CHANCELLOR ALLEN'S JURISPRUDENCE AND THE THEORY OF CORPORATE LAW

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I. INTRODUCTION

“The theory of our corporation law confers power upon directors as the agents of the shareholders; it does not create Platonic masters.”

* * * * *

Chancellor William T. Allen of the Delaware Court of Chancery is one of the most significant contemporary jurists. This claim may come as a surprise to legal academics and practitioners who do not work in the area of corporate law. They may have never heard of the Delaware Court of Chancery or of Allen, and may be inclined to doubt that a trial level judge in a tiny state has achieved such prominence.

While the Delaware Court of Chancery may not be widely known, its significance in matters of corporate law has been said to surpass that of the United States Supreme Court. And although Allen may not be renowned, most people are likely to be familiar with the cases he has decided, which involve the largest recent corporate transactions, including the Time-Warner merger, the RJR Nabisco transaction, and, most recently, the struggle for control of MGM.

Among professionals in the field of corporate law, Allen is widely known, and his work is held in the highest repute. Legal scholars applauded his attempts to give a coherent theoretical structure to corporate law. Unlike judges whom legal academics praise but whom

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Not all scholars share this highly favorable view of Allen. Professors Brudney and Chirelstein, for example, refer somewhat elliptically to Allen’s “episodic thrusts” at fashioning intelligible rules to guide one through the expansive formulae of the Delaware Supreme Court’s decisions in Revlon, Inc. v. MacAndrews & Forbes
practitioners abhor, Allen is also held in high repute by practitioners, who laud his ability to provide guidance to corporations.\(^6\)

There are many reasons for Chancellor Allen's influence and excellent reputation, including that he has presided over the Delaware Court of Chancery, the nation's central forum for shaping American corporate law, during a period of intense corporate activity. Although Allen's reputation alone would justify an examination of his jurisprudence, particularly in light of the recent interest in judicial reputations,\(^7\) several further considerations motivate this study.\(^8\)


Allen was at the center of decision making in an activity that has come to define the 1980s, the struggle for control of the largest American corporations. A shareholders' attorney in the RJR Nabisco case was thus not merely fawning when he stated in oral argument before Allen: "It is difficult for me to stand here and talk to you about the law of the State of Delaware, and cite all of the decisions—and the only decisions see[m] to be your decisions—but you will accept my apology for constantly referring to those cases." That all of the relevant Delaware decisions seem to be Allen's renders the chancellor and his work topics of fascination and importance.

Allen has decided cases in virtually every area of state corporation law during a period in which the importance of state law has far surpassed that of federal law. A study of his opinions thus provides a broad survey of the condition of state corporate law over the span of time that Allen has been chancellor. Since Allen is now just past the midpoint of his twelve year term as chancellor, a study of his opinions also provides a basis to assess his performance.

But Allen's significance is more than a question of a judge who was in the right place at the right time, and a study of his jurisprudence is of more than historical interest. In many important areas of corporate law—the rights of bondholders, the rise of institutional investors, the scope of a corporation's "constituencies"—Allen's opinions have responded to significant developments in corporate law and practice and have themselves established an agenda of corporate issues for the 1990s.

Allen has brought a perspective to the formulation and resolution of these issues that has contributed to the revival of interest in the

which Richards claims "remains yet dimly understood by the theory of American law." Id. at 1960.


study of corporate law as an intellectual endeavor. His opinions invite and can support a sustained analysis. This article argues that Allen’s judicial opinions reflect two underlying themes: certainty and legitimacy.

The term certainty refers to the necessity that corporate law provide a sufficient level of stability and predictability to allow corporate planners to have a high level of confidence as to the law that courts will apply to their transactions. Given Delaware’s role in corporate law, a commitment to certainty may seem unexceptional. However, Allen’s treatment of certainty deserves study because of the self-consciousness with which he employs the need for certainty as a basis for decisions and the manner in which he balances the commitment to certainty with an overriding commitment to ensuring the legitimacy of the corporate system.

The term legitimacy refers to the requirement that the power corporation law permits directors to exert over property they do not own must be justified. As Allen has emphatically stated, “[T]he corporate law that governs the inner-workings of corporations and thus it is corporation law that legitimizes and limits the exercise of power within the corporation.”

