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Gellaine T. Newton

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# LIKE OIL AND VINEGAR, SITTING JUDGES AND ARBITRATIONS DO NOT MIX: DELAWARE'S UNIQUE ATTEMPT AT JUDICIAL ARBITRATION

Gellaine T. Newton \*

## I. INTRODUCTION

Arbitration has been hailed by the highest court of the land as an expeditious, legally binding, alternative to the civil trial.<sup>1</sup> This federally favored<sup>2</sup> form of dispute resolution is especially attractive to large businesses eyeing arbitration's traditional benefits like: arbitrators with specialized expertise, cost efficiency, expedience, and confidentiality. Why then wouldn't the Delaware State Legislature merge the genius of arbitration with its Court of Chancery that is nationally renowned for its ability to expertly adjudicate complex business matters, in order to create a revolutionary judicial arbitration program? It would, and it did.<sup>3</sup> One of the law's most attractive characteristics doubles as the root of controversy: the arbitrations are conducted by sitting Court of Chancery judges.<sup>4</sup>

This article begins by outlining the Delaware law, and analyzing the purposes behind its enactment. It then discusses its brief tenure of legality. The article closes with an in depth analysis of the suit which brought the Delaware law to its knees,<sup>5</sup> and discusses possible ways the law might have been successful and may work in the future.

## II. THE BEGINNING: THE DELAWARE LAW

### A. *The Text: 10 Del. C. §349*

In April of 2009, the Delaware State Legislature granted arbitral powers to sitting judges of the Delaware Court of Chancery by amendment to state rules governing disputes.<sup>6</sup> Contained a single section of the Delaware Code, under three succinct sub-

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\* Gellaine T. Newton is a Senior Editor of the Yearbook on Arbitration and Mediation and a 2013 Juris Doctor Candidate at The Pennsylvania State University Dickinson School of Law.

<sup>1</sup> See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 (1974) (crediting the informality of arbitral proceedings as the reason for its ability "to function as an efficient, inexpensive, and expeditious means for dispute resolution").

<sup>2</sup> See, e.g., *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (noting that section two of the Federal Arbitration Act, 9 U.S.C. §2, "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act").

<sup>3</sup> See DEL. CODE ANN. tit. 10, §349 (West 2009).

<sup>4</sup> *Id.* (stating "The Court of Chancery shall have the power to arbitrate business disputes when the parties request a member of the Court of Chancery...to arbitrate a dispute").

<sup>5</sup> *Del. Coal. v. Strine*, 2012 U.S. Dist. LEXIS 123980 (D. Del. Aug. 30, 2012).

<sup>6</sup> DEL. CH. CT. R. 96, 97, and 98.

sections, the law outlines the Court of Chancery's power to arbitrate, the nature of the arbitral proceedings and the remedies in cases of appeal.<sup>7</sup> The law's text reads:

(a) The Court of Chancery shall have the power to arbitrate business disputes when the parties request a member of the Court of Chancery, or such other person as may be authorized under rules of the Court, to arbitrate a dispute . . . (b) Arbitration proceedings shall be considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal . . . (c) Any application to vacate, stay, or enforce an order of the Court of Chancery issued in an arbitration proceeding under this section shall be filed with the Supreme Court of this State, which shall exercise its authority in conformity with the Federal Arbitration Act, and such general principles of law and equity as are not inconsistent with that Act.<sup>8</sup>

The law reads like a standard arbitral provision, save for the fact that it charges officers of the court with the duties of arbitrators. The purpose of the Delaware law is “to preserve Delaware's pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters.”<sup>9</sup> Also, the arbitrations were set to generate substantial revenue for the state. In place was a \$12,000 filing fee, and a daily arbitration cost of \$6,000.<sup>10</sup> In order for parties to participate in the program, at least one party must be a citizen of Delaware,<sup>11</sup> and one must be a “business entity,” as is defined by Delaware law.<sup>12</sup> One party can fulfill both the jurisdictional and business entity requirements, thus making it easier to utilize the Delaware Court of Chancery as a ‘big business’ arbitration venue.<sup>13</sup> Further, should monetary damages be requested, the amount in controversy must exceed one million dollars; however, this requirement can be sidestepped if equitable remedies are sought in conjunction with monetary damages.<sup>14</sup>

