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COURT OF APPEALS
STATE OF NEW YORK

EZRASONS, INC.,

Appellant,

-against-

NO. 2

RUDD,

Respondent.

20 Eagle Street
Albany, New York
April 10, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUSTICE CARL LANDICINO
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Christian C. Amis
Official Court Transcriber



1 CHIEF JUDGE WILSON: The next case on the
2 calendar is Ezrasons v. Rudd.

3 We are delighted to be joined for this and the
4 next case by our colleague from the Appellate Division,
5 Second Department, the Honorable Carl Landicino.

6 And I also wanted to mention that several of my
7 colleagues had the pleasure of judging the final round of
8 the Gabrielli Moot Court Competition at Albany Law School a
9 couple of days ago, and we have a couple of members of the
10 winning team in the back. Welcome.

11 MR. BOTTINI: Good afternoon. May it please the
12 court. Franc Bottini for appellants.

13 Chief Judge Wilson, I'd request five minutes for
14 rebuttal.

15 CHIEF JUDGE WILSON: Five, yes.

16 MR. BOTTINI: Thank you.

17 The final two cases before the court this
18 afternoon present an important opportunity to safeguard the
19 New York legislature's intent to ensure access to justice
20 for shareholders who bring derivative cases against foreign
21 corporations doing business in New York and their officers
22 and directors.

23 Section 1319 of the Business Corporation Law was
24 passed in 1961 after almost four years of debate and
25 research. It reflects the legislature's careful balancing

1 of policy considerations, and takes into consideration both
 2 business interests, protection of shareholders, and the
 3 need to preserve New York's status as the leader in
 4 international commerce and dispassionately administer a
 5 known, stable, and commercially sophisticated - - -

6 JUDGE SINGAS: Well, despite the fact that it was
 7 enacted over sixty-four years ago, I think we've
 8 consistently held - - - and courts have consistently held -
 9 - - that the internal affairs doctrine is going to be what
 10 decides derivative actions.

11 So I'm just wondering why now you'd want to upend
 12 what we understand as precedent and flood the courts with
 13 these derivative actions based on something that has been
 14 in existence for a long time and has never been understood
 15 that way - - - the way that you want us to apply it here.

16 MR. BOTTINI: Well, we're certainly not looking
 17 to upend the law. And I believe Your Honor is referring to
 18 the Eccles decision, where this court confirmed the
 19 continuing viability of the internal affairs doctrine, but
 20 the application of 1319 is not in any way inconsistent with
 21 the internal affairs doctrine.

22 I think the misconception of respondent's
 23 position is that the internal affairs doctrine is an all or
 24 nothing proposition, and that's just not the case. The New
 25 York legislature chose and in fact mandated the application

1 - - -

2 JUDGE RIVERA: Well, how does it harmonize with
3 that common law doctrine?

4 MR. BOTTINI: Why is it not inconsistent - - -

5 JUDGE RIVERA: How does the BCL harmonize - - -
6 yes.

7 MR. BOTTINI: It's harmonized, Your Honor,
8 because, as the First Department noted, I think fairly
9 eloquently in the Culligan decision - - -

10 JUDGE RIVERA: Uh-huh.

11 MR. BOTTINI: - - - what the legislature mandated
12 is if there's a statute that applies to the particular case
13 - - -

14 JUDGE RIVERA: Uh-huh.

15 MR. BOTTINI: - - - you apply the statute. If
16 there's not a statute, then the normal rules under the
17 internal affairs doctrine are applied. And in fact, our
18 case is consistent with that harmonization principle. We
19 allege our claims under the substantive law in the Barclays
20 case here - - -

21 JUDGE SINGAS: I understand that, but Culligan is
22 not understood that way anymore. I think the First
23 Department has retreated and basically said they're not
24 following Culligan any longer. Am I wrong about that?

25 MR. BOTTINI: I think so, Your Honor. I think

1 every court of appeal, other than the panel decisions that
2 have considered this issue have gone our way. And the
3 Second Circuit in the Norlin case applied 1319 and said New
4 York law is straightforward. You read 1319, and because
5 626 applies in the statute, you apply 626 to a derivative
6 claim - - -

7 JUDGE HALLIGAN: So 13 - - - you're focused on
8 626 - - -

9 MR. BOTTINI: Yes - - - yes, Your Honor - - -

10 JUDGE HALLIGAN: - - - I appreciate - - - but
11 1319 addresses the applicability of other provisions, it
12 says, and it references quite a few provisions. Right. So
13 I take it under your reading of 1319 as it applies to 626,
14 the same would be true for every other provision referenced
15 in the statute. Is that correct?

16 MR. BOTTINI: Correct.

17 JUDGE HALLIGAN: So choice of law provisions
18 would be displaced for everything else in there.

19 MR. BOTTINI: Yes. Everything that's in 1319
20 applies if the foreign corporation is doing business in New
21 York. That's the standard. And also, Your Honor - - - and
22 - - - and you're right, there are some - - -

23 JUDGE HALLIGAN: That's pretty broad. Right.

24 MR. BOTTINI: Well, that's what the legislature
25 did. Our job is to give full effect to the statutory

1 provisions. The legislature - - -

2 JUDGE HALLIGAN: Well, of course. And that is
3 our job as well, I think. But my question, I guess, came
4 from wondering whether, if that was the legislature's
5 intent to sweep that broadly, whether we would see either
6 something more explicit in the text or some clearer signal
7 in the legislative history.

8 MR. BOTTINI: Well, I think we have that,
9 respectively, Your Honor. First of all, the statute says
10 the following provisions shall apply. That's a mandate.
11 That's not may apply. The respondent's position is 1319 is
12 merely permissive. It just says you may apply these
13 provisions. That's not what it said - - -

14 JUDGE CANNATARO: But if the legislative intent
15 was to sweep aside a long standing common law rule, you
16 would expect more than just the word, shall. We've
17 explained that sort of title change to the law as requiring
18 something along the lines of an explicit statement that
19 that is, in fact, what the legislature is attempting to do.
20 There's nothing like that in 626, is there?