10. In 1962, Bayless Manning, then a professor of law at Yale Law School, wrote that “corporation law, as a field of intellectual effort, is dead in the United States.” Bayless Manning, The Shareholder’s Appraisal Remedy: An Essay for Frank Coker, 72 YALE L.J. 223, 245 n.37 (1962).

11. G. Edward White connects a judge’s concern with certainty and predictability with a concern for a professional constituency, such as attorneys and clients, rather than with a more general political constituency. He believes that state court judges are especially likely to be concerned with certainty and predictability. G. Edward White, The American Judicial Tradition 113-15, 121-22, 127-28, 147, 464 (1988). In view of Delaware’s concern to remain a principal state of incorporation, it is not surprising that someone in Chancellor Allen’s position would have a concern with certainty and predictability.

White also links a concern with certainty and predictability to resistance to change, and notes that a concern for those values may conflict with doing justice and equity. Id. at 124, 126. In light of this claim, it is significant that Allen’s commitment to certainty and predictability is qualified by his overriding commitment to ensuring the legitimacy of corporate law.

12. Thomas Nagel, Equality and Partiality 36 (1991) ("The search for legitimacy can be thought of as an attempt to realize some of the values of voluntary participation, in a system of institutions that is unavoidably compulsory.").

13. William T. Allen, Competing Conceptions of the Corporation in American Law, Address at Rocco J. Tresolini Lecture in Law, Lehigh University 2 (Oct. 29, 1990) (transcript on file with the Delaware Journal of Corporate Law) [hereinafter Competing Conceptions]. See id. at 14-16 (expressing concern with what legitimizes exercise of corporate power under “property” model of corporation); id. at 23-26 (examining ability of “entity” theory of corporation to legitimize director power).
Allen's concern with questions of legitimacy is especially significant because the legitimacy of Delaware corporate law has been vigorously questioned. William Cary's well-known "race to the bottom" thesis, for example, presupposes that, in order to continue to attract incorporations, Delaware courts subordinate concerns of legitimacy to considerations that entice managers to incorporate in Delaware. Allen, in contrast, has given primacy to questions of legitimacy of corporate decisions, even when their short-term impact may be to jeopardize Delaware's appeal as a state of incorporation. Indeed, after Allen's decision in City Capital Associates v. Interco Inc., the opinion that most emphatically stressed the primacy of questions of legitimacy, a prominent corporate attorney counseled his clients to consider reincorporating in states other than Delaware. The tension between Chancellor Allen and the Delaware Supreme Court, noted at various points in this article, may in part be explicable on the basis of the supreme court's greater sensitivity to the constraints that Delaware's need to remain the dominant state of incorporation for large United States corporations places on the decisions of the Delaware courts.

Part II of this article considers Allen's judicial style, his relations with the Delaware Supreme Court, and his theory of judicial decision making. Part III considers the Delaware Court of Chancery, in particular the question of how a court of equity has become the nation's foremost forum for the resolution of corporate disputes. Part IV discusses the requirement that corporate law provides a sufficient level of certainty in the context of an examination of Allen's theory of statutory interpretation and the rights of corporate bondholders. Part V addresses questions of legitimacy in the context of shareholder voting and suits, while Part VI deals with questions of legitimacy in the context of Chancellor Allen's most well-known cases, involving the takeover battles of the 1980s.

While this article establishes that Chancellor Allen's reputation as a significant contemporary jurist is well deserved, it points to

14. See William L. Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 YALE L.J. 663, 705 (1974) (managers decide where corporations will incorporate; to attract incorporation Delaware tilts its corporation law to favor managers; consequence is "race to bottom," in which other states tailor their corporate law to compete with Delaware's appeal to managers).
15. 551 A.2d 787 (Del. Ch. 1988) (holding that a board's decision to leave "poison pill" measures in place was unreasonable in relation to threat of noncoercive tender offer).
16. Meyers, supra note 4, at 75; Parloff, supra note 5, at 31, 34.
certain unresolved tensions in his work. There is a recurrent formalism in his work, by which is meant an adherence to distinctions that on their face seem without significance. While Allen may rely on formalism out of a concern to promote certainty and predictability, this formalism seems to have a life of its own, and has led him to reach decisions that are at odds with his apparently more fundamental commitment to legitimacy. The article also contrasts the more "heroic" period of Allen's work, best reflected in decisions such as Interco and Blasius,17 with his work since those opinions were decided in 1988. Possible explanations for those tensions and contrasts in Allen's work are considered in the conclusion of the article. While they raise questions about the durability of his present high reputation, they also heighten interest in the way that his judicial work will develop in the second half of his term as chancellor.

