. of Delaware's Court of Chancery denied the motion of a special litigation committee (SLC) to dismiss derivative claims brought by Oracle stockholders. The SLC was established by the board of directors of the Oracle Corporation to investigate claims of insider trading and breach of the fiduciary duty of loyalty brought against Oracle directors. The court based its finding on the SLC's inability to prove the independence of its two members, and thus the committee itself, from the directors being investigated. In doing so, the vice chancellor applied an independence
inquiry that expanded upon the traditional "domination and control" notion of independence, to include personal and philanthropic connections with the directors, which the court concluded created an "unacceptable risk of bias."

This comment will analyze the court's reasoning in In re Oracle, which is arguably representative of a recent judicial trend of a shift in courts' interpretations of fiduciary duty law. In addition, this comment will project the possible breadth of this ruling and the hurdles it could place on corporations in the necessary and ongoing search for independent directors.

II. BACKGROUND

Directors of Delaware corporations derive their managerial decision making power from Section 141(a) of Delaware General Corporation Law, including whether to initiate or terminate litigation on behalf of the corporation. Correspondingly, a Delaware corporation can seek to terminate a stockholders' derivative suit only if its board is comprised of directors who can impartially consider a demand to bring a derivative action. This reasoning is based on the rationale of the business judgment rule, which requires that "a director's decision [be] based on the corporate merits of the subject before the board rather than extraneous considerations or influences."

One common solution for lack of independence on a board of directors is the appointment of a special litigation committee (SLC) of independent directors to conduct a good faith investigation of the suit's

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6 ibid. at 936.
7 Oracle, 824 A.2d at 947.
8 The text of § 141(a) states that "[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." DEL. CODE ANN. tit. 8, § 141 (2001).
10 Id. at 783 (noting that the precise language of Sohland v. Baker, 141 A. 277 (Del. 1927), "only supports the stockholder's right to initiate the lawsuit[i]t does not support an absolute right to continue to control it").
12 The 'business judgment' rule is a judicial creation that presumes propriety, under certain circumstances, in a board's decision." Zapata, 430 A.2d at 782 (citing S. Samuel Arsht, The Business Judgment Rule Revisited, 8 HOFSTRA L. REV. 93, 97, 130-33 (1979)).
13 Aronson, 473 A.2d at 816.
allegations. The SLC is entrusted with the all of the decision-making authority of the board of directors, given that a board may delegate its authority to such a committee under Section 141(c)(2). As long as the SLC is investigating, the derivative suit is stayed. Upon a motion by the special litigation committee that the suit be dismissed, Delaware's Court of Chancery reviews the decision and decides whether to uphold the decision of the special litigation committee or to overturn it and allow the derivative suit to continue.

A. Stockholders' Derivative Actions and the Role of Special Litigation Committees

In a typical stockholders' derivative action, disgruntled stockholders demand that the corporation take action against directors, officers, or others for wrongdoing that has harmed the corporation. If, and when the corporation refuses to take such action, the stockholders may bring an action against the alleged wrongdoers and join the corporation as a defendant. Invariably, the corporation will be recast as a plaintiff, since the action is brought to benefit the corporation itself. Court of Chancery Rule 23.1 governs the entire shareholder derivative process.

14\textsuperscript{14}"It is seems clear that the Delaware statute is designed to permit disinterested directors to act for the board." Zapata, 430 A.2d at 786 (referring to Del. Code Ann. tit. 8, § 141(c) (2001)).
15The text of the statute reads: The board of directors may designate 1 or more committees, each committee to consist of 1 or more of the directors of the corporation . . . . Any such committee, to the extent provided in the resolution of the board of directors, or in the bylaws of the corporation, shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corporation . . . . Del. Code Ann. tit. 8, § 141(c)(2) (2003).
17"The committee can properly act for the corporation to move to dismiss derivative litigation that is believed to be detrimental to the corporation's best interest." Zapata, 430 A.2d at 786.
18\textit{id}. at 788.
20See Sohland v. Baker, 141 A. 277, 281 (Del. 1927) (holding that a stockholder may sue in his own name for the purpose of enforcing corporate rights).
21\textit{id}.
22Court of Chancery Rule 23.1 provides in part: In a derivative action brought by 1 or more shareholders . . . to enforce a right of a corporation, . . . the corporation . . . having failed to enforce a right which
Based on the disruptive and potentially incapacitating nature of a derivative suit, one common defensive strategy of a board of directors is to appoint an SLC to evaluate the merits of the action prior to the filing of an answer. Under Delaware law, the committee must be comprised of independent directors and the committee's finding that the suit is not warranted is grounds for dismissal of the action.

After the SLC completes an "objective and thorough" investigation of the proposed suit, the committee may move, through the corporation, to dismiss in the court of chancery. "The basis of the motion is the best interests of the corporation, as determined by the committee." As per the requirements set forth in Zapata, "the motion should include a written record of the investigation and its findings and recommendations." As to the limited issues presented by the motion, the moving party must meet the normal burden under Rule 56, demonstrating that there is no genuine issue

may properly be asserted by it, the complaint shall allege that the plaintiff was a shareholder . . . at the time of the transaction of which the plaintiff complains . . . . The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for plaintiff's failure to obtain the action or for not making the effort.

DELC. CH. CT. R. 23.1.

23. "To allow one shareholder to incapacitate an entire board of directors merely by leveling charges against them gives too much leverage to dissident stockholders." Lewis v. Anderson, 615 F.2d 778, 783 (9th Cir. 1979), cert. denied, 449 U.S. 869 (1980).


25. Zapata, 430 A.2d at 786.

26. Id. at 788. See also Kaplan v. Wyatt, 484 A.2d 501, 506-07 (Del. Ch. 1984). [T]he motion itself is neither a motion to dismiss under Rule 12(b), nor is it a motion for summary judgment pursuant to Rule 56. This is because it is not addressed to the adequacy of the cause of action alleged in the complaint, on the one hand, nor, on the other, is it addressed to the merits of the issues joined by the pleadings. Rather, the motion is a hybrid one, derived by analogy to a motion to dismiss a derivative suit based upon a voluntary settlement reached between the parties and to a motion brought pursuant to Rule 41(a)(2) whereby a plaintiff unilaterally seeks a voluntary dismissal of the complaint subsequent to the filing of an answer by the defendant. As such, it is addressed necessarily to the reasonableness of dismissing the complaint prior to trial without any concession of liability on the part of the defendants and without adjudicating the merits of the cause of action itself.

Id.

27. Zapata, 430 A.2d at 788.

28. Id.
as to any material fact and therefore the moving party is entitled to dismissal as a matter of law.29

B. *The Delaware Supreme Court's Independence Test*

In 1980, the Supreme Court of Delaware set forth in *Zapata Corp. v. Maldonado* the standard that a special litigation committee must satisfy in order to prevail on a motion to terminate a Delaware derivative action.30 Pursuant to this standard, the SLC bears the burden of persuasion in the court of chancery.31

1. *Zapata v. Maldonado* and its Progeny

According to *Zapata Corp. v. Maldonado*, the court of chancery should apply a two-step test when evaluating an SLC's motion to dismiss a stockholder derivative suit.32 "First, the Court should inquire into the independence and good faith of the committee and the bases supporting its conclusions."33 The corporation bears the burden of proof for each of these three prongs.34

If the Court determines either that the committee is not independent or has not shown reasonable bases for its conclusions, or, if the Court is not satisfied for other reasons relating to the process, including but not limited to the good faith of the committee, the Court shall deny the corporation's motion.35

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29Vice Chancellor Strine comments on the use of the rule 56 standard stating that the focus is on the SLC and not the merits of the case:

Importantly, the granting of the SLC's motion using the Rule 56 standard does not mean that the court has made a determination that the claims the SLC wants dismissed would be subject to termination on a summary judgment motion, only that the court is satisfied that there is no material factual dispute that the SLC had a reasonable basis for its decision to seek termination.