It seems as if the Delaware Legislature made a sincere effort to pull out all the stops to make the court both desirable and easily accessible to corporations. Parties' ability to circumvent the amount in controversy requirement, as explained above, for example, allows greater access to Court of Chancery Judges than is otherwise permitted by the law because of the Court's limited equitable jurisdiction.<sup>15</sup> Also, parties need not have a prior agreement to arbitrate future disputes in order to enter the court; all parties simply need to consent to arbitration at the time that the dispute arises.<sup>16</sup> Delaware's commitment to alternate dispute resolution shines through in the law's provisions, as it

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<sup>7</sup> DEL. CODE ANN. tit. 10, §349 (West 2009).

<sup>8</sup> *Id.*

<sup>9</sup> Del. H.B. No. 49, at 4 (2009).

<sup>10</sup> Tom Hals, *Backers of Secret Delaware Arbitrations See Grounds For Appeal*, Thomson Reuters News & Insight (Sep. 10, 2012), [http://newsandinsight.thomsonreuters.com/Legal/News/2012/09\\_-\\_September/Backers\\_of\\_secret\\_Delaware\\_arbitrations\\_see\\_grounds\\_for\\_appeal/](http://newsandinsight.thomsonreuters.com/Legal/News/2012/09_-_September/Backers_of_secret_Delaware_arbitrations_see_grounds_for_appeal/).

<sup>11</sup> *Strine*, 2012 U.S. Dist. LEXIS 123980, \*4; 10 DEL. CODE ANN. §§ 349(a), § 347 (a), (b).

<sup>12</sup> *Strine*, 2012 U.S. Dist. LEXIS 123980, at \*4.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at \*5.

<sup>16</sup> *Id.* at \*4.

allows for the halt of arbitration proceedings at any stage in the process in order to commence mediation or reach a settlement agreement.<sup>17</sup> To sweeten the deal, parties are guaranteed an audience before a judge, in the form a preliminary hearing, within ten days of filing a petition with the court, and could get a final hearing before a sitting judge as soon as ninety days after filing.<sup>18</sup> Former Chancellor of the Court of Chancery and advocate of the Delaware law, William B. Chandler, described the attractive attributes of the Delaware law saying:

[The arbitration program is] a way to save time and money for business entities and their investors, while it also would simultaneously preserve the Court's resources and time by reducing the volume of drawn-out trials and hearings. The arbitration process is more streamlined, with abbreviated decision schedules and reduced emphasis on discovery and motion practice – all of the features of regular litigation that make it so time-consuming and expensive, and that drain limited judicial resources.<sup>19</sup>

To the former Chancellor at least, Delaware's arbitration program was clearly divergent from traditional litigation and was an improvement upon the way businesses resolve their disputes and upon the way the Delaware judiciary handles the resolve of said disputes.

### 1. *Shhh, It's a Secret!*

Arguably, the most attractive benefit of this judicial arbitration is its dedication to secrecy. In compliance with the new duties bestowed upon it, the Delaware Court of Chancery adopted Rules 96<sup>20</sup>, 97<sup>21</sup>, and 98<sup>22</sup> in January of 2010. The rules govern the Court of Chancery's administration of arbitrations. Both substantive Rules, 97 and 98, contain clear "Confidentiality" provisions. Rule 98 being the more comprehensive of the two, reads in pertinent part as follows:

Arbitration hearings are private proceedings such that only parties and their representatives may attend, unless all parties agree otherwise . . . All memoranda and work product contained in the case files of an Arbitrator are confidential. Any communication made in or in connection with the arbitration that relates to the controversy being arbitrated, whether made to the Arbitrator or a party, or to any person if made at an arbitration hearing, is confidential. Such confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding with the following exceptions: (1) where all parties . . . waive the confidentiality, or (2) where the confidential materials and communications consist of . . .