21 MR. BOTTINI: Well, there's - - - 1319 contains
22 the shall language, Your Honor. 626 is the provision
23 governing the maintenance of derivative actions in New
24 York, so - - -

25 JUDGE CANNATARO: All right. So what about 1319?

1 What do you derive out of 1319 that evinces an intent to
2 supplant the internal affairs doctrine?

3 MR. BOTTINI: Well, because when you look at the
4 provisions of the BCL that are listed in 1319, there are
5 substantive provisions there. They wouldn't have listed
6 substantive provisions if they didn't intend to partially
7 set back the internal affairs doctrine. Again - - -

8 JUDGE HALLIGAN: But it could have been as
9 against the backdrop of the common law, couldn't it? I
10 mean, isn't the question before us whether or not the
11 backdrop of the internal affairs doctrine remains in play
12 and this is against that context, or whether it actually
13 displaces all of that?

14 MR. BOTTINI: I think all it is, Your Honor, is
15 to recognize that New York, given its preeminent position
16 in international commerce, chose to adopt a modified
17 version of the internal affairs doctrine. It - - - because
18 of the importance of New York law, and because, actually,
19 business interests want New York law applied - - - they - -
20 - we have in the next case contracts containing New York
21 choice law enforcement provisions. And because of the
22 importance of that, they said certain provisions of our law
23 are going to apply.

24 Dean Stevens, who wrote a very seminal article
25 about the passage of 1319, said it would completely

1 undermine the intent of the legislature in mandating the
2 application of these provisions if a company doing business
3 in New York could go across the state lines, incorporate
4 somewhere else, and get around New York law.

5 JUDGE CANNATARO: So let me ask you this then,
6 counselor, what's the state of awareness in the business
7 community at large? Do you think the foreign managers of
8 foreign corporations are operating under the under the
9 understanding that New York's BCL controls who can bring a
10 derivative action versus their own local law? In other
11 words, do they put any credence in our internal affairs
12 doctrine?

13 MR. BOTTINI: Well, I think they're aware of the
14 statute. The statute's been on the books since 1961. And
15 again, it was - - -

16 JUDGE CANNATARO: So then you would answer, yes.

17 MR. BOTTINI: Yes.

18 JUDGE CANNATARO: Foreign managers assume - - -

19 MR. BOTTINI: Yes.

20 JUDGE CANNATARO: - - - that the BCL is what
21 controls in terms of who can bring a derivative action - -
22 -

23 MR. BOTTINI: It - - -

24 JUDGE CANNATARO: - - - even if their own
25 statutes say you can't bring a derivative action.

1 MR. BOTTINI: Right. And they understand if they
2 do business in New York, they're going to be subject to
3 certain provisions, not all. And again, the substantive
4 law governing liability of the directors will still be
5 governed by the foreign law. And that's why our position
6 is perfectly consistent - - -

7 JUSTICE LANDICINO: So how do you define what a
8 shareholder is?

9 MR. BOTTINI: What a shareholder is?

10 JUSTICE LANDICINO: Yeah. How do you do you
11 define that term?

12 MR. BOTTINI: It's very simple. You read 1319,
13 which is plain on its text, and it says 626 applies. Then
14 you go to 626, and 626 says a beneficial shareholder can
15 bring a derivative claim. So therefore, 626 applies, just
16 like this court in Davis held that it applied. The foreign
17 rules are procedural. And in Davis, this court held that
18 those procedural gatekeeping rules of the foreign and
19 corporations locale will not apply. And so in Davis, 626
20 was applied.

21 And the Norlin case, the Second Circuit said, all
22 you have to do is look at 1319 because 626 is listed there,
23 626 applies. The Second Circuit applied it. Culligan
24 applied 626.

25 JUDGE CANNATARO: Counsel, 626 in another section

1 has a demand requirement - - - 626(c). Right. So if we're
2 dealing with a foreign corporation, and their home
3 jurisdiction also has a demand requirement, which one needs
4 to be followed?

5 MR. BOTTINI: 626, as long as it's doing business
6 in New York. That's what the legislature said.

7 JUDGE RIVERA: So if it is not doing business in
8 New York, what happens?

9 MR. BOTTINI: It's not doing business in New
10 York, then the shareholder cannot file suit here. Very
11 straightforward.

12 The other decisions that have looked at this
13 issue, 1319 was not raised. That's one of the reasons I
14 think, Your Honor, when you see some of these decisions in
15 the lower courts and they go the other way, it's because
16 the shareholders never raised 1319 for whatever reason.

17 JUDGE SINGAS: Well, shouldn't that tell us
18 something?

19 MR. BOTTINI: No, it's just that the plaintiffs
20 don't always raise all the applicable provisions available
21 to them. A lot of the times, what you are dealing with is
22 a Delaware corps, and everybody's focused on Delaware law,
23 and everybody looks at Delaware law. Well, New York has
24 its own laws, and they're not always cited.

25 Culligan looked at 1319 and said, wow, if you

1 read it, it's very simple. It's very straightforward.
2 These other cases that are cited by the other side didn't
3 involve 1319. The text of 1319 must be given effect. The
4 legislature chose that.

5 Also, if you think about it, it's - - - think
6 about it. It - - - their position, if you credit it,
7 you'll have to throw out all kinds of provisions under the
8 BCL. You'd have to throw out 1317 because 1317 says if
9 you're a foreign corporation doing business in New York,
10 719 and 720 of the BCL apply. You're just going to throw
11 that out after the legislature passed that important
12 statute.

13 And what do you do about 1320? Take a look at
14 Section 1320 - - - it's very important - - - of the BCL.
15 In 1320 is an exemption statute. In 1320, says a foreign
16 corporation doing business in New York doesn't have to
17 comply with some of the other provisions that we just said
18 are applicable if one of two things apply, either its
19 shares are traded on a national stock exchange, or it
20 derives less than half of its income and revenues from
21 business in New York.