*Oracle*, 824 A.2d at 929 n.20.


31*Id.* at 788.

32*Id.*

33*Id.*

34*Zapata*, 430 A.2d at 788.

35*Id.* at 789.
If the court is satisfied, under Rule 56 standards,\textsuperscript{36} that the SLC was independent and was able to show reasonable bases for its good faith findings and recommendations, the court may, subject to its discretion, proceed to the second step of the analysis.\textsuperscript{37}

In the second step of the \textit{Zapata} analysis,\textsuperscript{38} the court applies its own "independent business judgment" in order to make a final determination of whether the motion should be granted.\textsuperscript{39} The second step is intended to avoid situations where the SLC is found to be independent and has shown a reasonable basis for its conclusions, yet dismissal does not appear to satisfy the impetus of the independence inquiry, or dismissal would prematurely terminate a stockholder grievance that deserves further consideration for the corporation's best interest.\textsuperscript{40}

The \textit{Zapata} analysis has subsequently been applied by the Delaware Court of Chancery numerous times.\textsuperscript{41} As a consequence, the role of the court of chancery in reviewing a motion by an SLC to terminate a derivative suit has been more clearly defined.\textsuperscript{42}

2. The Role of the Delaware Court of Chancery

As "the only instance in American Jurisprudence where a defendant can free itself from a suit by merely appointing a committee to review the allegations of the complaint,"\textsuperscript{43} the termination of a stockholder derivative suit by an SLC is a very important tool; perhaps the most potent defensive measure available to a board. It is certain that a board of directors who makes use of this "unique power to self destruct a suit brought against it"\textsuperscript{44} must take extraordinary measures to ensure that the SLC is "truly

\textsuperscript{36}See supra note 29 and accompanying text.

\textsuperscript{37}Zapata, 430 A.2d at 789.

\textsuperscript{38}"The second step provides, we believe, the essential key in striking the balance between legitimate corporate claims as expressed in a derivative stockholder suit and a corporation's best interests as expressed by an independent investigating committee." \textit{Id.}

\textsuperscript{39}\textit{Id.}

\textsuperscript{40}"This means, of course, that instances could arise where a committee can establish its independence and sound bases for its good faith decisions and still have the corporation's motion denied." \textit{Id.}


\textsuperscript{43}Fuqua, 502 A.2d at 967.

\textsuperscript{44}\textit{Id.}
The court of chancery uses the *Zapata* standard as a guideline in making its determination whether an SLC will prevail on a motion to dismiss a stockholder derivative suit. To be successful, the SLC must persuade the court that: its members were independent, those members acted in good faith, and they had reasonable bases for their recommendations. Once that burden is satisfied, the court is free to grant the SLC's motion. In the alternative, the court may disregard the SLC altogether and apply its own independent business judgment to decide whether the motion should be granted.

As noted by the court of chancery in *Katell v. Morgan Stanley Group*, "the Court does not take an independent look at the merits of the lawsuit, but must find that the Special Committee's consideration of the merits of the claims was reasonable." In this sense, the court's role is to determine that the correct process was followed and that the SLC conducted the investigation with the requisite amount of vigor. As set forth in *Zapata*, the court must apply Chancery Rule 56 standards in making that determination. "The standard for a Rule 56 motion for summary judgment is that the movant has the burden of demonstrating the absence of any material issue of fact, and any doubt as to the existence of such an issue will be resolved against him." Additionally, the court of chancery must give "special consideration to matters of law and public policy in addition to the corporation's best interests" when necessary. After completing the whole of this analysis, the court may grant the motion to terminate the derivative action, subject to "any equitable terms or conditions the court finds necessary or desirable."

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45 Id.
46 *Zapata*, 430 A.2d at 788-89.
47 Id.
48 Id.
49 Id.
51 Id.
52 *Zapata*, 430 A.2d at 788; *see also supra* notes 29, 37 and accompanying text (describing the procedure for granting or rejecting the SLC's motion).
53 *Fuqua*, 502 A.2d at 966 (citing Nash v. Connell, 99 A.2d 242 (Del. Ch. 1953); Brown v. Ocean Drilling & Exploration Co., 403 A.2d 1114 (Del. 1979)).
54 *Zapata*, 430 A.2d at 789
55 "This step shares some of the same spirit and philosophy of the statement by the Vice Chancellor: 'Under our system of law, courts and not litigants should decide the merits of litigation.' *Id.* at 789 n.18 (quoting Maldonado v. Flynn, 413 A.2d 1251, 1263 (Del. Ch. 1980)).
56 Id.
57 Id.
III. ANALYSIS

In *In re Oracle Corp. Derivative Litigation*, the court of chancery responded to the historically inconsistent approach of Delaware courts to the issue of director independence. Although the court of chancery did not adopt a new rule of director independence per se, its approach in applying the existing rule manifested a somewhat novel methodology. Furthermore, this new approach created anything but an across-the-board definition of director independence, since it broadened the subject matter that may possibly be taken into account in each determination of director independence by a court.

**A. The Facts and Procedural Posture of Oracle**

According to the stockholder plaintiffs in the complaint, four members of the board of directors of the Oracle Corporation were allegedly involved in insider trading which occurred during January 2001. These four directors were Lawrence Ellison, Oracle's chairman and chief executive officer, as well as Oracle's largest stockholder; Jeffrey Henley, Oracle's chief financial officer and executive vice president; Donald Lucas, chair of Oracle's executive committee and finance and audit committee; and Michael Boskin, who is chairman of the compensation committee and a member of the finance and audit committee. It was alleged that each of these directors received and misappropriated "material, non-public information" that Oracle would not meet earnings and revenue guidance that was provided to the market in December 2001.

In response to the derivative action, the Oracle Board of Directors formed a special litigation committee in February 2002 to investigate the insider trading allegations and to determine whether Oracle should pursue the claims brought by the stockholder plaintiffs or move to terminate the suit. The SLC was composed of two outside directors of Oracle's board
of directors, Professor Hector Garcia-Molina and Professor Joseph Grundfest. Notably, both members of the SLC were tenured professors at Stanford University.

The SLC retained independent counsel and economic advisors and conducted an investigation, which the court found to be "by any objective measure, extensive." In conducting its investigation, which included interviewing seventy witnesses and produced a final 1100 page report, the SLC conclusively decided that Oracle should move to terminate the derivative suit because it was not in the best interest of the corporation. The SLC seemed quite certain that there was no evidence of insider trading and "concluded that even a hypothetical Oracle executive who possessed all information regarding the company's performance in December and January of 3Q FY 2001 would not have possessed material, non-public information that the company would fail to meet the earnings and revenue guidance it provided the market in December." The allegedly improper sales by the four directors, posited as the "Trading Defendants" by the court of chancery, amounted to between two percent and seventeen percent of their respective holdings in the company. As noted by the SLC, these sales fell within the internal guidelines set up by Oracle that attempted to preclude insider trading.

As part of its final report, the SLC included several findings of fact that supported its conclusion that the SLC's members were independent from the Oracle directors under investigation. The report disclosed that defendant [Michael J.] Boskin was a Stanford professor; the SLC members were aware that [Donald] Lucas had made certain donations to Stanford; and among the contributions was a donation of $50,000 worth of stock that Lucas donated

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69Id. at 923-24. Both members of the SLC joined the board of directors of Oracle Corporation after this derivative action was instituted. Id. at 923.

70Id. at 923-24.

71Id. at 925.

72Oracle, 824 A.2d at 926.

73Id.

74Id.

75Interestingly, the shares Lawrence Ellison sold, which amounted to only two percent of his holdings in Oracle, amounted to over 29 million shares producing over $894 million. Id. at 922.

76Oracle, 824 A.2d at 922.

77These policies included a discouragement toward trading in the last month of a quarter. Id. at 927 n.14.