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<sup>17</sup> Del. Coal. v. Strine, 2012 U.S. Dist. LEXIS 123980, \*6 (D. Del. Aug. 30, 2012).

<sup>18</sup> *Id.* at \*5-6.

<sup>19</sup> JAMS Dispute Resolution Alert, *Delaware Business Court Arbitration Program Provides Fast Resolution Path For Fortune 500 Company Disputes*, (2011), <http://www.jamsadr.com/files/Uploads/Documents/DRA/DRA-2012-01.pdf>.

<sup>20</sup> DEL. CH. CT. R. 96 (outlining the scope of the Rules).

<sup>21</sup> DEL. CH. CT. R. 97 (describing "Commencement of Arbitration").

<sup>22</sup> DEL. CH. CT. R. 98 (describing the structure of the Arbitration Hearing).

tangible evidence otherwise subject to discovery, which were not prepared specifically for use in the arbitration hearing.<sup>23</sup>

The commitment to privacy engraved into this Rule neither rang alarms nor stirred any feathers amongst Delaware legal community, for privacy is a standard characteristic of contractual agreements to arbitrate.<sup>24</sup> Former Court of Chancery Chancellor Chandler normalized the privacy provision by likening it to other (unchallenged) privacy provisions currently in place in Delaware law saying:

The process, by statute 10 Del. C. section 349(b), is deemed confidential in exactly the same manner and for the same reasons that mediation proceedings in Chancery are confidential and in exactly the same manner and for the same reasons that guardianship and many trust and will matters are deemed confidential and not open to the public . . . [M]uch of the Court of Chancery's traditional equity jurisdiction has been conducted in confidential proceedings designed to facilitate a socially wholesome resolution, an amicable resolution that is much less likely to occur in the klieg light setting of a courtroom battle. The same should be true with the arbitration process, which is built on a similar business model.<sup>25</sup>

Other commentators have praised the law's privacy feature; one was even quoted saying, "[the] Court of Chancery is already known far and wide for its ability to adjudicate cases quickly. This is the natural evolution of that existing benefit . . . a lot of people do business together and may not want to air their dirty linen in public[.]"<sup>26</sup> Indeed, one clear advantage of the secret resolve of disputes is circumvention of class action lawsuits; if the people don't know, i.e., consumers and shareholders, then there is nothing to sue about. Therein lies the problem with this Delaware law; at least as far as the current suit is concerned.

### *B. The Delaware Law in Action*

Since January of 2011, when the Delaware Court of Chancery adopted Rules 96, 97, and 98, the court only arbitrated a disappointing six cases.<sup>27</sup> The six arbitrations only

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<sup>23</sup> *Id.*

<sup>24</sup> The Federal Arbitration Act does not address the issue of confidentiality, but parties are generally encouraged to include confidentiality provisions in their arbitral agreements. For an informative article discussing the need for privacy in arbitration see JAMS Dispute Resolution Alert, *Delaware Business Court Arbitration Program Provides Fast Resolution Path For Fortune 500 Company Disputes*, (2011), available at <http://kluwerarbitrationblog.com/blog/2012/05/17/confidentiality-not-to-be-overlooked-when-drafting-the-arbitration-clause/>.

<sup>25</sup> JAMS Dispute Resolution Alert, *Delaware Business Court Arbitration Program Provides Fast Resolution Path For Fortune 500 Company Disputes*, (2011), at 2 <http://www.jamsadr.com/files/Uploads/Documents/DRA/DRA-2012-01.pdf>.

<sup>26</sup> Steven M. Davidoff, *The Life and Death of Delaware's Arbitration Experiment*, Deal Book- THE N.Y. TIMES (Aug. 31, 2012, 11:58 AM), available at <http://dealbook.nytimes.com/2012/08/31/the-life-and-death-of-delawares-arbitration-experiment/#postComment>.