II. THE CHANCELLOR

"[E]ven when unappealed, [Delaware Court of Chancery opinions on corporate law] carry great weight and authority. This is due, in no small measure, to their high quality and to the unusually able succession of chancellors, especially in this century."18

* * * *

William T. Allen succeeded Grover Brown as Chancellor of the Delaware Court of Chancery on June 28, 1985.19 When asked at his confirmation hearing, which lasted only twenty minutes, why a successful partner at a prominent law firm would want to become a judge, Allen responded:

I think that judicial work is very important work and I think it's work that I would do well. I think I'm temperamentally suited for it. Beyond that it's work that has a public importance . . . for me it's attractive or important to have some significance in my community, beyond simply facilitating private transactions, which is what lawyers largely do. Beyond that I've had a model. When I first came to Delaware I worked for Judge Stapleton in the federal court,

18. 1 Ernest L. Folk, III et al., Folk on THE DELAWARE GENERAL CORPORATION LAW lxiii (2d ed. 1988).
19. State Developments, 17 Sec. Reg. & L. Rep. (BNA) 1131, 1147 (June 28, 1985). Prior to his appointment as chancellor, Allen was a partner at the Wilmington firm of Morris, Nichols, Arsht & Tunnell. Id.
who previously had been a partner in the same law firm that I'm currently a partner in, and had given up the benefits that that partnership yielded him for public service. And I admired him greatly and realize that that was a choice that could be made, and was not simply a foolish choice, but that there is a world of service and scholarship that is more important or at least at some times in your life more important than personal interests alone. 20

A year after assuming the position, Allen rejected the suggestion that previous judicial experience is absolutely necessary to function as chancellor. "'It's not subatomic physics', he said. 'Reasonably intelligent people can decide these cases.'"21

A. Judicial Style

Chancellor Allen's cases during his first six years on the bench fall into two broad categories: corporate law questions, often of national significance, and more local questions, relating to matters such as property disputes and contested wills.22 Most of his well-known opinions in corporate law have involved motions for preliminary injunctions, where a decision and written opinion were needed within a matter of days. Paramount Communications, Inc. v. Time Inc., 23


22. A search on LEXIS for opinions by Chancellor Allen listed him as having issued 212 opinions during the first half of his term as chancellor, June 28, 1985 to June 28, 1991. Of these, 61% (130) were in the area of corporate law, while 39% (82) were more local cases. The breakdown of corporate cases is: Shareholder Litigation—10% (21); Miscellaneous—9% (20); Statutory Interpretation—9% (19); Voting—7% (14); Equity Jurisdiction—5% (11); Reolon cases—4% (9); Discovery—4% (9); Unocal cases—3% (7); Contracts—3% (7); Ethics and Professional Responsibility—3% (7); Bondholders' Rights—3% (6). The breakdown of local cases is: Miscellaneous—10% (22); Wills—8% (16); Real Property—8% (16); Employment Agreements—3% (7); Partnership—3% (6); Statutory Interpretation—2% (5); Contracts—2% (4); Equity Jurisdiction—1% (3); Voting—1% (3).

Allen has stated that this diversity of cases makes the court's work interesting; at one moment he is considering a quarrel over a fence in a neighbor's yard, while the next moment he is considering a billion-dollar transaction. Gruson, supra note 21, at F6.

a case decided by the Chancellor in 1989, is illustrative. The case was submitted on July 11, 1989, and Chancellor Allen issued a seventy-eight page slip opinion three days later. The opinion, discussed below in Part VI, is a model for judicial opinions written under such exigent circumstances. It presents the parties’ claims and arguments in a clear and faithful manner and its resolution of the dispute is decisive and forceful. It also reveals that distinctively valuable judicial virtue of encapsulating an entire approach to the law in a concise and quotable epithet: 24 "But just as the Constitution does not enshrine Mr. Herbert Spencer’s social statistics, neither does the common law of directors’ duties elevate the theory of a single, efficient capital market to the dignity of a sacred text."