78Id. at 929.
to Stanford Law School after [Joseph] Grundfest delivered a speech...in response to Lucas's request.79

The report also claimed an "absence of any other material ties" between Oracle, the directors under investigation, and the SLC, namely, Joseph Grundfest and Hector Garcia-Molina.80

B. The Delaware Court of Chancery's Analysis

In denying the SLC's motion to terminate the derivative action, the court concluded that the "possibility that these extraneous considerations biased the inquiry of the SLC is too substantial for [the] court to ignore."81 In reaching this conclusion, the court coupled the facts that both professional and philanthropic ties existed, at least indirectly, between the members of the SLC and the Trading Defendants, with the gravity of the situation and the implications the investigation's outcome would have.82

The vice chancellor relied on the two-step analysis that comes from Zapata83 in determining whether the SLC was able to meets its burden of persuasion.84 The focus, however, was solely on the independence of the members of the SLC,85 since this was one of the two principle challenges of the plaintiffs and serves as a threshold issue.86

1. More than "Domination and Control"

In asserting its position to terminate the derivative suit, the SLC focused heavily on language from previous Delaware Court of Chancery and Delaware Supreme Court opinions that indicate "that a director is not independent only if he is dominated and controlled by an interested party."87 This argument is supported in law.88 This argument, however, is

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79 "It happens that...approximately half the donation was allocated for use by Grundfest in his personal research." Id.
80 Oracle, 824 A.2d at 929.
81 Id. at 921.
82 Id.
84 Oracle, 824 A.2d at 928.
85 Id. at 929.
86 The second challenge of the plaintiffs was the reasonableness of the recommendation of the SLC, but Vice Chancellor Strine did not address this issue because upon examination of the first issue, the SLC was unable to prove its independence. Id.
87 Id. at 936.
88 See, e.g., In re Walt Disney Co. Derivative Litig., 731 A.2d 342, 355 (Del. Ch. 1998).
not unlimited nor conclusive and the court responded expansively to this assertion by the SLC. In partial concurrence with the SLC's argument, the vice chancellor conceded that if "domination and control" were the central inquiry in the independence determination, the SLC would "win." This, however, is not the case. The court criticized and renounced a law that put its focus only on "domination and control," saying it "would serve only to fetishize much-parroted language, at the cost of denuding the independence inquiry of its intellectual integrity."

In a thorough discourse, Vice Chancellor Strine noted, "Delaware law should not be based on a reductionist view of human nature that simplifies human motivations on the lines of the least sophisticated notions of the law and economics movement." In concluding that humans are motivated not only by pecuniary interests, the vice chancellor articulated that "[h]omo sapiens is not merely homo economicus." Moreover, the vice chancellor stated that Delaware law should not ignore the "social nature of humans," before moving on to discuss the evolution and current position of director independence in Delaware courts.

2. "Independence" in the Delaware Courts

Next, the court summarized the concept of director independence as historically addressed by Delaware courts. "At bottom, the question of independence turns on whether a director is, for any substantial reason, incapable of making a decision with only the best interests of the corporation in mind. That is, the Delaware Supreme Court cases ultimately focus on impartiality and objectivity." This notion is consistent, the Court notes, with the basic definition of director independence given in Aronson v. Lewis. Particularly, independence ensures that "a director's

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89Oracle, 824 A.2d at 937-39.
90Id. at 937. "Nothing in the record suggests . . . that either Garcia-Molina or Grundfest are dominated and controlled by any of the Trading Defendants, by Oracle, or even by Stanford." Id.
91See Aronson v. Lewis, 473 A.2d 805, 815 (Del. 1984). "There must be coupled with the allegation of control such facts as would demonstrate that through personal or other relationships the directors are beholden to the controlling person."
92Oracle, 824 A.2d at 937.
93Id. at 938.
94Id.
95Id.
96Oracle, 824 A.2d at 938 (quoting Parfi Holding AB v. Mirror Image Internet, Inc., 794 A.2d 1211, 1232 (Del. Ch. 2001), rev'd in part on other grounds, 817 A.2d 149 (Del. 2002), cert. denied, 538 U.S. 1032 (2003)).
97473 A.2d 805, 816 (Del. 1984).
decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences." 98 Lastly, of vital importance to the concept of director independence is the idea that these considerations are in no way limited to financial interests, and in fact can stem from "personal or other relationships to the interested party." 99

Although central to the Zapata inquiry, determination of the independence of directors has been carried out essentially in an inconsistent fashion in Delaware courts. 100 Courts have come to different conclusions in different cases involving family relationships as well as personal ones; in fact, "there is admittedly case law that gives little weight to ties of friendship in the independence inquiry." 101 The vice chancellor clearly pointed out that his role in deciding the motion of the SLC in Oracle was not to do what he believed to be the impossible, which was to "attempt to rationalize all these cases in their specifics." 102

3. The Contextual Nature of the Independence Inquiry

Opting to avoid the impossible, the court instead endeavored to apply the independence inquiry that the Supreme Court of Delaware had already "articulated in a manner that is faithful to its essential spirit." 103 In doing this, the court described the importance of taking into account all of the facts and circumstances that might be pertinent to director independence. 104 On this premise, the significant role of a special litigation committee necessarily became an important aspect of the independence inquiry. 105 In addition, the fact that such a small number of directors, in this case only two, bore the burden of a task with the potential for such an enormous impact needed to be measured. 106 Lastly, the nature of the investigation itself and the investigators themselves may have compounded the difficulty

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98Id.
99Id. at 815; see Orman v. Cullman, 794 A.2d 5, 24 (Del. Ch. 2002) (citing Aronson, 473 A.2d at 816); see also Parfi Holding, 794 A.2d at 1232 (discussing director independence in the context of non-pecuniary motivations).
100Different decisions take a different view about the bias-producing potential of family relationships, not all of which can be explained by mere degrees of consanguinity." Oracle, 824 A.2d at 939 (footnote omitted).
101Id. (noting Crescent/Mach I Partners, L.P. v. Turner, 846 A.2d 963, 980 (Del. Ch. 2000), as one such case).
102Id. at 939.
103Id.
104Oracle, 824 A.2d at 941.
105Id. at 939.
106Id. at 940-41.
of the situation. Using the Oracle SLC as an example, the court pointed out how each "investigator's mindset and talent influence, for good or ill, the course of an investigation" and how an investigation may require, as in Oracle, a consideration of the "subjective state of mind" of those being investigated.

In accordance with all of these considerations, the court necessarily measured the independence of the SLC "contextually," identifying this as a "strength" of Delaware law. By taking into account all circumstances, the court was able to circumvent the fact that "even the best minds have yet to devise across-the-board definitions that capture all the circumstances in which the independence of directors might reasonably be questioned." Finally, Vice Chancellor Strine points to an additional layer of the inquiry, namely, that "Delaware law requires courts to consider the independence of directors based on the facts known to the court about them specifically, the so-called 'subjective actual person standard.'" Given the natural tendency of an SLC to forgo live witness testimony, courts are forced to assume that each member of an SLC has "typical professional sensibilities."

C. The Court of Chancery's Decision

Applying this contextual approach to the determination of the independence of the directors in Oracle, the court concluded that the SLC did not meet its burden of persuasion regarding its independence. Central to the finding of a lack of independence was a number of facts that were "noticeably absent from the SLC Report," including "several significant ties between Oracle or the Trading Defendants and Stanford University." Included in these facts were extensive ties between three

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107 Id. at 941.
108 Oracle, 824 A.2d at 941.
109 Id.
110 Id.
111 Id.
112 Oracle, 824 A.2d at 942 (citing Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1167 (Del. 1995)).
113 This is sensible, the vice chancellor points out, because if it were not the case, a special litigation committee motion to dismiss would possibly turn into a burdensome process, nearly as much so as the litigation the committee is seeking to terminate. Id.
114 Id.
115 Id.
116 Oracle, 824 A.2d at 929.
out of four of the Trading Defendants and Stanford University, where both members of the SLC happened to be tenured professors. Specifically:

- Michael Boskin taught Joseph Grundfest when Grundfest was a Ph.D. candidate in the 1970s and the two remained in contact over the years speaking on public policy issues. Furthermore, Boskin and Grundfest are both involved with the Stanford Institute for Economic Policy Research (SIEPR) as senior fellows and members of the SIEPR steering committee.