<sup>27</sup> *Id.*

generated \$60,000 in revenue for the state.<sup>28</sup> Of the six arbitrated cases, only one was reported in a one-and-a-half page order.<sup>29</sup> In fact, arbitrations of the sort normally don't even make it on the court's public docketing system.<sup>30</sup> The new program had no chance of survival, for only nine months after its inception, in October of 2011, the Delaware Coalition for Open Government (DELCOG)<sup>31</sup> filed suit with the principal claim that the secret proceedings violated the public's First Amendment qualified right of access to criminal and civil trials.<sup>32</sup>

### III. THE END: DELAWARE COALITION FOR OPEN GOVERNMENT V. HONORABLE LEO E. STRINE, JR., ET AL.

#### A. *Excuse Me, I'd Like to Lodge a Complaint!*

On Tuesday October 25, 2011, DELCOG filed a Complaint in the United States District Court for the District of Delaware. Named in the complaint are the five judges currently sitting on the Delaware Court of Chancery<sup>33</sup>, the Delaware Court of Chancery, and the State of Delaware. The complaint alleged that the Delaware law,<sup>34</sup> along with Chancery Court Rules 96, 97 and 98 collectively deprive the public of a right of [contemporaneous] access to judicial proceedings and records, as is bestowed upon them by the First Amendment to the Constitution of the United States.<sup>35</sup> Specifically, DELCOG instituted the action because it believes that the secret proceedings provided for by the above mentioned Delaware statute and Rules are not arbitral proceedings but are, in fact, trials in disguise.<sup>36</sup> Therefore, if the proceedings are not actually "arbitrations" but are confidential litigation proceedings, DELCOG has a viable 42 U.S.C. §1983 claim for a violation of the First Amendment.<sup>37</sup> The complaint explains DELCOG's "litigation not arbitration" theory saying in relevant part:

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<sup>28</sup> *Id.*

<sup>29</sup> See *Chrysalis Ventures III, L.P. v. Mobile Armor, Inc*, Arb. No. 001-A-2011 -VCL, C.A. No. 6069-VCL (Del. Ch. Dec. 30, 2011). It is worth noting here that the order contains no substantive information about the nature of the case and is only available on the Lexis File and Serve system, one must be a member to use this cite – membership is not free. See *id.*

<sup>30</sup> *Del. Coal. v. Strine*, 2012 U.S. Dist. LEXIS 123980, \*9 (D. Del. Aug. 30, 2012).

<sup>31</sup> The Delaware Coalition for Open Government is a state affiliate of the National Freedom of Information Coalition and is "committed to promoting and defending the people's right to transparency and accountability in government," more information about the Delaware Coalition for Open Government can be found on their website at <http://www.delcog.org/index.php/about/#missionstatement>.

<sup>32</sup> *Strine*, 2012 U.S. Dist. LEXIS 123980, at \*2.

<sup>33</sup> The named judges are: Hon. Leo E. Strine, Jr., Hon. John W. Noble, Hon. Donald F. Parsons, Jr., Hon. Sam Glasscock, III, Delaware Court of Chancery, Hon. J. Travis Laster.

<sup>34</sup> DEL. CODE ANN. tit. 10, §349 (West 2009).

<sup>35</sup> Complaint at ¶¶ 18-20, *Del. Coal. v. Strine*, 2012 U.S. Dist. LEXIS 123980 (D. Del. Aug. 30, 2012) (CA No. 11-01015), available at [http://jenner.com/system/assets/assets/5748/original/Delaware\\_20Coalition\\_20v.\\_20Strine.pdf?1326223902](http://jenner.com/system/assets/assets/5748/original/Delaware_20Coalition_20v._20Strine.pdf?1326223902).

<sup>36</sup> *Id.* at ¶ 19.

<sup>37</sup> *Id.* at ¶¶ 18-20.

Although the statute and rules call the procedure “arbitration,” it is really litigation under another name. Although procedure may vary slightly, the parties still examine witnesses before and present evidence to the Arbitrator (a sitting judge), who makes findings of fact, interprets the applicable law and applies the law to the facts, and then awards relief which may be enforced as any other court judgment. The only difference is that now these procedures and rulings occur behind closed doors instead of in open court.<sup>38</sup>

To be fair, arbitrations are usually conducted in this way, and those proceedings are private without so much as a peep on the process’ legality from naysayers. The outstanding attribute of the Delaware arbitration law that supports DELCOG’s theory is the fact that sitting judges arbitrate the cases, and not say the usual perpetrators, like retired judges and attorneys.