Allen appears to devote as much attention and care to the local cases as he does to the corporate cases. For example, when two neighbors disputed whether a glass structure over a swimming pool cast too bright a light, Allen twice visited the scene to evaluate the light’s effects and issued a detailed and thoughtful opinion. 26 Further, the Chancellor is especially solicitous of persons who are in particular need of the court’s protection, as evidenced by his referral to the court’s "respect for the interest of an incompetent person over whom it exercises a certain responsibility and to whom as a result it extends a tender regard . . . ." 27

Though Allen’s opinions manifest a commitment to his duties as a jurist and a seriousness of purpose, 28 they are leavened by a

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24. Posner, supra note 7, at 56 (1990) ("The power to compress a tradition of legal thought into a sentence is given to few judges.").


wry sense of humor and a candid assessment of parties’ motives. Like Justice Robert Jackson, Allen appears to use humor to pierce through the judicial role and communicate at a more personal level. Yet his humor is also functional; he uses it to cast a party or its arguments in a certain light, which perspective is often crucial to understanding why one side is entitled to judgment in its favor.

Allen’s willingness “to blast off intellectually and explore uncharted regions of the legal firmament” has created a certain tension

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Some of the matters touched-upon in this memorandum are weighty and I express my views reluctantly, not having had time to consider them very deeply. However, the obligation to render a timely decision and to state as faithfully as I can the basis for that decision requires me in this instance to address matters that, when they are next presented, may warrant further reflection.

Id.

29. See White, supra note 11, at 232 (describing Justice Jackson’s style as “a means by which the self pierced through roles to communicate at a more personal level”).

30. Allen’s humor suggests a cautious and even skeptical view of the participants in the takeover phenomenon of the 1980s. In Time, for example, Allen notes that the range of trading values that Time’s investment bankers forecasted for the combined Time–Warner stock was “a range that a Texan might feel at home on.” Time, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,514, at 93,273, reprinted in 15 Del. J. Corp. L. at 724. A reader familiar with Allen’s previous observations about investment bankers is unlikely to mistake the import of his comment. See, e.g., Interco, 551 A.2d at 792 (suggesting that investment bankers had deliberately left the important notion of “reference range” unclear) (emphasis added); Solash v. Telex Corp., [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,608, at 97,722, 97,725 (Del. Ch. Jan. 19, 1988), reprinted in 13 Del. J. Corp. L. 1250, 1257 (1988) (Drexel’s “view” differs from its “more reliable opinion”) (internal quotation omitted); In re J.P. Stevens & Co. Shareholders Litig., 542 A.2d 770, 775 n.2 (Del. Ch.) (“Odyssey had a ‘highly confident’ letter from Drexel Burnham, the famous junk-bond innovator, who, it is claimed, has never disappointed the recipient of such a letter.”) (emphasis added), aff’d, 549 A.2d 300 (Del. 1988).

Prominent takeover specialists are not immune from Allen’s sometimes caustic wit. He noted (at a time when Asher Edelman was teaching a course at the Columbia University Business School) that Edelman withdrew his apparently unfinanced tender offer after receiving more than $9 million in “reimbursement of fees and expenses . . . presumably [withdrawing] to groves of academe to instruct the young.” Solash, [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,608, at 97,726, reprinted in 13 Del. J. Corp. L. at 1260-61. Indeed, Allen’s remarks often suggest a suspiciousness of the entire takeover movement, as when he states that “dry up” fees are unlikely to be effective “at this point when the global economy seems awash in cash available to finance takeovers,” Time, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,514, at 93,271, reprinted in 15 Del. J. Corp. L. at 719, or when he humorously refers to the corporate law “drama” and to the scene on which it enacts its dramas. Lacos Land Co. v. Arden Group, Inc., 517 A.2d 271, 274 (Del. Ch. 1986).

31. Meyers, supra note 4, at 66.
between the chancery court and the Delaware Supreme Court. An examination of this tension reveals further features of Allen’s judicial style.