- Donald Lucas earned undergraduate and graduate degrees at Stanford. In addition, he is chairman of the board of the Richard M. Lucas Foundation, which has given $11.7 million to Stanford since 1981. Additionally, Lucas has donated $4.1 million from his personal funds to Stanford. He is also chair of the advisory board of SIEPR and the conference center at SIEPR's facility is named the Donald L. Lucas Conference Center.

- Lawrence Ellison has made major charitable contributions to Stanford including indirect contributions through the Ellison Medical Foundation, which has donated nearly $10 million to Stanford. Moreover during Ellison's time as CEO of Oracle, the company donated over $300,000 to Stanford and generously endowed an educational foundation, naming Stanford as the "appointing authority." An additional detail includes Ellison's tentative proposal to donate over $270 million to the institution at the time the SLC members were added to the board of directors of Oracle.

These facts were not disclosed by the SLC and were discovered by the court only after limited discovery was granted for the hearing. In itself,

117Id. at 923.
118Id. at 931.
119Id.
120Oracle, 824 A.2d at 931.
121Id.
122Id. at 932.
123Id.
124Oracle, 824 A.2d at 932.
125Id. at 933.
126Id.
127Id. at 929.
this lack of disclosure and completeness in the SLC's report, which the court considered a "shock," has become another aspect of the court's contextual evaluation of the case.\textsuperscript{128}

In "necessarily draw[ing] on a general sense of human nature,"\textsuperscript{129} the court decided that the connections it found "would weigh on the mind of a reasonable special litigation committee member deciding whether to level the serious charge of insider trading."\textsuperscript{130} Actual knowledge of all of the aforementioned facts by the SLC was decidedly not determinative of the court's decision. "Whether the SLC members had precise knowledge of all the facts that have emerged is not essential, what is important is that by any measure this was a social atmosphere painted in too much vivid Stanford Cardinal red for the SLC members to have reasonably ignored."\textsuperscript{131}

In making his decision, the vice chancellor acknowledged that his ruling is not consistent with other specific holdings in other opinions.\textsuperscript{132} He does not feel, however, that his holding somehow changed the definition of independence or created a new one.\textsuperscript{133} Rather, "it recognizes the importance (i.e., the materiality) of bias-creating factors other than fear that acting a certain way will invite economic retribution by the interested directors."\textsuperscript{134}

In synopsis of the decision, the court found the ties between the SLC, the directors under investigation, and Stanford University to be "so substantial that they cause reasonable doubt about the SLC's ability to impartially consider whether the Trading Defendants should face suit."\textsuperscript{135} The task assigned to the SLC directors was difficult to begin with and "[f]or Oracle to compound that difficulty by requiring SLC members to consider accusing a fellow professor and two large benefactors of their university [with] . . . a violation of criminal law was unnecessary and inconsistent with the concept of independence."\textsuperscript{136}
IV. EVALUATION

In In re Oracle Corp. Derivative Litigation, Delaware's Court of Chancery denied the decision of a special litigation committee to dismiss a stockholder derivative action. In Oracle, the court arguably implemented a much broader rule that focused not only on the traditional aspects of director independence such as pecuniary interest and job security, but expanded the scope of the law to include social and professional relationships, as well as philanthropic interests.

This section will examine the court of chancery's analysis in denying the motion of the SLC to terminate the derivative action due to its finding of issues of material fact concerning the committee's independence. In terms of the court's reasoning, the tension within Delaware case law regarding director independence will be addressed, and specifically, whether this ruling has accomplished more than to exacerbate this already complicated area of the law. In addition, it will project possible implications the ruling might have on stockholders as well as Delaware and non-Delaware corporations. Finally, recent case law citing to and/or applying the rule of Oracle will be surveyed as an indicator of such implications.

A. A New Standard of Director Independence?

As previously presented, Vice Chancellor Strine does not claim to create a new rule of director independence. Rather, the court merely attempted "the application of the independence inquiry that . . . [the] Supreme Court has articulated in a manner that is faithful to its essential spirit" by recognizing "the importance (i.e., the materiality) of other bias-creating factors other than fear that acting a certain way will invite economic retribution by the interested directors."

Specifically, the rule referenced by the court comes from Parfi Holding AB v. Mirror Image Internet, Inc., which summarized the Delaware Supreme Court's teachings on independence. "[T]he question of

137 824 A.2d 917 (Del. Ch. 2003).
138 Id. at 936-37.
139 Id. at 934 n.55; for additional discussion of this point, see supra text accompanying notes 132-34.
140 Oracle, 824 A.2d at 939.
141 Id. at 939 n.55.
independence turns on whether a director is, for any substantial reason, incapable of making a decision with only the best interests of the corporation in mind.\textsuperscript{143} Overall, as pointed out by the Court, the cases decided by the Delaware Supreme Court ultimately focus on impartiality and objectivity\textsuperscript{144} in making an independence determination.

Superficially, In re Oracle does follow this rule of independence, which identifies "any substantial reason" as plausible grounds for invalidating the status of independence. In fact, this has not always been the approach applied in Delaware Courts, which makes Oracle a point of divergence. Traditionally, courts have focused solely on pecuniary interests of directors and any conflicts these may be expected to create.\textsuperscript{145}

In its determination of the independence of the members of the SLC, the court in Oracle undeniably broadened the application of the rule to include additional, original factors. To evolve from considering solely pecuniary interests to include considerations of social, professional, and philanthropic ties is a potentially huge change in the law. While the vice chancellor disputed that his ruling "applie[d] a new definition of independence,"\textsuperscript{146} it is clear that there has at least been a shift in or a broadening of the focus of the independence inquiry. In recognizing the importance of bias-creating factors other than fear of becoming the subject of a derivative suit, the court altered the emphasis the law has on such ties.\textsuperscript{147}

By including so many factors in a court's independence inquiry, the amount of leeway a court has in making a determination has become immense. This, in the view of Vice Chancellor Strine, is a strength of Delaware law because it allows each independence inquiry to be "tailored to the precise situation at issue."\textsuperscript{148} A negative side effect of this purported benefit lingers—the growing concern of the inability to predict a court's application of the law in reaching a director independence determination—because the analysis will necessarily be situational under this expanded facts and circumstances test.

Furthermore, Oracle may suggest that courts may also scrutinize numerous other connections between directors more rigorously. Several commentators and practitioners have adopted this view in evaluating

\textsuperscript{143}Id. at 1232 (footnote omitted).
\textsuperscript{144}Id.
\textsuperscript{145}Oracle, 824 A.2d at 937.
\textsuperscript{146}Id. at 939 n.55.
\textsuperscript{147}Id.
\textsuperscript{148}Id. at 941.
Oracle. In line with these sources and the role of directors generally, new factors might include "length of service on a board or committee, levels and types of director compensation and the robustness of the nominating committee and its nominating process," philanthropic, professional, personal, familial and perhaps any other type of connections between directors that could create "an unacceptable risk of bias." In addition, as discussed at length in Oracle, the gravity of any procedure involved and the situation itself may serve as one facet of an independence determination. Central to the determination in Oracle was the "extraordinary importance and difficulty of [a special litigation] committee's responsibility" coupled with the limited number of directors who "feel[] the moral gravity—and social pressures—of this duty alone."