22 Here's what's so incredible. It exempts certain
23 provisions of 1319, but not 13(a)(2). 626 was so important
24 to the New York legislature to apply to protect
25 shareholders that they said that's going to apply even if

1 the foreign corporation stock is publicly traded, and even
2 if it doesn't derive more than half of its revenues from
3 New York.

4 You can't reconcile all those provisions of the
5 BCL with the respondent's interpretation, but you can with
6 our interpretation, because, again, the New York
7 legislature, because of the importance of all these foreign
8 companies that want to come in and take advantage of New
9 York's business, list their shares here, raise their
10 capital here, billions of dollars in capital that they
11 raise in these two cases before the court. We have a \$63
12 billion acquisition in the Bayer case, and Barclays was
13 fined \$18 billion in New York - - - for activities that
14 they undertook in New York. And so - - -

15 JUDGE SINGAS: The Joint Legislative Committee to
16 study the revision of the corporate - - - corporation laws.
17 Right. You know who they are. They studied these laws and
18 gave their opinions as they were switching over - - - said
19 that Section 1319 was merely a list of business corporation
20 provisions that apply to foreign corporations, and only to
21 the extent provided therein. It doesn't seem that there's
22 any creation of any substantive rights by the people who
23 were tasked to study this.

24 MR. BOTTINI: It's interesting when you look at
25 the joint report, both the State and City Bar of New York



1 opposed 1319. They said it's an improper attempt to
2 regulate the internal affairs of foreign corporations
3 beyond what other states have chosen to do. The New York
4 legislature rejected that opposition. They did choose to
5 regulate the internal affairs of foreign corporations, not
6 across the board, but just in limited circumstances, and
7 626 is one of them.

8 JUDGE CANNATARO: Let me ask you this regarding
9 the debate over 1319. What was the dialog specifically as
10 it relates to 626(a) in that debate? Was there a loud hue
11 and cry from the community that 626(a) was unfairly
12 impinging on the internal affairs doctrine?

13 MR. BOTTINI: Well, we don't have all the exact
14 comments that were made, Your Honor, but - - -

15 JUDGE CANNATARO: Because I couldn't find
16 anything. I couldn't find anything about that. It sounded
17 to me like whatever they were debating, no one was
18 seriously concerned that 626(a) was going to damage the
19 internal affairs doctrine, but we now find out from you
20 that it actually completely sets aside the internal affairs
21 doctrine.

22 MR. BOTTINI: No. No. Again, it doesn't
23 completely set it aside. It just reflects the New York
24 legislature's policy decision, which we must respect, to
25 have certain aspects of New York law apply, and 626 is one

1 of them. As to the substantive law of liability of
2 directors, that's still governed by the foreign law. So
3 that's consistent with Eccles, and it's consistent with the
4 fact that New York chose to adopt a modified version of the
5 internal affairs doctrine. It's not a casting aside of the
6 doctrine, Your Honor. I would - - -

7 JUDGE CANNATARO: Well, but - - -

8 MR. BOTTINI: - - - reserve my time for rebuttal.
9 Thank you.

10 CHIEF JUDGE WILSON: Thank you.

11 MS. FLATH: Good afternoon. Lara Flath for the
12 respondents. May it please the court. I think the
13 questions that have been raised by this panel are precisely
14 correct and precisely why plaintiff's argument is
15 completely wrong with respect to the internal affairs
16 doctrine.

17 JUDGE HALLIGAN: Can I ask you to address the
18 German-American Coffee case? Because it seems to me that
19 maybe Judge Cardozo's - - - a reading of the law there
20 suggests that perhaps we could read 1319 as plaintiffs
21 suggest.

22 MS. FLATH: Of course, Your Honor. That case
23 specifically deals with Section 1317 - - -

24 JUDGE HALLIGAN: Uh-huh.

25 MS. FLATH: - - - which is obviously a very

1 important distinction, because, in fact, Section 1317 does
2 reflect choice of law. It talks about direct actions
3 against a corporation by foreign corporations and with
4 respect to domestic corporations, which is different than -
5 - -

6 JUDGE HALLIGAN: So you're saying there's a
7 distinction in the text of the two statutes that leads to a
8 different result?

9 MS. FLATH: Indeed. 13 - - -

10 JUDGE HALLIGAN: And what exactly - - - go ahead.

11 MS. FLATH: No, please. I'm sorry, Your Honor.

12 JUDGE HALLIGAN: I was just going to ask you what
13 that is.

14 MS. FLATH: The difference, certainly, is the
15 language of the statutes in which Section 1317 does reflect
16 that the same foreign - - - domestic corporations shall
17 apply to the same extent. Right. An action against a
18 foreign corporation shall be against the same extent as a
19 domestic corporation. 1319(a)(2) has no such language, and
20 in fact reflects, except as provided thereon, precisely as
21 was recognized before by Judge Singas.

22 JUDGE CANNATARO: So what is 626 if it's not a
23 legislative statement regarding standing in derivative
24 actions?

25 MS. FLATH: 626 certainly allows for derivative

1 juris - - - excuse me - - - derivative suits to be brought
2 in certain circumstances, but it is not - - -

3 JUDGE CANNATARO: What are those circumstances?

4 MS. FLATH: If in fact there is standing. All of
5 those sorts of pieces. 13 - - -

6 JUDGE CANNATARO: So it does not confer standing
7 in and of itself.

8 MS. FLATH: Correct.

9 JUDGE CANNATARO: Why not?

10 MS. FLATH: Because one should look, when you are
11 dealing with a derivative suit brought on behalf of the of
12 the corporation, what fundamental law should apply? That
13 is still the internal affairs doctrine and how it applies.

