

## **Chancery Court Praised At NYC Meeting**

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In a landmark legal article, Delaware's corporate laws and courts were derided in 1974 by William Cary, a prominent professor at New York's Columbia Law School and a former Securities and Exchange Commission chairman, as the product of a "race to the bottom" among states competing for business tax dollars.

He alleged the state created a climate of lax rules that favored corporate managers as a way to encourage them to incorporate in Delaware.

But on Friday, Columbia Law Professor John C. Coffee Jr. declared what he hoped was an armistice with Delaware -- on Veterans Day -- by hosting what amounted to a day-long celebration of the Delaware Court of Chancery's prestige and pre-eminence in corporation law, titled "Change and Continuity."

He said the debate about the value of Delaware's court is "dated" and largely over.

And the fees generated by those incorporations annually account for about 26 percent of Delaware's general fund revenue.

While no one at Friday's conference doubted Delaware's dominance, some warned that the court's pre-eminence could be in danger and corporate litigation may flee to other courts or its power may be taken away by federal regulation if it fails to adapt or compensate for some trends, such as the continuing perception that the court is pro-management and anti-plaintiff.

Coffee said while the judges on the Delaware Court of Chancery may not be household names in Delaware, "they are close to that in the New York legal community."

Delaware's Chancery Court "has a great impact in the New York legal community because Delaware has a near-monopoly on corporation law," Coffee said, noting that 60 percent of the Fortune 500 companies are incorporated here.

More than 300 academics and attorneys -- including many from Delaware -- participated in Friday's seminar that Delaware Supreme Court Justice Jack Jacobs helped organize at Columbia's Manhattan campus. Newly named Chancery Court Chancellor Leo E. Strine Jr. and all four of the court's sitting vice chancellors also participated.

William Savitt of the law firm of Wachtell Lipton Rosen & Katz also helped organize the event.

This honor for the Chancery Court is good news for Delawareans, not just as a matter of civic pride but also as a matter of economic self-interest.

It is because of the court's track record and expertise in business matters that huge numbers of companies, partnerships and trusts incorporate in the state, according to Delaware Chief Deputy

Secretary of State and Director of Corporations Rick Geisenberger. In fiscal year 2010, corporations paid about \$1.34 billion in fees that range from \$75 to \$180,000 per company to ensure access to Chancery Court, he said.

And that is not counting the economic impact of spin-off benefits in the form of law firms that open or locate offices here and employ hundreds to practice in Chancery Court.

Geisenberger said many buildings in downtown Wilmington that used to be filled by the DuPont Co. and credit card companies "are now filled with corporate lawyers and bankruptcy and intellectual property attorneys."

### **People in minority**

Delaware, which has a population of about 898,000, currently is corporate home to more businesses -- more than 920,000 -- than people, Geisenberger said.

In other states, the ratio of people to corporations is about 20 to 1, he said, while in Delaware it is about 1 to 1.

"It is why Delaware does not have a sales tax," Geisenberger said, and the state's property-tax rate is lower than many others.

At Friday's conference, law professors and litigators all talked about the "genius" of the Delaware Chancery Court system and its influence not only on corporate America and corporate governance but on Washington and federal regulation.

"Delaware Court of Chancery is unique among U.S. courts," said Professor Ronald J. Gilson of Columbia Law School and Stanford Law School, adding it marries regulation with a common law model, allowing it to react quickly to "tweak" past rulings as new trends emerge. "Chancery Court's experience is ultimately the source of Delaware's success," he said.

But not all the presentations on Chancery Court were positive.

Professor Mark Roe of Harvard Law School talked about how some new federal regulations have been passed that appear to intrude on areas previously dominated by Chancery Court. But he also said a shift in rulings from the Delaware Chancery Court, like those that give more access to shareholders, has appeared to calm federal policymakers and their constituents. "Delaware's position affects Washington," he said, and vice versa.