In this specific context of special litigation committees, the importance of the process was discussed in Kaplan v. Wyatt. The significance of the special litigation committee process is especially important to stockholder plaintiffs, and the case points out how the Zapata procedure takes the case away from the plaintiff, turns his allegations over to special agents appointed on behalf of the corporation for the purpose of making an informal, internal investigation of his charges, and places the plaintiff on the defensive once a motion to dismiss is filed by the Special Litigation Committee . . .

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150Shearman & Sterling, supra note 149.

151Oracle, 824 A.2d at 939; for additional analysis of the SLC's role in an independence inquiry, see supra text accompanying notes 105-09.

152Oracle, 824 A.2d at 940.


154Id.
In light of the substantial role that SLC's occupy in corporate governance, perhaps the court felt obligated to ensure the very essence of each SLC investigation and determination is held to the highest judicial scrutiny.

In accord with this contextual independence analysis, *Oracle* seems to give courts additional weight to tip the scale of justice in finding the "balancing point where bona fide stockholder power to bring corporate causes of action cannot be unfairly trampled on by [a] board of directors, but [a] corporation can rid itself of detrimental litigation." This is realized, however, at the expense of certainty and any possibility of a safe harbor for boards absent absolute independence, if such a thing is even possible. While *Oracle* may have stayed "faithful to [the] essential spirit" of the Supreme Court's independence inquiry by looking to *any substantial reason* that might affect director independence, it has not established any comprehensive definition. At least for now, it seems that uncertainty will remain the norm for boards of directors.

**B. No Denying It: This Ruling Creates Tension**

In *In re Oracle Corp. Derivative Litigation*, Vice Chancellor Strine unmistakably avoids prior case law in order to sidestep the potential judicial dilemma of attempting to harmonize the specifics of an assortment of contradictory holdings from Delaware courts. Distinctively, the rulings that focused on "domination and control" as the central inquiry into independence are downplayed. While some logic is given as to why Delaware law should not be based merely on dominion and control, there are three viable reasons why the court elected to diverge from prior opinions that held as much.

First, the court's decision in *Oracle*, in conjunction with other recent Delaware court rulings, is conceivably representative of a trend in Delaware case law. Namely, courts have decreased the usual level of deference paid to corporate boards in recent cases. In the May 2003 ruling in *In re Walt Disney Co. Derivative Litigation*, the court of chancery determined that directors were not shielded by the business judgment rule in circumstances where they failed to exercise good faith in the context of

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156Oracle, 824 A.2d at 939.
157Id. at 920 (quoting Parfi Holding AB v. Mirror Image Internet, Inc., 794 A.2d 1211, 1232 (Del. Ch. 2001)).
158See, e.g., *In re Walt Disney Co. Derivative Litig.*, 731 A.2d 342 (Del. Ch. 1998)
159825 A.2d 275 (Del. Ch. 2003).
the approval of an excessive compensation agreement.\textsuperscript{160} Likewise, in \textit{Biondi v. Scrushy},\textsuperscript{161} the court of chancery ruled that a special litigation committee was not independent even before the completion of the committee's investigation.\textsuperscript{162} As noted by commentators, "these...rulings represent a shift by the Delaware Chancery Court, whose anti-takeover rulings and pro-management slant attracted scores of businesses to incorporate [in Delaware] over the past two decades."\textsuperscript{163} It seems that Delaware courts have made an effort to "become more liberal toward stockholders as corporate governance has become more important."\textsuperscript{164}

A second theory involves the influence of the recent encroachment of federal and private regulation on corporate governance.\textsuperscript{165} Corporate governance has evolved into what has been described as "a collaborative venture that can only be understood if one models the participation of state government, federal regulation, and the listing requirements of the [self-regulatory organizations]."\textsuperscript{166} This idea was coincidentally addressed by Vice Chancellor Strine in a timely article in which he alleged that "Congress may even be tempted to consider federalizing key elements of corporate law that have traditionally been the province of state law by, for example, attempting to define a federal standard of performance for corporate directors and officers."\textsuperscript{167} These concerns may have influenced the court in \textit{Oracle} and the other recent cases mentioned herein\textsuperscript{168} in an

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\textsuperscript{160}Id. at 278.

\textsuperscript{161}820 A.2d 1148 (Del. Ch. 2003).

\textsuperscript{162}Id. at 1066.

\textsuperscript{163}Scannell & Lublin, \textit{supra} note 149.

\textsuperscript{164}Id.

\textsuperscript{165}This theory was the subject of a recent lecture by Professor Robert B. Thompson, who spoke of the need for change in Delaware law in order to minimize the expansion of federal rules thereby preserving the prominence of the Delaware judiciary and bar at the center of corporate governance. Robert B. Thompson, Delaware, the Feds, and the Stock Exchange: Challenges to the First State as First in Corporate Law, Lecture at The Delaware Journal of Corporate Law and Widener University School of Law's 19th Annual Francis G. Pileggi Distinguished Lecture in Law (Nov. 14, 2003). This hypothesis is also the subject of Professor Thompson's recent article, which was published in conjunction with the aforementioned lecture. Robert B. Thompson, \textit{Delaware, the Feds, and the Stock Exchange: Challenges to the First State as First in Corporate Law}, 29 Del. J. Corp. L. 779 (2004).

\textsuperscript{166}Robert B. Thompson, \textit{Collaborative Corporate Governance: Listing Standards, State Law, and Federal Regulation}, 38 Wake Forest L. Rev. 961, 981 (Fall 2003).


\textsuperscript{168}See, e.g., \textit{In re Walt Disney Co. Derivative Litig.}, 825 A.2d 275 (Del. Ch. 2003); Biondi v. Scrushy, 820 A.2d 1148 (Del. Ch. 2003).
effort to fortify Delaware law in order to prevent further usurpation of this role by federal legislation and private regulations.\(^{169}\)

In Oracle, the vice chancellor remarked on the then proposed, and now enacted reforms of the stock exchanges regarding director independence as well as recent reforms by Congress.\(^{170}\) Effected by these changes are areas of the law analogous to those impacted by Oracle, including the definition of "independent director." It was noted how the recent reforms "reflect a narrower conception of who can be an independent director."\(^{171}\) According to the New York Stock Exchange (NYSE), the new rules are designed to "further the ability of honest and well-intentioned directors . . . to perform their functions effectively."\(^{172}\) Additional benefits will allow stockholders "to more easily and efficiently monitor the performance of companies and directors in order to reduce instances of lax and unethical behavior."\(^{173}\) Likewise, the National Association of Securities Dealers through its subsidiary the Nasdaq Stock Exchange (Nasdaq) has indicated that the purpose of its new rule regarding independent directors is "to provide greater transparency regarding certain relationships that would preclude a board of directors from finding that an individual can serve as an independent director."\(^{174}\) While more stringent than the previous rules, the new NYSE and Nasdaq rules are much more limited in scope than the rule in Oracle. This is because of the use of

\(^{169}\)Commenting on the collaboration of federal and state law and private listing requirements in corporate governance, one commentator has noted:

In the wake of the financial abuses revealed in recent years, each of the three regulators has responded differently. State law has been the slowest, with changes in statutes just beginning to be seen and case law beginning to modify traditional notions of fiduciary duty to fit the new environment.

Thompson, supra note 166, at 981.

\(^{170}\)On November 4, 2003, the Securities and Exchange Commission approved new rules that were proposed and adopted by the New York Stock Exchange (NYSE) and the National Association of Securities Dealers, through its subsidiary the Nasdaq Stock Market (Nasdaq) in an effort to "ensure the independence of directors of listed companies and to strengthen corporate governance practices." NASDAQ and NYSE Rulemaking: Relating to Corporate Governance, Exchange Act No. 34-48745 (Nov. 4, 2003), available at http://www.sec.gov/rules/sro/34-48745.htm [hereinafter NASD and NYSE Rulemaking]; see also Oracle, 824 A.2d at 941 n.62 (distinguishing that while the recent reforms of Congress and the stock exchanges do address director independence, the definitions are categorized labels that fail to include the situation of In re Oracle).