14 CHIEF JUDGE WILSON: So is 626 brand new as of
15 1961?

16 MS. FLATH: Your Honor, I don't know the specific
17 date in which 626 - - -

18 CHIEF JUDGE WILSON: Didn't it - - - didn't - - -
19 didn't - - - yeah, didn't - - -

20 MS. FLATH: - - - was in - - - but if we focus on
21 the BCL, and certainly in 1319 here with the legislative
22 history - - -

23 CHIEF JUDGE WILSON: Yeah, it - - - wasn't it
24 actually in the same words, in haec verba, Business
25 Corporation Law 61, that existed for half a century, at

1 least, before that.

2 MS. FLATH: Yes. I mean, this - - -

3 CHIEF JUDGE WILSON: And aren't there cases under
4 that in which people have standing - - - had standing?

5 MS. FLATH: They do. Certainly, reading 626
6 should not, in fact, suggest that a derivative suit on
7 behalf of a court - - - foreign corporation could never be
8 brought in New York. It is simply the application to
9 assess that question, you should look to the internal
10 affairs doctrine on the substantive law and stand as a
11 court - - -

12 JUDGE CANNATARO: Was that ever a question before
13 626 was enacted? I'm still struggling to understand what
14 the purpose of 626 is if it's not conferring standing.
15 What else - - - I'm just - - - I'm struggling to understand
16 what else it could be doing.

17 MS. FLATH: It's - - - certainly when the BCL is
18 enacted and Section 13 in particular comes together to sort
19 of explain what provisions do and do not apply to foreign
20 corporations and enumerate that, 626 can, in certain
21 instances, apply to a foreign corporation if in fact the
22 corporation - - - the foreign corporation is doing
23 business. Yes, certainly, New York law allows for
24 derivative suits in particular instances to be brought.
25 626 allows that to happen, but it is not - - -

1 JUDGE SINGAS: Isn't 626 merely a floor, which
2 says that if you don't have these minimal requirements,
3 then you can't bring a derivative action? That's the way I
4 read it.

5 MS. FLATH: I would agree. And those two come -
6 - - 1319 and 626 read together are the statutory predicates
7 for subject matter jurisdiction over shareholder derivative
8 suits brought on behalf of a foreign corporation in certain
9 instances, but it does not automatically - - -

10 JUDGE RIVERA: But where is the in certain
11 instances?

12 MS. FLATH: In certain instances, a shareholder
13 suit may be brought. It is not always an automatic. And -
14 - -

15 CHIEF JUDGE WILSON: I'm not really sure what you
16 mean by subject matter jurisdiction, because the Supreme
17 Court is a court of unlimited jurisdiction - - - has
18 general jurisdiction. So in that sense, why is your use of
19 subject matter jurisdiction different from a cause of
20 action?

21 MS. FLATH: Certainly, Your Honor. At the time
22 of the BCL being enacted, numerous courts, in fact, were
23 rejecting jurisdiction over foreign derivative suits all to
24 begin with, because they read the internal affairs doctrine
25 as being so strong that, in fact, New York courts could

1 never have jurisdiction. Article 13 codifies which
2 provisions may apply in certain instances and narrows to
3 those corporations doing business in New York. So I - - -
4 it does pull that all together, that in the legislative
5 history, in fact, supports a reading that can be harmonized
6 with still continuing to apply the internal affairs
7 doctrine.

8 JUDGE RIVERA: That - - - but with respect to
9 1319 and 626, the limitation is doing business in this
10 state.

11 MS. FLATH: But - - -

12 JUDGE RIVERA: It doesn't say anything in a
13 foreign corporation so long as they could - - - they had
14 standing in the foreign jurisdiction to have initiated the
15 lawsuit. It doesn't say anything like that.

16 MS. FLATH: It doesn't, Your Honor. But
17 certainly 1319 on its face should not be read as a choice
18 of law provision.

19 JUDGE RIVERA: Why not?

20 MS. FLATH: Choice of law provisions are very
21 rare under the restatement - - - complex - - -

22 JUDGE HALLIGAN: So what do you think it is? I
23 mean, does it confer any authority at all - - - create any
24 rights or obligations? It seems like you're suggesting
25 it's sort of a CliffsNotes listing. I don't mean that to

1 be - - - I mean, it - - - tell me what - - - how do you see
2 it?

3 MS. FLATH: Your Honor, we would say that it
4 does, in fact, clarify and enumerate all of the provisions
5 - - -

6 JUDGE HALLIGAN: Well, by clarify, do you mean
7 change in any respect, or simply - - - what I mean by
8 CliffsNotes is simply that I take it you're suggesting it's
9 just listing in one place a bunch of provisions; is that
10 right?

11 MS. FLATH: That is, Your Honor. And - - -

12 JUDGE HALLIGAN: And that's kind of unusual. I
13 mean, I don't think statute - - - I don't think
14 legislatures often pass a statute simply to do that.
15 Usually, they are enacting a law that, you know, has some
16 consequence for parties, for anyone subject to the terms of
17 the statute.

18 MS. FLATH: It may be unusual, Your Honor, but I
19 think it does serve that purpose. As we've talked about,
20 and the panel has discussed, there was a lengthy process by
21 which BCL - - - the BCL was enacted in 1963, several years
22 of discussion over that. And in fact, 1319 does list out
23 those particular provisions providing clarity so there was
24 no more - - - no confusion - - -

25 JUDGE HALLIGAN: What do you do about the - - -

1 the legislative history the State and the City Bar
2 Association reports, which are treat it very differently?

3 MS. FLATH: So in that instance, Your Honor,
4 first, the submission of the Bar Commission, the report, is
5 not part of the legislative history, and in fact, was
6 commented - - -

7 JUDGE HALLIGAN: Yeah. But we do often look to
8 documents like that as shedding some light.

9 MS. FLATH: Certainly. It was commenting on a
10 draft - - - an earlier draft that, in fact, the opposition
11 was later withdrawn. That's in the compendium - - -

12 CHIEF JUDGE WILSON: But this wasn't the earlier
13 draft identical in language to the final version enacted?

14 MS. FLATH: Well, it is hard for us to tell
15 because in fact, it doesn't specify that the objection was
16 to 1319(a)(2). It talks about those pieces. It's
17 certainly withdrawn. So to sort of suggest that because
18 that objection was raised and never taken back, that this
19 must mean there was an objection to the internal affairs
20 doctrine being overturned.