Not surprisingly, various press organizations viewed things through DELCOG’s eyes and sided with the nonprofit organization, showing support by way of submitting briefs to the court. These organizations include: The Associated Press, The New York Times, The Washington Post, and Reporters Committee for Freedom of the Press.<sup>39</sup> Equally predictable are the supporters of the Delaware law, the list is comprised of entities sympathetic to the needs of companies faced with corporate discord needing quick, economic, and quiet resolve. The list of supporters who submitted briefs to the court in favor of the Delaware arbitration program features the Corporate Law Section of the Delaware State Bar Association, The New York Stock Exchange, and the NASDAQ Stock Market.<sup>40</sup> This became a battle between the upright citizens who sought to protect the rights guaranteed to them by the United States Constitution, and big businesses who sought to save money by having quick, secret proceedings, adjudged by the best of the best: sitting judges on the Delaware Court of Chancery.

### *B. The Case to End all Arbitrations*

The United States District Court for the District of Delaware, under Judge Mary McLaughlin, granted Plaintiff DELCOG’s motion for judgment on the pleadings, and ruled the Delaware law creating confidential arbitration proceedings an unconstitutional violation of the First Amendment’s qualified right of access to civil trials.<sup>41</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> See Steven M. Davidoff, *The Life and Death of Delaware’s Arbitration Experiment*, Deal Book - THE N.Y. TIMES (Aug. 31, 2012, 11:58 AM), available at <http://dealbook.nytimes.com/2012/08/31/the-life-and-death-of-delawares-arbitration-experiment/#postComment>.

<sup>40</sup> *Id.*

<sup>41</sup> Del. Coal. v. Strine, 2012 U.S. Dist. LEXIS 123980, \*1 (D. Del. Aug. 30, 2012).

1. “Where Secrets or Mystery Begins, Vice or Roguery is Not Far Off” – Samuel Johnson : There’s Just Something About a Secret that Makes People Uncomfortable

On August 30, 2012, Judge McLaughlin, sitting in Philadelphia,<sup>42</sup> agreed with DELCOG’s theory of the case and decided the fate of the Delaware program, putting it to rest, if only temporarily.<sup>43</sup> It is clear from the opinion that the merit of DELCOG’s First Amendment claims is found in the fact that sitting judges of one of the nation’s most prominent and powerful courts are keeping secrets for the corporate world, all in the name of private arbitration.<sup>44</sup>

The court began its 26 page opinion by outlining the Delaware law and the accompanying Chancery Court Rules.<sup>45</sup> The Court analogized the case to *Richmond Newspapers, Inc. v. Virginia*.<sup>46</sup> In *Richmond Newspapers*, the Supreme Court ruled that the “First Amendment prevents the government from denying the public access to historically open government proceedings.”<sup>47</sup> While *Richmond Newspapers* dealt specifically with a criminal trial, the Court went on to note the benefits of public accountability in the court system generally. As accounted by Chief Justice Burger in *Richmond Newspapers*:

Public accountability encourages honesty from witnesses and reasoned decision making by jurists. Accessible court proceedings serve an educational function, informing the public about the judicial system and the important social and legal issues raised by many cases. Judicial rulings are more easily accepted and mistakes are more quickly corrected when the subject to the scrutiny of public and press. Access to criminal trials thus improves both the functioning of the judicial system and public confidence in its fairness. Given the experience of public openness and the benefits of that practice, the Court found that the First Amendment protects the public’s right to access historically open proceedings.<sup>48</sup>

Even If the opinion didn’t open with the holding, audiences would have known where the court was going at this point. It is clear only thirteen pages into the opinion that the case was won; the court decided that Delaware’s arbitration program was indeed a trial proceeding and not in fact arbitration.<sup>49</sup> In actuality, however, the case Supreme Court case that put the nail in Delaware’s coffin dealt with criminal trials specifically.<sup>50</sup> There

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<sup>42</sup> All the eligible Delaware judges recused themselves.