\(^{171}\)Oracle, 824 A.2d at 941 n.62.

\(^{172}\)NASD and NYSE Rulemaking, supra note 170, at (II)(B).

\(^{173}\)Id.

\(^{174}\)Id. at (II)(C).
several specific categories that define certain relationships that serve to invalidate a director's independence.\textsuperscript{175}

Vice Chancellor Strine considers the new definitions to be "blanket labels that do not take into account the decision at issue."\textsuperscript{176} He does, however, look to the commentary of the then proposed rules for support of his contextual independence inquiry. The text of the commentary he cites reads:

It is not possible to anticipate, or explicitly to provide for, all circumstances that might signal potential conflicts of interest, or that might bear on the materiality of a director's relationship to a listed company. Accordingly, it is best that boards making "independence" determinations broadly consider all relevant facts and circumstances. In particular, when assessing the materiality of a director's relationship with the company, the board should consider the issue not merely from the standpoint of the director, but also from that of persons or organizations with which the director has an affiliation. Material relationships can include commercial, industrial, banking, consulting, legal, accounting, charitable and familial relationships, among others.\textsuperscript{177}

Significant to the court's decision was the recognition that there could be no bright line test. In effect, it was acknowledged that factors other than those specifically identified in the new exchange rules might defeat a finding of director independence depending on the conditions specific to the case.\textsuperscript{178} In this way, Oracle's application of the rule of "any substantial reason" goes beyond what the court of chancery viewed as a foundation set forth by the SEC rules. Consequently, this ruling may serve a step in a broader movement to protect Delaware law as the center of corporate law.

A final theory entails the lack of disclosure by the SLC in its final report and the effect it may have had on the court's decision. It is plausible that this lack of disclosure influenced the inquiry even more than was

\textsuperscript{175}Id. at (II)(B)(2).
\textsuperscript{176}Oracle, 824 A.2d at 941 n.62.
\textsuperscript{178}Oracle, 824 A.2d at 941 n.62.
emphasized in the opinion.\textsuperscript{179} Perhaps the vice chancellor was so troubled by the nondisclosure of the substantial ties that were uncovered during discovery that this in itself served as part of the impetus that necessitated the inclusion of the nontraditional factors in the independence inquiry to provide the court an avenue to deny the SLC's motion to dismiss. In essence, because of the magnitude of nondisclosure, that the Court learned "with some shock" noting that the "plain facts [were] a striking departure from the picture presented in the Report,"\textsuperscript{180} it is conceivable that the vice chancellor felt the need to find some way to deny the motion of the committee in the interest of justice. This could explain the branding of the court's analysis as an unnatural distortion of Delaware law.\textsuperscript{181}

Vice Chancellor Strine felt that the SLC's claim of ignorance as to the facts uncovered in discovery "undermine[d], rather than inspire[d], confidence that the SLC did not examine the Trading Defendants' ties to Stanford more closely in preparing its Report."\textsuperscript{182} The SLC's failure to recognize and disclose its significant substantial ties was viewed by the court as "important because it is the SLC's burden to show independence."\textsuperscript{183} For example, the "many visible manifestations of Lucas's status as a major contributor" precluded a finding that Grundfest "did not understand Lucas to be an extremely generous benefactor of Stanford."\textsuperscript{184} Additionally, the very nature of the process, whereby the Oracle board of directors should have considered thoroughly all of the facts that might bear on the SLC's independence from the "key objects of the investigation"\textsuperscript{185} before appointing its members was certainly not honored.

C. Implications of Oracle—Better for Whom?

In examining the probable scope of \textit{In re Oracle}, it is feasible that the effect it might have on the law of corporate governance could vary, dependent of course, on how other courts interpret the holding. While the decision focuses on philanthropic ties between members of a special litigation committee and members of the board of directors it is

\textsuperscript{180}\textit{Oracle}, 824 A.2d at 929-30.
\textsuperscript{181}Mike O'Sullivan, \textit{Can Any Special Litigation Committee Satisfy Strine?}, CORP LAW BLOG (July 30, 2003), at http://wwwcorplawblog.com/archives/000161.html.
\textsuperscript{182}\textit{Oracle}, 824 A.2d at 943.
\textsuperscript{183}\textit{Id.}
\textsuperscript{184}\textit{Id.} at 944.
\textsuperscript{185}\textit{Id.} at 943.
investigating, a wider application to all situations requiring independent directors is conceivable.

1. Stockholders

Stockholders are clearly the beneficiaries of In re Oracle. As previously declared, "perhaps the most effective stockholder protection device is the independence of directors."\(^{186}\) Hence, the real impact this case will have on stockholders will be ascertained in whether Oracle will prove to disqualify director action based on innovative ties that might truly compromise independence.

"Stockholders vote for directors and expect proper governance from them. The expectation is a strong bond of trust vested in the directors. Courts enforce that trust."\(^{187}\) In response to this relationship of trust, "courts should be reluctant to interfere with business decisions and should not create surprises or wild doctrinal swings in their expectations of directorial behavior."\(^{188}\) Rather, corporate law operates under the proposition that "truly independent directors can have a meaningfully beneficial influence in ensuring that corporate decisions are made impartially and with integrity."\(^{189}\) This ideology is based at least partially on "an intuitive judgment that independent directors can serve important cleansing and protective purposes," but also more fundamentally, "it is the directors that the stockholders elect to make corporate decisions, not the judiciary."\(^{190}\) In re Oracle offers courts supplementary capacity to ensure such independence.

Inherently, the question of whether a director can act independently is situational.\(^{191}\) In the situation of SLC's, the independence of directors "is critically important if the . . . process is to retain its integrity."\(^{192}\) The logic of this premise was expressed in Biondi v. Scrushy, as noted by the court in In re Oracle, "][o]ne of the obvious purposes for forming a special litigation committee is to promote confidence in the integrity of corporate decision making by vesting the company's power to respond to accusations of serious misconduct by high officials in an impartial group of

\(^{186}\)Strine, supra note 167, at 1375 n.9 (quoting E. Norman Veasey, Should Corporation Law Inform Aspirations for Good Corporate Governance Practices—or Vice Versa, 149 U. PA. L. REV. 2179, 2180 (2001)).

\(^{187}\)Id.

\(^{188}\)Id.

\(^{189}\)Id.

\(^{190}\)Strine, supra note 167, at 1375.

\(^{191}\)Id.

\(^{192}\)Oracle, 824 A.2d at 940.
independent directors."193 This will only be effective, of course, if the SLC's "fairness and objectivity cannot be reasonably questioned,"194 thereby allowing stockholders to be confident that only independent decisions will be made by the committee. Both "[t]he composition and conduct of a special litigation committee" must certainly "instill confidence in the judiciary and, as important, the stockholders of the company that the committee can act with integrity and objectivity."195

With the broadening of the director independence inquiry in the special litigation committee context accomplished by In re Oracle, stockholders may regain some confidence in director action because of increased trust that important decisions will be made by truly independent directors. In comparison to the impact Oracle may have, the influence of the recent SEC rule approval196 has been described as immense. SEC Chairman William Donaldson said of the new rules, "[t]hese . . . changes are at the core of a broad movement by our markets to enhance the corporate governance practices of the companies traded on them . . . . Investors will recognize significant benefits from these actions today and long into the future."197 By analogy, because of the contextual nature of the independence inquiry of Delaware courts as presented in Oracle, perhaps stockholders will benefit from Oracle to an even greater extent than expected from the newly adopted SEC rules.