21 JUSTICE LANDICINO: But Counsel, it simply says a
22 holder of shares. Very basic, right. Why would you need
23 anything more? And why wouldn't the State have an interest
24 in these derivative suits for shareholders to protect their
25 interests here?

1 MS. FLATH: Because we are talking about a
2 shareholder derivative suit, in which case, the plaintiff
3 seeks to step into the shoes of a foreign based
4 corporation. And the internal affairs doctrine dictates,
5 just as recently as this last year, and consistently in
6 numerous of these cases, that, in fact, it should be
7 respected. And that is both with respect to the
8 expectations of shareholders who choose to invest in a
9 foreign corporation with all of the principles for policy,
10 for expectation of interests, for knowing what restrictions
11 apply to them, in which case they can or cannot bring these
12 types of suits - - -

13 JUDGE RIVERA: But they certainly could have made
14 the choice to invest in a foreign corporation that's doing
15 business in New York, right? Doing business in New York.

16 MS. FLATH: It is - - -

17 JUDGE RIVERA: New York Law applies, according to
18 this, not only procedurally, but at least for standing
19 purposes.

20 MS. FLATH: But the provisions there, Your Honor,
21 in 1319 and 626, still say nothing expressly about
22 standing. And standing is a substantive requirement,
23 particularly in the context of a derivative - - -

24 JUDGE RIVERA: So is that needed to say that this
25 is a provision that recognizes standing?

1 MS. FLATH: There should be something that would
2 expressly identify it as a choice of law provision to then
3 displace the internal affairs doctrine. That truly is what
4 is happening. If we were to adopt it - - -

5 JUDGE RIVERA: So again, if it's not a choice of
6 law provision, it's doing what work?

7 MS. FLATH: It provides the statutory predicate
8 to jurisdiction, which at the time of the enactment of the
9 BCL, was in fact an open question as to whether or not New
10 York courts, in any circumstances, would exercise
11 jurisdiction over a shareholder derivative suit brought on
12 behalf of a foreign corporation.

13 JUDGE RIVERA: That would be a - - -

14 JUDGE CANNATARO: So is there a question when - -
15 - I'm sorry. Go ahead, Judge - - -

16 JUDGE RIVERA: No. I - - - just to follow up on
17 this. So when you say a statutory predicate to
18 jurisdiction, are you saying that this establishes
19 jurisdiction - - - that this is a jurisdiction granting
20 provision?

21 MS. FLATH: Yes.

22 JUDGE RIVERA: Because I'm trying to figure out
23 what the predicate to jurisdiction - - - that phrase - - -
24 what you meant by that.

25 MS. FLATH: Sure. Yes. Because it does then

1 impose the additional restriction of on corporations doing
 2 business in New York and in fact narrows the jurisdiction
 3 that can be exercised. If a foreign corporation was not
 4 doing business in New York, there would be no jurisdiction
 5 over this type of suit. We focused certainly on the on the
 6 plaintiff standing aspect, but that also then provides a
 7 limitation from the perspective of the company itself. So
 8 doing business in New York is simply not enough to then say
 9 a particular plaintiff automatically is able to bring suit
 10 standing in the shoes of the foreign corporation itself.

11 JUDGE CANNATARO: I want to go back to the last
 12 thing you said about 1319, 636 because it's pretty, you
 13 know, impactful. Are you saying that at the time of the -
 14 - - at the time of enactment, it was an open question in
 15 New York whether a shareholder could bring a derivative
 16 action against a foreign corporation in the New York
 17 courts? That was unanswered.

18 MS. FLATH: That - - - yes, Your Honor. And that
 19 that - - -

20 JUDGE CANNATARO: Surely this - - - you know,
 21 there had to be foreign derivative actions, at least
 22 commenced in New York prior to the enactment of these
 23 provisions.

24 MS. FLATH: And there - - - and courts, in fact,
 25 were rejecting those under the internal affairs doctrine



1 because New York did not have jurisdiction. That's
2 discussed in the Lewis v. Dicker case at the First
3 Department from some time ago.

4 JUDGE CANNATARO: And not because the - - - not
5 because of, you know, what you said before and not because
6 they weren't doing business in New York or some other
7 grounds for jurisdiction. You're saying because under the
8 internal affairs doctrine, because these were entities
9 governed by foreign jurisdictions, there was no home for
10 them, for their disputes in the New York courts.

11 MS. FLATH: Certain courts were interpreting that
12 to say there is no subject matter jurisdiction here.

13 CHIEF JUDGE WILSON: Did you happen to come
14 across an Appellate Division case called Hirschhorn v.
15 Hirschhorn from 1952?

16 MS. FLATH: I don't know that that is cited - - -

17 CHIEF JUDGE WILSON: I didn't see it in the
18 papers. I - - - you'll have to take on faith that I'm
19 describing it roughly correctly. But it - - - it was
20 three-two split in which three justices said - - - it was
21 the question in the case was whether New York or Canadian
22 law governed concerning a Canadian corporation. Canada had
23 a registration requirement just like the ones here. New
24 York didn't. And three justices sent it back to the
25 supreme court to determine whether the registration

1 requirement was real or not. Two justices dissented on the
2 ground that General Corporation Law 61, which is the
3 precursor to BCL 626, applied. Two of them held that it
4 applies, and you would apply - - - you would disregard the
5 foreign registration requirement. Any thoughts about that?

