

A Survey of the Use of Corporate Scholarship in Delaware State Court Cases from 1997 to 2007

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I. Introduction

Commentators have observed two apparent trends in the use of legal scholarship by the judiciary. First, judges now cite law review articles in their opinions with less frequency. Second, despite this general decline in the invocation of legal scholarship, judges now cite articles in specialty journals with more frequency.

Some commentators suggest that the use of specialty journals by the courts reflects a gap between the content of legal scholarship in general law reviews and the practical needs of the judiciary. “As general law reviews have become increasingly dominated by law professors writing for the attention of each other, the specialty journals have been publishing articles that provide information more likely to be of use to the bench and the bar.”¹ Similarly, a circuit judge has suggested that judges cite legal scholarship to help resolve doubt surrounding complex legal issues.² Consequently, “[t]he more practical [the articles] are, the more help they provide, for rare is the party in a case who wants an impractical result.”³

This study analyzes, among other things, whether courts addressing primarily business law issues rely more heavily on doctrinal or practical scholarship than other types of scholarship. The study focuses on the use of corporate scholarship by Delaware state courts from 1997 to 2007. The study identifies the legal issue before the court; the sources of the scholarship cited; the type of scholarship invoked (e.g., doctrinal,

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¹ Robert M. Lawless & Ira David, *The General Role Played by Specialty Law Journals: Empirical Evidence from Bankruptcy Scholarship*, 80 AM. BANKR. L.J. 523, 542 (2006).

² Thomas L. Ambro, *Citing Legal Articles in Judicial Opinions: A Sympathetic Antipathy*, 80 AM. BANKR. L.J. 523, 549 (2006).

³ *Id.*

normative, empirical, comparative); and, to the extent possible, the impact of the scholarship on the court's resolution of the legal issue.

II. Overview of Study

We designed our study to evaluate two key questions: how courts use corporate scholarship in their judicial opinions and whether their use of corporate scholarship has changed over time. The study itself involved three separate but related components. First, we conducted an extensive review of 200 corporate decisions rendered by the Delaware state courts from 1997-2007. Second, we supplemented this ten-year review with an additional 200 cases pulled from two-year intervals dating to 1965. We used this second component of the study to assess the general claim discussed above that judicial use of academic scholarship has declined in recent years. Finally, we administered a written survey regarding the use of corporate scholarship in judicial opinions to judges currently serving on the Delaware state bench. The qualitative results of the survey complement the quantitative data collected from the courts' dockets.

III. Summary of Methodology

A. Method for Obtaining Quantitative Data

To obtain a randomly selected sample of Delaware corporate cases in a ten-year span, we used the Lexis Nexis Total Research System Delaware Corporate Cases database. 1,655 cases emerged from the selected time period of January 1, 1997 to December 31, 2007. It must be noted that these are not likely 1,655 individual cases. Rather, cases reported at the trial court, appellate court and Delaware Supreme Court level all likely contribute. We then utilized the Research Randomizer (available at www.randomizer.org) to obtain 20 random cases for each year. We then used this same selection method for the interval study of years 1965-66, 1975-76, 1985-86, 1995-96 and 2005-06.

The primary focus of our study was academic scholarship. We did not limit our study, however, to academic scholarship. Rather, we determined that a more complete understanding of the courts' use of academic scholarship could be obtained by evaluating a broader range of reference sources. Accordingly, we invoked a very broad definition of "scholarship" and coded any reference materials explaining or describing legal concepts, other than case and statutory law, as a form of scholarship. However, we excluded dictionaries, thesauruses, newspapers and other general reference sources because we determined that they generally did not serve as alternatives to academic scholarship.

B. Method for Obtaining Qualitative Data

To supplement the quantitative data collected from the courts' docket, we designed a written survey to solicit more subjective, qualitative data from the judges deciding at least some of the cases included in the database described above. Specifically, we asked the judges currently serving on the Delaware state bench to complete the survey.⁴ To date, of the 53 sitting judges, 20 judges have completed the survey, generating a current response rate of approximately 38 percent.