<sup>43</sup> Defendants have already appealed the decision.

<sup>44</sup> See generally *Strine*, 2012 U.S. Dist. LEXIS 123980, at \*8-9.

<sup>45</sup> *Id.* at \*4-5.

<sup>46</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

<sup>47</sup> *Id.*

<sup>48</sup> *Del. Coal. v. Strine*, 2012 U.S. Dist. LEXIS 123980, at \*13 (D. Del. Aug. 30, 2012) (paraphrasing Berger, C.J., in *Richmond Newspapers, Inc.*, 448 U.S. 555 at 573).

<sup>49</sup> See *id.* at \*12-14 (discussing plaintiffs’ right of access in civil trials and proceedings sufficiently like trials).

<sup>50</sup> See *id.* (referring to *Richmond Newspapers*).



is, however, precedent among the circuit courts, as well as the Court of Appeals for the Third Circuit, that a right of access exists in civil trials as well as criminal.<sup>51</sup>

The court admits that the public's interests in the matters of a criminal trial are different (read: lesser) than their interests in the happenings in private disputes between private citizens and entities.<sup>52</sup> However, the opinion comes full circle shortly thereafter when the court nevertheless justifies their position by highlighting the fact that the business of sitting judges is the business of the public, and therefore any proceedings they preside over must be done in the view of the public eye:

But the actions of those charged with administering justice through the judiciary is always a public matter. Openness of civil trials promotes the integrity of the courts and the perception of fairness essential to their legitimacy. Public dissemination of the facts of a civil trial can encourage those with information to come forward, and public attention can discourage witnesses from perjury.<sup>53</sup>

The court further reiterated the articulated need for transparency in judicial proceedings by citing the “six benefits of open judicial proceedings, both criminal and civil” as comprised by the Court of Appeals for the Third Circuit in *N. Jersey Media Grp., Inc. v. Ashcroft*.<sup>54</sup>

## 2. *Arbitration v. Litigation : The Court's Analysis*

The Third Circuit test for determining whether the public has a right of access to a specific record or proceeding is that of “logic and experience”:

First, because a tradition of accessibility implies the favorable judgment of experiences, we have considered whether the place and process have historically been open to the press and general public . . . Second, in this setting the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question.<sup>55</sup>

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<sup>51</sup> See *id.* at \*14 (citing: *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir. 1984); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988); [15] *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n*, 710 F.2d 1165, 1179 (6th Cir. 1983); *Matter of Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1309 (7th Cir. 1984); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983)).

<sup>52</sup> *Strine*, 2012 U.S. Dist. LEXIS 123980 at \*15-16.

<sup>53</sup> *Del. Coal. v. Strine*, 2012 U.S. Dist. LEXIS 123980, \*15-16 (D. Del. Aug. 30, 2012).

<sup>54</sup> *N.J. Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 217 (3d Cir. 2002) (listing the six benefits of judicial proceedings: “[1] promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system; [2] promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; [3] providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; [4] serving as a check on corrupt practices by exposing the judicial process to public scrutiny; [5] enhancement of the performance of all involved; and [6] discouragement of perjury.”).

<sup>55</sup> *Id.* at 208-09 (quoting *In Press-Enter. Co. v. Superior Court*, 478 U.S. at 81 (U.S. 1986)).

This is the test the Defendants asserted was apposite in this case. However, in order to reach that test, the case at hand must be one involving an arbitration as opposed to a “procedure ‘sufficiently like a trial.’”<sup>56</sup> The logic and experience test would almost certainly yield the result desired by the Defendants, for the history of arbitration features confidential proceedings, thereby making it logical that this arbitration program could also, constitutionally, be legally confidential. However, the Defendants cannot ignore the precedent set by *Publicker Indus., Inc. v. Cohen*.<sup>57</sup> In *Publicker Industries*, the Court of Appeals for the Third Circuit ruled that the reasoning of *Richmond Newspapers* applies to civil trials,<sup>58</sup> thereby granting the public a right of access to civil trials and negating the need to determine the same by way of the logic and experience test. Following this precedent, the Plaintiffs proposed that *Publicker Industries* applies here, and therefore the court should not reach the logic and experience test for the same reason. This is the “threshold question” that lead to the court’s engagement in an ‘arbitration verses litigation’ analysis.