6 Well, let me ask it this way. Is it possible
7 that the drafters of this, Dean Stevens, who wrote Stevens
8 on Corporations and was involved very heavily in all of
9 this, and others, would have known about this case, and
10 then that should guide our interpretation somewhat about
11 what was happening with 1319 and 626.

12 MS. FLATH: Your Honor, very, very challenging to
13 answer that, but certainly since these provisions have been
14 enacted, I think it is important to go back and to correct
15 something that plaintiff sort of suggested in opening,
16 which is that any court who has looked at this has found
17 that 1319 should be respected. In fact, Culligan is the
18 rarity and has not been interpreted in the same way - - -

19 CHIEF JUDGE WILSON: Well, Culligan is much
20 later. I guess, what I'm what I'm wondering about is sort
21 of this, is if the idea of the internal affairs doctrine
22 that you're very heavily relying on has really taken form
23 after 1961, and that if you were looking for things about
24 the internal affairs doctrine before 1961, you'd maybe find
25 kind of a mishmash of things, and it was not formed this

1 way. So you might actually require a lot less specificity
2 than you see in the revision from 1961, which was done
3 pretty comprehensively.

4 And I also don't know if you've gone, but I and
5 my law clerks spent a great deal of time. There's about
6 150 research reports that are only in the state archives
7 here that have some bearing on some of these questions. So
8 just whether it's possible that the doctrine you're
9 referring to really evolved after this legislation was
10 enacted.

11 MS. FLATH: The internal affairs doctrine has
12 been a principle that has been used and respected for a
13 very long time, including prior to the BCL.

14 CHIEF JUDGE WILSON: Yes.

15 MS. FLATH: In terms of the proliferation of
16 shareholder derivative suits and the application and an
17 increasing global world and business and operation,
18 certainly, I think that you do see changes for those
19 reasons. And to that point, the Companies Act, which we
20 are talking about, right, enacted in 2006, recognizing
21 certain of these requirements under the - - - with the
22 guise that the internal affairs doctrine certainly should
23 apply.

24 CHIEF JUDGE WILSON: And it's possible the United
25 States and the - - - or New York in 1961 - - - thought it

1 had a bit more power in regulating international markets
2 than it does today.

3 MS. FLATH: Certainly could be the case, Your
4 Honor. There's many things to talk about, but when we look
5 at the interpretation of how these provisions have worked
6 for the last sixty years, consistently, it has been that
7 the internal affairs doctrine will dictate you should look
8 to the substantive law of the place of incorporation.

9 CHIEF JUDGE WILSON: And so how would you address
10 counsel's argument about Section 1320?

11 MS. FLATH: Your Honor, certainly, 1320 is really
12 not mentioned at all in their briefs, and so I was looking
13 to figure out where that comes up. And with the
14 legislative history, it is a bit more, I think, of the
15 particular differences, but it is trying to sort of say,
16 and it is, I think, an example of what 1319 could have
17 done, just like 1317. Had, in fact, the legislature
18 decided they wanted to do something expressly and
19 explicitly, they could have done so, and they did not in
20 the instance of 1319(a)(2).

21 CHIEF JUDGE WILSON: Yeah. But 1320 seems to
22 exempt portions of 1319, and it's kind of hard to
23 understand why that would happen if 1319 sort of did
24 nothing other than collect things.

25 MS. FLATH: So with respect to what 1320 deals

1 with, I do think it is particular aspects that it is
2 drawing that distinction. And then to sort of imply that
3 1319 means something because of what the legislature did
4 not do, takes that a step too far. The 1320 point is sort
5 of just beyond on those pieces, and there's nothing sort of
6 discussing that difference that would say that means that
7 the internal affairs doctrine should not apply for suits
8 brought on behalf of a foreign corporation.

9 To turn sort of just very, very briefly, again,
10 about - - - you know, counsel mentioned and discussed
11 extensively the Norlin case. That's from 1984 and was
12 discussed in the Eccles case just this last year, is not
13 really standing for that particular provision.

14 And when, in fact, the internal affairs doctrine
15 is applied here, it is clear that standing is a substantive
16 requirement under English law and should be respected for a
17 host of policy reasons, including to protect the interests
18 of shareholders as well as the directors, the officers, and
19 to avoid forum shopping too, to - - - in order to ensure
20 that there is not a floodgate that is open, that any
21 plaintiff who does not have standing under the law of,
22 here, England or other jurisdictions can just bring suit.

23 JUDGE CANNATARO: Let me ask you. If the
24 substantive requirement of - - - you know, doesn't have to
25 be the English company law - - - some other foreign

1 jurisdiction substantive requirement provides standing to a
2 larger group of people than the persons named in 626, would
3 the New York courts have to respect that determination made
4 in a foreign jurisdiction?

5 MS. FLATH: I think, yes. The answer would be
6 yes. In fact, you should look to who is able to bring suit
7 under the substantive requirements. And so in those
8 instances, yes, it could be - - -

9 JUDGE CANNATARO: So then you've just admitted
10 that 626(a) would actually supplant the internal affairs
11 doctrine.

12 MS. FLATH: No, I think it's still - - - it looks
13 to, again - - - it still dictates that the question of
14 standing of who is able to do that would be also then
15 permitted under law. That is the - - - I think, that the
16 twist, Your Honor, is that 626(a) is not the deciding vote.
17 It is the internal affairs doctrine, meaning the
18 substantive requirements of that place of incorporation.

19 CHIEF JUDGE WILSON: You're not saying the
20 legislature couldn't have displaced the foreign
21 registration requirements for suit, are you? You're just
22 saying it didn't.