2. Delaware Corporations and Beyond

In the view of some attorneys, Oracle is another signal of the "shift in the level of judicial scrutiny to be applied to director conduct."198 In fact, this was not the first time within the past year that the court of chancery denied the motion of an SLC to terminate a stockholders' derivative suit199 in an area of the law that traditionally has commanded great judicial

193See supra notes 172-77 and accompanying text.
194Id.
195Id. (citing Biondi v. Scrushy, 820 A.2d 1148, 1156 (Del. Ch. 2003)).
deference to the business judgment of boards of directors.\textsuperscript{200} This decreased deference will certainly be considered a negative impact by boards of directors of corporations.

As the court of chancery's response to the "less than wholly consistent\textsuperscript{201}" application of the Supreme Court of Delaware's independence inquiry by Delaware courts,\textsuperscript{202} Oracle may have done little to create any certainty. On the contrary, depending on the particular circumstances, boards of directors may now need to establish a degree of independence that goes beyond the foundational requirements imposed by the SEC, NYSE, and NASdaq for publicly traded companies, including the more stringent rules that were recently approved.\textsuperscript{203} One commentator describes the lessons of Oracle as twofold: "independence goes far beyond a person's relationship with the company; and a board must investigate and consider a number of factors to determine independence, including charitable and non-financial relationships.\textsuperscript{204}

A broader application of Oracle is also possible because under Delaware fiduciary duty law, the independence of directors becomes critical in several situations outside the context of special litigation committees, mainly when conflicts of interest are a potentiality. "The more a board is dominated by purely independent directors, the more likely it is that board action will find a safe harbor from liability in most settings."\textsuperscript{205} Thus, the relevant inquiries for a board of directors and corporations have become: "Independent for what purpose?" and "Independence from whom?\textsuperscript{206}

It has already been proposed that it may be nearly impossible for corporations to find independent directors under the heightened scrutiny this case creates.\textsuperscript{207} Nonetheless, this has already been proven false in the recent court of chancery ruling in Beam v. Stewart,\textsuperscript{208} in which the court

\textsuperscript{200}See supra text accompanying note 2.

\textsuperscript{201}Oracle, 824 A.2d at 939.

\textsuperscript{202}See supra notes 97-100 and accompanying text.

\textsuperscript{203}See supra notes 170-77 and accompanying text.

\textsuperscript{204}Geoffrey R. Morgan, Developments in Director Responsibilities, WALL ST. LAW., Sept. 2003, at 17.

\textsuperscript{205}Strine, supra note 167, at 1374 n.7 (citing Veasey, supra note 186, at 2181-82).

\textsuperscript{206}Id.

\textsuperscript{207}This argument was proffered by the SLC in the sense of the chilling effect a ruling against it would have on the ability of corporations to locate "qualified independent directors in the academy" and was responded to by Vice Chancellor Strine: "This is overwrought . . . ." "Undoubtedly, a corporation of Oracle's market capitalization could have found prominent academics willing to serve as SLC members, about whom no reasonable question of independence could have been asserted." Oracle, 824 A.2d at 947-48.

\textsuperscript{208}833 A.2d 961 (Del. Ch. 2003), aff'd, 845 A.2d 1040 (Del. 2004).
granted a motion of a board of directors to dismiss a stockholder derivative suit.\textsuperscript{209} In determining whether "the board of directors could have properly exercised its independence and disinterested business judgment in responding to a demand,"\textsuperscript{210} the court evaluated the ability of one of the outside directors to make an independent decision.\textsuperscript{211} While it was found that the director in question, Moore, was a friend of Martha Stewart,\textsuperscript{212} the allegations fell short of raising a reasonable doubt such that the court would question Moore's independent judgment.\textsuperscript{213} Even after considering \textit{In re Oracle Corp. Derivative Litig.}, according to the court of chancery, the facts and circumstances of the case did not cross the necessary threshold in this "close call."\textsuperscript{214}

If nothing more, \textit{Oracle} at a minimum reminds boards of the importance of considering all aspects of a director's independence. This is especially true in the context of the formation of a special litigation committee. As one commentator has noted, "[i]f Strine believes it is difficult for two Stanford professors to investigate another Stanford professor, when there are over 1,700 Stanford professors, how much more difficult must it be for two directors to investigate three directors on a ten-person board?"\textsuperscript{215} The same commentator continued, "[s]ocial and institutional bonds, as well as economic bonds, can be much stronger between directors than between professors at a large university."\textsuperscript{216} Because of these new complexities, "boards of directors may want to re-examine the independence of their directors in light of the expanding contexts in which independence has been successfully challenged by plaintiffs."\textsuperscript{217}

\begin{itemize}
  \item \textsuperscript{209}Id. at 984.
  \item \textsuperscript{210}Id. at 977.
  \item \textsuperscript{211}Id. at 980.
  \item \textsuperscript{212}Stewart has overwhelming voting control of [the corporation] . . . ; hence, she has the power to remove or replace the directors. The Court, however, noted that this does not in itself "demonstrate that Stewart has [any] capacity to control the outside directors . . . ." \textit{Beam}, 833 A.2d at 978.
  \item \textsuperscript{213}Id. at 980.
  \item \textsuperscript{214}The court suggests that this decision was "quite a close call," and [p]erhaps the balance could have been tipped by additional, more detailed allegations about the closeness or nature of the friendship, details of the business and social interactions between the two, or allegations raising additional considerations that might inappropriately affect Moore's ability to impartially consider pursuit of a lawsuit against Stewart. \textit{Id.} (citing \textit{In re Oracle Corp. Derivative Litig.}, 824 A.2d 917 (Del. Ch. 2003)).
  \item \textsuperscript{215}O'Sullivan, \textit{supra} note 181.
  \item \textsuperscript{216}Id.
  \item \textsuperscript{217}Shearman & Sterling, \textit{supra} note 149.
\end{itemize}
In the current state of heightened scrutiny, directors are well advised to assume a more proactive role in corporate governance, which has been described as the most effective response to concerns about director conduct.218 It is essential that independent directors consider "whether they are truly free of improper influence, to exercise the right degree of diligence, oversight and critical analysis, and to seek the timely advice of qualified and independent experts."219

In this manner, "[d]irectors should examine their ties to the corporation, its management, those entities with which the corporation has business or philanthropic relationships, as well as [their ties] to the other directors, to determine whether their independence is, or would reasonably be perceived to be, compromised."220 The materiality of certain sources of bias may also be viewed differently by courts in light of Oracle. In this sense, the focus may have been shifted away from dollar amounts of certain pecuniary ties and more toward the entirety of the circumstances thereof. This implies the need to examine all facts and all circumstances that may create impermissible biases in relation to a broader social and community context. As exemplified by Oracle, the ties between the investigator and the potential defendant need not arise from work they both did for a single entity.221 They can also arise from mutual ties to a school, institution, or other organization.

When coupled, this contextual nature of the inquiry into director independence and the resulting inability to predict a court's application to any factual situation become significant obstacles to certainty for corporations. In response to the uncertainty that Oracle creates, corporations will need to make their best efforts to ensure the independence of their boards of directors. The necessary lesson for corporations from Oracle is to view the matters of factors that may compromise director independence broadly and contextually. In addition, any conflicts should be fully disclosed to avoid possible inferences of dishonesty that would surely undercut the value of any decision made or report issued.

219Id.
220Id.
221Indirect connections to Stanford University were enough, taken together, to find material fact as to question of independence. Oracle, 824 A.2d at 942.
D. Indications of Potential Impact—Recent Case Law

In its role as a forerunner of corporate law, the decisions of Delaware courts, especially those of the court of chancery, have proven to be influential on a national level.222 Because of this, numerous law firms and legal commentators across the country and beyond have issued client advisories and opinions in response to Oracle.223 In fact, this case has already been taken into account by several jurisdictions in judicial opinions and has been commented on by the Delaware Supreme Court. As such, the breadth and number of recent courts that have cited to, commented on, or interpreted Oracle may serve as an indicator of the probable impact the decision may have on the law of director independence, perhaps beyond the realm of special litigation committees.