### **Fading dominance?**

On one of the more controversial panels, professor Bernard S. Black of Northwestern School of Law said his analysis shows that Delaware's dominance might be fading. He said the state is starting to "lose cases" to federal courts and other states that have formed business courts, such as Nevada.

He conceded that the number of cases filed in Delaware's Chancery Court remains high and that some cases filed outside Delaware may be "junk," but argued "Delaware's share is not what it once was." He said 10 years ago, nearly 100 percent of certain types of cases went to Delaware and now some significant cases are going elsewhere.

And while the loss of "case flow" will not have much, if any, economic impact on Delaware, if the trend continues and important cases continue to go elsewhere, incorporations might one day start to depart Delaware as well, Black said.

Among the possible reasons for a trend away from Delaware, according to Black, is a perception that Delaware is not friendly to plaintiffs because of issues like limits on plaintiff-friendly things like expedited discovery, limits on fees for plaintiff attorneys and "colorful anti-plaintiff rhetoric" in some court opinions.

With an excerpt from a Strine opinion showing on a screen, Black said the criticism of the plaintiffs' attorneys may be valid, "but plaintiffs' lawyers don't like judges to say this in public."

Attorney Stuart M. Grant, another panelist, endorsed Black's conclusions based on conversations with his colleagues.

"The court is creating opportunities for others to go elsewhere," Grant said, though he conceded it was like the field of Republican presidential candidates this year: there is Mitt Romney and then there is everyone else who is not Mitt Romney.

### **Going elsewhere**

He said while some plaintiffs seek to not go to Delaware, they are not all going to one other place and in some cases may be going to a jurisdiction where they hope a weak case might get a favorable ruling from an inexperienced or overburdened judge.

But early in the conference, Gilson spoke for many presenters when he said the day was a bit unusual because he and others would be speaking on the meaning of decisions and actions by Chancery Court judges with the judges themselves in the audience.

He said it was like the scene in the movie "Annie Hall" when Woody Allen is arguing with someone about the work of Marshall McLuhan and pulls McLuhan himself from the crowd to tap the man on the shoulder and tell him he is wrong.

And at lunch, Strine got to play the role of McLuhan by telling the crowd that some of what he heard in morning sessions amounted to "fiction."

Strine then asked all the attorneys who had ever had a case sped up through expedited discovery by Chancery Court to stand and more than half the people in the room stood up.

Strine then asked all the plaintiffs' attorneys who had ever received more than \$1 million in fees from Chancery Court to stand. Then he asked those awarded more than \$10 million to stand and then those awarded more than \$20 million. At that point, Grant was the only one standing.

"It is news to me that Chancery Court is not open to business," Strine said, adding the court moves quickly and efficiently, produces good results, is responsive to the needs of litigants and has granted some plaintiffs huge victories.

He then touted the court's new program that offers confidential arbitration by Chancery Court judges to business litigants, a service that is the focus of a federal lawsuit by the Delaware Coalition for Open Government.

The suit alleges the new service amounts to a secret court and violates the U.S. Constitution.

Strine expressed confidence the federal action would be dismissed before going on to the focus of his speech -- a tribute to his predecessor, former Chancellor William B. Chandler III, who returned to private practice in June.

"Bill is a special person: gracious, caring, hard-working, supportive and wise. ... I miss him immensely already," Strine said, adding he hopes to continue moving the Chancery Court down the path set by Chandler.

Strine also reminded the business-focused crowd that the Chancery Court's mandate is to be a court of equity for all matters in Delaware, not just those related to corporation law. This includes guardianships and resolving other "challenging, emotional and knotty 'smaller' matters," which include ruling last week in favor of Occupy Delaware's right to protest overnight at a city plaza in Wilmington.

In one of the final panels, "Perspectives on Delaware's Future," almost all the speakers offered largely positive projections for Chancery Court, with attorney Gregory Williams of the Delaware-based Richard, Layton & Finger saying his advice to the court was to ignore talk about marketshare, competition and "strategic" rulings. "Don't try to do anything other than achieve fair and just results in cases," he said. Keep doing that, he concluded, "and everything else will take care of itself."