23 MS. FLATH: It didn't. Correct, Your Honor.

24 CHIEF JUDGE WILSON: It could, though. If the
25 legislature had been clear, they could have done that.

1 MS. FLATH: Correct.

2 Unless there are no further questions, I'm out of
3 time.

4 CHIEF JUDGE WILSON: Thank you.

5 MR. BOTTINI: Very briefly, we didn't get to
6 discuss the substantive versus procedural issue. I'd like
7 to briefly touch on that reverse. Regardless of how this
8 court comes out on - - -

9 JUDGE CANNATARO: Is that an issue in this case?

10 MR. BOTTINI: Yes - - -

11 JUDGE CANNATARO: Is that preserved here,
12 substantive versus procedural?

13 MR. BOTTINI: Yes. Because that's what the lower
14 court decided on it. It decided that the standing
15 requirement was substantive and therefore had to be applied
16 under the law of England, the English Companies Act.

17 So here, regardless of the interpretation of
18 1319, this court's holding in Davis requires reversal of
19 the First Department's panel - - -

20 JUDGE RIVERA: Well, I think it's a question of
21 what argument you made that's preserved regarding that
22 substantive versus procedural.

23 MR. BOTTINI: Well, it's inherent in 1319 because
24 1319 is a choice of law provision. We argued that, that it
25 displaces - - -

1 JUDGE RIVERA: No. No. No. Did you preserve an
2 argument that the foreign law that you might not satisfy,
3 your client might not satisfy, is merely procedural, not
4 substantive?

5 MR. BOTTINI: We did. And - - -

6 JUDGE RIVERA: I think that's what Judge
7 Cannataro was asking. I may - - -

8 JUDGE CANNATARO: It is.

9 JUDGE RIVERA: - - - have misunderstood him, but
10 I thought that was the question - - -

11 JUDGE HALLIGAN: Can you point us to where you -
12 - -

13 JUDGE CANNATARO: Yeah. I don't see your
14 argument - - -

15 JUDGE HALLIGAN: Over here. Can you point us to
16 where you preserved that?

17 MR. BOTTINI: We - - - we submitted the statute.
18 I'm looking at record page 961. We made arguments in the
19 First Department. We cited the Davis case, where there was
20 a lengthy discussion of that issue by cite. It just - - -
21 but by mere - - -

22 JUDGE RIVERA: In nisi prius, not in the - - -
23 not at the appellate level.

24 MR. BOTTINI: We cited Davis for the proposition
25 that Davis is holding required the whole - - - the whole

1 holding of Davis is a procedural versus substantive. By
2 citing the decision alone, we preserved the issue, Your
3 Honor, in the trial court.

4 And again, the section here in the English
5 Companies Act, which is in the record at page 961, is
6 identical in substance to the Cayman Island procedural rule
7 that this court in Davis said was procedural and therefore
8 didn't govern in a derivative action filed in New York.
9 Instead, New York's gatekeeping rules, specifically 626,
10 apply. So on that basis alone, reversal is required.

11 Section 260 of the English Companies Act says
12 this chapter applies to proceedings in England and Wales or
13 Northern Ireland by a member of the company. That's a
14 procedural rule, just like the rule that this court said
15 was procedural in Davis, because it only governed actions
16 filed in Bermuda - - - I'm sorry - - - in the Cayman
17 Islands.

18 And so this provision of the English Companies
19 Act only would apply if my clients had filed their case in
20 one of those jurisdictions, England, Wales or Northern
21 Ireland, and it didn't.

22 And moreover, as this court held in Davis,
23 there's no indication in the English Companies Act that
24 this provision was meant to apply to cases filed outside of
25 England or Wales or Northern Ireland. So on that ground

1 alone, reversal is required, regardless of the
2 interpretation of 1319.

3 And finally, again, we don't think that our
4 interpretation is in any way inconsistent with the internal
5 affairs doctrine. It is consistent. We plead the
6 substantive law of England - - -

7 JUDGE SINGAS: Are there any jurisdictions that
8 follow your interpretation?

9 MR. BOTTINI: Yes. The Second Circuit decision.
10 And Norlin followed it. Culligan followed it. And again,
11 Your Honor, many of these cases didn't look at 1319. So
12 that's the real problem, and Culligan mentioned that. If
13 the parties don't bring 1319 up, the court's not going to
14 address it or decide it, so most of the decisions haven't
15 involved 1319, and they've been decided purely on the
16 procedural versus substantive grounds.

17 JUDGE SINGAS: But so if we agreed with your
18 position, wouldn't that make New York an extreme outlier?

19 MR. BOTTINI: I wouldn't say an extreme outlier,
20 but it is an outlier.

21 JUDGE SINGAS: Outlier - - -

22 MR. BOTTINI: Your Honor, New York applied a
23 modified version of the internal affairs doctrine when it
24 passed the BCL in 1961. It didn't sign on to an
25 unadulterated version. California also adopted a modified

1 version of the internal affairs doctrine. California, like
2 New York, has, as part of its corporation code, numerous
3 provisions of the corp code that will apply to companies
4 doing business in California.

5 New York and California are the two most powerful
6 states in the United States when it comes to business.
7 They demanded that certain parts of their law apply to
8 these companies that are coming into this great state and
9 taking advantage of doing business here, raising billions
10 of dollars, having their stock listed on the stock
11 exchange, and they said certain provisions are going to
12 apply, so that's what they did. It's in the - - - the
13 legislature, in their infinite wisdom, decided this is what
14 we want to do, and it's not our job to second guess what
15 the legislature did. It's our job to faithfully apply the
16 statutes that have been passed, and they represent - - -

17 JUSTICE LANDICINO: But what about what your
18 shareholder did? Your shareholder decided to invest in
19 this company, and with that, carries all that occurred in
20 that home jurisdiction, right, including the statute,
21 including what the articles of incorporation might say. So
22 isn't it unreasonable for them to expect to come here and
23 just cast that all aside?