As mentioned, the Delaware Supreme Court commented on Oracle in its recent decision, Beam v. Stewart,224 in the context of a presuit demand case. Purportedly distinguishing Oracle, or at least limiting its application to the context of special litigation committees,225 the court affirmed a decision in which the court of chancery dismissed claims, including breach of the fiduciary duties of loyalty and care, because of the failure of the plaintiffs to make presuit demand.226 Addressing specifically the issue of demand futility, the court turned to the requirements a plaintiff must satisfy in order to show that such demand is excused based on lack of director independence.227 Surveying the law of this area, the court explained how "[a] director [is] considered unable to act objectively with respect to a presuit demand if he or she is interested in the outcome of the litigation or is otherwise not independent."228

222Because of the large number of companies incorporated in Delaware, the decisions made by this court are closely watched and often have far-reaching consequences in other states." Scannell & Lublin, supra note 149, at Cl.

223See sources cited supra note 149.


225"We need not decide whether the substantive standard of independence in an SLC case differs from that in a presuit demand case. As a practical matter, the procedural distinction relating to the diametrically-opposed burdens and the availability of discovery into independence may be outcome-determinative on the issue of independence." Id. at 1055. In addition to these procedural distinctions, the court pointed out that "the Stanford connections in Oracle are factually distinct from the relationship present [in Beam]." Id.

226Id. at 1044.

227Id. at 1048. Unlike the realm of special litigation committees, which carry their own burden of proving their independence, directors are presumed to be faithful to their fiduciary duties in the context of presuit demand cases. Id. at 1048, 1055.

228Beam, 845 A.2d at 1049 (citations omitted).
Next, before endeavoring to distinguish *Oracle* as applicable only in the special litigation committee context based partly on procedural distinctions, the court points to the broad rule that serves as the "primary basis upon which a director's independence must be measured" in a presuit demand case.\(^{229}\) Specifically, director independence in such a context is determined by "whether the director's decision is based on the corporate merits . . . rather than extraneous considerations or influences."\(^{230}\) Finally, the court discusses the necessarily contextual nature of the inquiry and the fact that "a variety of motivations, including friendship" could influence the independence determination.\(^{231}\)

The broad and somewhat subjective language of this analysis is similar to that used in the very case the court in *Beam* sought to distinguish—*Oracle*. While it may be true that the rule of *Oracle* was issued in the context of determining the independence of the members of a special litigation committee, it is certainly not clear, at least in any significant way from *Beam*, that its impact will be limited to independence determinations of that limited scope. This proposition is supported by the fact that several cases from multiple jurisdictions have already interpreted and applied *Oracle*, some even beyond that limited scope, one even in the wake of the Delaware Supreme Court's "word about the *Oracle* case."

Prior to the court's decision in *Beam v. Stewart*, *Oracle* was applied in *Klein v. FPL Group, Inc.* by the District Court for the Southern District of Florida.\(^{232}\) In a derivative claim involving executive compensation directors, the independence of an outside director on a special committee was questioned because of claims the director "ignored key issues in a related executive-compensation controversy at another large public company."\(^{233}\) The judge considered the principle set forth in *In re Oracle* including the "psychological or friendship pressures that may bear on the decision to be made by the Committee."\(^{234}\) In conclusion, however, it was decided that the request for documents regarding the director's involvement with the other company "goes too far afield into the business decisions of an unrelated company."\(^{235}\)

\(^{229}\) *Id.* (citation omitted).

\(^{230}\) *Id.*

\(^{231}\) *Id.* at 1050.


\(^{233}\) *Id.* at *53-*54 (emphasis added).

\(^{234}\) *Id.*

\(^{235}\) *Id.*
Likewise, the United States District Court for the District of Columbia reflected on Oracle in Atlantic Coast Airlines Holdings, Inc. v. Mesa Air Group, Inc.\textsuperscript{236} In Atlantic Coast Airlines Holdings, Inc., a dispute arising from a consent solicitation to replace the company's board of directors was presented to the court based on alleged violations of the Securities and Exchange Act of 1934 and other laws.\textsuperscript{237} Despite granting the preliminary injunction sought by the plaintiffs, the court concluded that "[t]he evidence of prior business or social relationships is insufficient to render the Mesa nominees unfit to be directors."\textsuperscript{238} This conclusion—finding the prior relationships involved unsubstantial—was reached only after considering Oracle's articulation of the "for any substantial reason" rule of independence.\textsuperscript{239}

Turning to case law decided after the Delaware Supreme Court's decision in Beam, the Superior Court of Massachusetts considered not only Oracle in its decision in Demoulas v. Demoulas Super Markets, Inc.,\textsuperscript{240} but also Beam v. Stewart. While this case involved a demand excused derivative action as in Oracle, it cited both Oracle and Beam in finding that certain directors were not interested, biased, nor controlled in deciding to grant a waiver for transfer of stock.\textsuperscript{241}

Most recently, the Delaware Court of Chancery referred to Oracle in its decision in Official Committee of Unsecured Creditors of Integrated Health Services, Inc. v. Elkins.\textsuperscript{242} In this case, a committee of creditors sued the former president and other board members in the United States Bankruptcy Court for the District of Delaware alleging breaches of the fiduciary duties of loyalty and good faith.\textsuperscript{243} After that court denied hearing the dispute, the court of chancery found in part that the plaintiffs failed to raise doubt that a majority of those approving the questioned transactions were independent and disinterested. In making its decision, the court referred to Oracle by noting that "domination and control are not tested merely by economics;"\textsuperscript{244} rather, "a plaintiff must allege some facts

\textsuperscript{236}295 F. Supp. 2d 75 (D.C. Cir. 2003).
\textsuperscript{237}Id. at 78, 79.
\textsuperscript{238}Id. at 86.
\textsuperscript{239}Id.
\textsuperscript{241}Id. at *47-*48.
\textsuperscript{242}No. 20,228-NC, 2004 Del. Ch. LEXIS 122 (Del. Ch. Aug. 24, 2004).
\textsuperscript{243}Id. at *7-*8.
\textsuperscript{244}Id. at *38 (citing Oracle, 824 A.2d at 938).
showing a director is beholden to an interested director in order to show a lack of independence.\textsuperscript{245}

In several of these cases, \textit{Oracle} was considered outside the strict bounds of the special litigation committee context, and in terms of director independence more generally. As shown by this sampling of cases from courts of different jurisdictions, the jury is still out on exactly what the range of \textit{Oracle}'s ostensible rescript of director independence will be. However, this level of response may be indicative of the lasting and far-reaching effect \textit{Oracle} may have on corporate governance—specifically director independence—in general. As such, corporations of many jurisdictions will need to prepare for and deal with its repercussions to some degree, no matter how literally or broadly its ruling is construed.

V. CONCLUSION

\textit{In re Oracle Corp. Derivative Litigation} represents a broadening of the inquiry of director independence by the Delaware Court of Chancery to include not only the traditionally utilized notions of "domination and control" in terms of material economic ties between an interested party and a director. Contrarily, the determination has been expanded to include, and in certain situations even be commanded by, any personal, social, professional, or philanthropic ties that might substantially impair a director's ability to make an impartial decision—even in the absence of any significant personal pecuniary interest. Whether or not \textit{Oracle} is indicative of a larger judicial movement projected at preserving the robustness of Delaware's corporate law, it is evident that this ruling has the vigor to initiate change in the way boards of directors select independent directors and to increase stockholder confidence and trust in the decisions of the directors they elect—particularly in situations involving special litigation committees. While, based on this, an entirely separate strain of independency may not have been unearthed, the new force and meaning imputed to the inquiry has certainly uncovered a new, albeit related, species of director independence.

\textit{Jeremy J. Kobeski

\textsuperscript{245}Id. (citing \textit{Oracle}, 824 A.2d at 938-39).