In finding that the Delaware arbitration program was litigation cloaked in arbitration garb, the court listed the attributes of arbitration and litigation, and the differences between judges and arbitrators to reach the conclusion that:

The Delaware proceeding, although bearing the label arbitration, is essentially a civil trial . . . Because the Court finds that the Delaware procedure is a civil judicial proceeding, it is not necessary to [utilize] the experience and logic test . . . The public benefits of openness are not outweighed by the Defendants' speculation that such openness will drive parties to use alternative non-public fora to resolve their disputes . . . the judiciary as a whole is strengthened by the public knowledge that its courthouses are open and judicial officers are not adjudicating in secret.<sup>59</sup>

The public benefits of Delaware’s global domination as the home of corporations, the efficient handling of corporate disputes, and a better economy in Delaware did not phase this court. Ironically, since there was no trial on the merits of this case, the Delaware Defendants were subject to a process similar to one they were trying to institute: an abbreviated, less expensive, swift act of judicial resolve of a complex dispute. Nevertheless, it is back to the drawing board for Delaware on this issue.

#### **IV. CONCLUSION: DO YOU BELIEVE IN LIFE AFTER DEATH?**

To the Delaware State Legislature and the Chancellors at the Court of Chancery, losing the case only meant that a battle was lost, not the war. The Defendants have already appealed Judge McLaughlin’s decision, making it clear that this ruling will not be the last the world hears of the innovative, yet currently unconstitutional, Delaware law. It is clear that the Defendants genuinely believe that the Delaware arbitration program is a step in the right direction for their state, and their future viability on the

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<sup>56</sup> Del. Coal. v. Strine, 2012 U.S. Dist. LEXIS 123980, \*20 (D. Del. Aug. 30, 2012).

<sup>57</sup> Publicker Indus., Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984).

<sup>58</sup> *Strine*, 2012 U.S. Dist. LEXIS 123980 at \*14.

<sup>59</sup> *Id.* at \*27, \*30-31.

world's market for corporate dispute resolution. A Republican member of the Delaware House Judiciary committee said on the matter, "We want to stay competitive. We want [the] Chancery Court to have the best tools possible. It's really important for employment and it is a significant generator of revenue."<sup>60</sup>

Keeping hope alive, members of the Delaware legal community are already talking reform and strategies for appeal. Among the major areas of the law needing reform are the strict privacy provisions in conjunction with sitting judges serving as arbitrators. It has been reported that lawmakers are considering both making the final hearings public and using retired Chancery Court judges to preside of the proceedings.<sup>61</sup> However, mandating public arbitration hearings takes away the parties' treasured freedom to craft their own arbitration proceedings by agreement. And, limits the effects of the decision to those parties involved in the arbitration, notwithstanding concerns of the public. The latter provision would take the lure of the supreme expertise that Delaware was trying to capitalize on out of the program, thus making it resemble the several existing court annexed arbitration programs across the country.<sup>62</sup> Something has to be done to alleviate the fear of big businesses settling multimillion dollar disputes in secret, all with the backing of one of the nation's most powerful judiciaries. If this Delaware law is to resurrect itself, one thing is certain: novelty is needed; but as of now, spectators must wait and see which way the Delaware State Legislature will go in trying to make this law work and the result of the current appeal.

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<sup>60</sup> Tom Hals, *Backers of Secret Delaware Arbitrations See Grounds For Appeal*, Thomson Reuters News & Insight (Sep. 10, 2012), available at [http://newsandinsight.thomsonreuters.com/Legal/News/2012/09\\_-\\_September/Backers\\_of\\_secret\\_Delaware\\_arbitrations\\_see\\_grounds\\_for\\_appeal/](http://newsandinsight.thomsonreuters.com/Legal/News/2012/09_-_September/Backers_of_secret_Delaware_arbitrations_see_grounds_for_appeal/).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*