24 MR. BOTTINI: Well, no, Your Honor, it's - - -
25 they're definitely not casting aside. Again, the rule to

1 let - - - the New York legislature gave my client mine - -
2 - my - - - and by the way, my client is a New York
3 resident, and my client got the right to file a derivative
4 case here. As long as Barclays was doing business in New
5 York - - - and boy, is Barclays doing business. I mean,
6 have you been to the Barclays Center in New York? Have you
7 seen their high-rise tower in New York? They say that
8 their second home market is New York. This is not some
9 minor doing business in New York. So my client did what
10 the New York legislature said he is entitled to do. He's
11 not casting aside anything. And the rules that they're
12 trying to assert are procedural rules that this court has
13 said in Davis do not apply when a derivative case is filed
14 in New York. So it's perfectly consistent with the
15 company's rules and the New York statute, Your Honor, not
16 in contravention of it.

17 JUSTICE LANDICINO: Okay. Because that - - -

18 CHIEF JUDGE WILSON: Thank you.

19 MR. BOTTINI: Thank you. Thank you.

20 CHIEF JUDGE WILSON: I'm sorry. Go ahead.

21 JUSTICE LANDICINO: It's all right.

22 CHIEF JUDGE WILSON: No. No.

23 JUSTICE LANDICINO: But that's why I asked you
24 before. How do you define a shareholder? Right. Because
25 if you start off as investing in that company, and you



1 understand what the nature of that investment means, it's
2 all encompassing, isn't it? Isn't it all part and parcel
3 of what the statute says? What the articles say, what you
4 can expect to have as a right. I mean, you have
5 shareholders that have limited powers, right? Certain
6 voting rights, various types of things. And then when you
7 come here, how does a trial court grapple with that?
8 Right, they have to make some determination as to whether
9 or not this person has a right to bring the case, right.

10 MR. BOTTINI: Yes. Your Honor, I agree. And the
11 only issue here was our client, as a beneficial owner,
12 allowed to bring the case. And 626 is very clear.
13 Beneficial owners have the right to bring the claims, and
14 626 - - -

15 JUDGE RIVERA: So yes, you get to file the case,
16 and then you're subject to the substantive law of the
17 jurisdiction in which you're incorporated. And under that
18 substantive law, if you're not allowed to proceed with the
19 action, it gets dismissed.

20 MR. BOTTINI: But the - - -

21 JUDGE RIVERA: How - - - why is that not a good
22 harmonization of the BCL and the internal affairs doctrine?

23 MR. BOTTINI: Because as reflected at the - - -
24 in the statute that I mentioned earlier, the section of the
25 English Companies Act where the member requirement applies

1 is part of the procedural rules regarding filing cases in
2 England and Wales and Northern Ireland. It's not part of
3 the substantive law. That's the reason, Your Honor.

4 JUDGE RIVERA: Well, let's say we found
5 differently. We disagreed with you. If we could even
6 reach it. If we disagreed with you, why isn't what I've
7 suggested to you the way you would harmonize the BCL and
8 the application of substantive law from the foreign - - -
9 from the country of where the foreign corporation is
10 corporation is incorporated?

11 MR. BOTTINI: Well, again, the - - - because 626
12 - - - this court has held in Davis - - -

13 JUDGE RIVERA: Uh-huh.

14 MR. BOTTINI: - - - as part of New York's
15 gatekeeping rules - - - it's not a substantive provision as
16 this court has interpreted it. And so we apply our own - -
17 -

18 JUDGE RIVERA: 626.

19 MR. BOTTINI: 626. And 626 says beneficial
20 owners can bring claims it. It - - - 626 is all about
21 standing and what it takes to bring a derivative claim in
22 New York. And remember, the BCL was part of a major push
23 to modernize New York's business corporation law, and there
24 are no record holders anymore. Cede and Company is the
25 only record holder. And in order to facilitate electronic

1 trading of shares, everything in America moved to
2 beneficial owners. Otherwise, you couldn't clear the
3 trades - - -

4 JUDGE CANNATARO: And what if that's all correct,
5 what is your response to Eccles concern about companies
6 being subject to different requirements in different
7 jurisdictions? Because I think even you would concede that
8 a beneficial owner could not bring this derivative action
9 in the home jurisdiction, but they can here. And now - - -
10 so now the company is dealing with different sets of rules
11 depending on what forum they're in. Is that just
12 immaterial to the question?

13 MR. BOTTINI: It's not immaterial, but I think
14 the - - - in Eccles, the concern was different substantive
15 liability rulings, and that's not at issue here. Here,
16 it's the gatekeeping rules, and there's no inconsistency in
17 gatekeeping rules - - -

18 JUDGE CANNATARO: Who's suing you isn't a
19 substantive question? Who can bring an action against you
20 and who can't is just a gatekeeping function?

21 MR. BOTTINI: Whether you're a beneficial owner
22 or record holder is not a substantive issue, Your Honor.
23 You own the shares - - -

24 JUDGE CANNATARO: But that wasn't my question,
25 though. My question was, who can sue. Who actually has a

1 right of action against you? And you're saying, in this
2 jurisdiction, its shareholders and - - - whatever the three
3 categories are in are in 626 - - - and in the home
4 jurisdiction of this company, it would not include
5 beneficial ownership. It just doesn't. That seems obvious
6 - - -

7 MR. BOTTINI: It's - - - it - - - no, it's not a
8 substantive issue, Your Honor. It's part of - - - 626,
9 again, in Davis, said that this is a procedural issue.
10 Whether you're a record holder or beneficial owner is a
11 procedural issue. Just like what you need to allege,
12 demand for utilities, other issues, these are gatekeeping
13 issues to begin the case. They're not issues dealing with
14 the liability of the directors, and that was the concern in
15 Eccles.

16 And therefore, Your Honor, I would respectfully
17 submit, we don't have in this case the concern for
18 inconsistent rulings that Eccles mentioned; we just have
19 procedural rules. And regardless of how you interpret
20 1319, the - - - we need reversal here because even under
21 Davis procedural substantive, this was a procedural rule.

22 CHIEF JUDGE WILSON: Thank you.

23 MR. BOTTINI: Thank you.

24 (Court is adjourned)

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C E R T I F I C A T I O N

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of Ezrasons, Inc. v. Rudd, No. 2 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: April 18, 2025