IV. Preliminary Data Report

We are in the process of analyzing both the quantitative and qualitative data. Our preliminary analysis suggests that, contrary to the more general trend, the Delaware state courts' use of corporate scholarship has not changed significantly during the past ten years. Moreover, we did not find a significant declining trend in the courts' use of corporate scholarship during the past forty years, based on the preliminary results of our interval study.

That being said, our preliminary analysis suggests some interesting trends with respect to corporate scholarship. For example, the Delaware state courts' use of academic, non-doctrinal articles in judicial opinions increased significantly during 2006 and 2007. Similarly, we noted a significant trend in the courts' citation of academic authors. For example, in 2004, 2005, 2006, and 2007, the courts were more likely to cite academic authors while in 2000, 2001, 2002 and 2003, the courts were more likely to cite practitioner authors.

Regarding the type of publication, 20 percent of scholarship citations came from a general university law review or journal; 7 percent from a specialized university law review or journal; 1 percent from a non-university legal journal or periodical; 42 percent from a treatise; 10 percent from a textbook; 7 percent from educational materials (e.g., ALI-ABA course materials); 0.5 percent from an article on SSRN; and 13 percent from a Restatement. Overall, the scholarship cited most often is a treatise ($p < .01$), and this result is particularly true within motions for summary judgment and opinions after trial. General university law reviews or journals are cited significantly more frequently when there is a motion to dismiss as compared to all other publication types. Interestingly, all 15 specialized university law review or journal

⁴ We distributed the survey to all judges serving the Delaware State Courts as of February 2009. This distribution included the Delaware Supreme Court, Court of Chancery, Superior Court, Family Court and Court of Common Pleas. We used a broad distribution to collect information from all courts addressing business law issues, as well as from those that do not for comparative purposes. A total of 53 judges were identified, excluding the Chief Magistrate for the Justice of the Peace Courts.

publications and 16 of 17 textbook citations stemmed from opinions focused on corporate governance (internal affairs) issues.

Significantly longer cases were more likely to cite specialized university law reviews and journals ($p < .001$) and cite more cases overall ($p < .01$). These findings might stem from judges using specialized articles to explain more complex legal issues. In fact, one of the respondents to the judges' survey noted that, on average, he or she finds articles published by specialized university law reviews and journals more useful than those published by general law reviews or journals because the "[d]iscussion is more in depth and relevant to emerging issues." Correspondingly, although no overall effect emerged regarding the relationship between the number of plaintiffs and the type of publication ($p = .172$), opinions citing specialized university law reviews and journals had significantly more plaintiffs than cases citing textbooks, educational materials or Restatements.

Perhaps not surprisingly, our study of the 1997-2007 database showed that scholarship use largely is tied to the individual preferences of a particular judge. For example, the cases in this database were written by 35 different authors, including memorandum opinions with no author mentioned. Nevertheless, Justice Jacobs, Chancellor Chandler and Vice Chancellors Lamb, Strine and Noble combined to provide 117 (59 percent) of the case opinions. Although the author of the opinion did not significantly relate to use of scholarship overall, individual judges showed significant inclination in one way or another. While 45 percent of the 200 cases cited scholarship, Chancellor Chandler was significantly less likely to cite scholarship (31 percent) than the other judges. Vice Chancellor Strine was significantly more likely to cite scholarship (71 percent) than the other judges. Justice Jacobs and Vice Chancellors Lamb and Noble all cited at the overall average level (53 percent, 53 percent, and 50 percent, respectively). This individualized approach toward the use of scholarship in judicial opinions also was reflected in the results of judges' survey.

The foregoing summarizes only a small portion of our preliminary data report. We will review these and additional findings in further detail during the presentation and in our final written report.

V. Conclusion

The study does not purport to assess the optimal or even preferred substance, style, tone or substance of legal scholarship that may be invoked by the courts. Rather, it attempts to catalog, for purposes of objective analysis of those topics, the types of legal scholarship used by courts in the corporate context. The data provide an overview of when and

how courts rely upon that scholarship. The data in turn may help corporate scholars in future writings designed to influence decisional law.