B. Relation to the Delaware Supreme Court

A controversial February 1989 article portrayed Chancellor Allen and Delaware Supreme Court Justice Andrew G.T. Moore II as personal rivals competing to control the shape of Delaware corporation law.\(^{32}\) In describing the rivalry between Allen and Moore, the article went so far as to label Allen a “liberal experimentalist” whose opinions tended to support the interests of equity investors, while it portrayed Moore as “a crusty 53-year-old conservative” who favored the interests of management and who had “gained control of Delaware’s Supreme Court . . . .”\(^{33}\) Whatever the truth in this portrayal, it fails to consider certain deeper aspects of the differences between Chancellor Allen’s approach and that of the supreme court.

Allen recognizes an important distinction between doctrine and theory, as in Blasius,\(^{34}\) where he explicitly acknowledged the distinction between arguments that are based on theoretical considerations and those based on doctrinal considerations.\(^{35}\) Although Allen is fully capable of the more traditional doctrinal analysis, his opinions are replete with references to theories of the corporation and to the role of such theories in deciding cases.\(^{36}\) On the other hand, the major

32. See id.
33. Id. at 66, 67, 75. But see Labaton, supra note 2, at D4 (recognizing the description of Allen as a “liberal experimentalist,” but noting that “a close reading of his opinions suggests that he is difficult to pigeonhole”).
34. Blasius Indus., 564 A.2d at 658-60.
35. Doctrinal arguments attempt to decide cases principally by the application of legal doctrines, such as the business judgment rule, while theoretical arguments attempt to decide cases by reference to more general legal or moral principles.
36. Allen sees both law and markets as “social products that importantly reflect value judgments.” William T. Allen, Law and Markets as Social Products: Comments on Chapter 7, in BATTLE FOR CORPORATE CONTROL, supra note 6, at 147, 153. “[A] judgment concerning the wisdom of a specific legal rule requires ‘thick’ substantive information about the systemwide operation of the rule under review and its alternatives and a clear understanding concerning the various ends (values) the system (and, thus, the rule) ought (normatively) to seek to promote.” Id.

Allen even more explicitly assigns theory a prominent role when he states that “the choices that are reflected in even the most technical legal subjects come, in the end, to reflect contestable visions of what constitutes the good life [and that] [b]eneath the surface of the most fundamental corporation law problems lie normative questions masquerading as technical corporation law questions.” Competing Conceptions, supra note 13, at 28.
recent opinions of the Delaware Supreme Court are thoroughly doctrinal, in that they attempt to decide cases by reference to doctrines such as the "entire fairness" standard, without reference to any underlying theoretical or policy considerations. The opinions move from one doctrinal discussion to another, with little attempt to link the discussions or to suggest that any underlying theory explains why certain doctrines rather than others are applicable, or why they should be applied in particular ways.

Related to this difference in approach is a difference in attitude towards scholarship. Allen clearly values scholarship. He is comfortable with legal scholars and with the concepts they employ, and he finds legal scholarship relevant to deciding cases.

37. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. 1988), is a typical example. In Parts II through V, the court applied the "entire fairness" standard, concluding that the transaction failed under this standard. Id. at 1278-84. This would seem to have been a sufficient basis on which to have reversed the vice-chancellor's denial of a motion for a preliminary injunction against the transaction. In Parts VI and VII, however, the court applied the Revlon doctrine, concluding that the transaction failed this test as well. Id. at 1284-88. There is no discussion of the connection between the "entire fairness" and the Revlon discussions, or of why the discussion of both doctrines was necessary.

38. See, e.g., text accompanying infra notes 311-455 (discussing the supreme court's rejection of Allen's "sale of control" trigger for Revlon duties).

39. Allen referred to the importance of scholarship as part of his explanation for wanting to become a judge. Confirmation Hearing, supra note 20, at 11. In a speech at the Stanford Law School, Allen modestly stated that he was not a scholar, a statement with which many disagree, though he said that he admired scholars. William T. Allen, A Glimpse at the Struggle for Board Autonomy in American Corporation Law, Address at Stanford University Law School 1 (Apr. 5, 1990) [hereinafter Struggle for Board Autonomy].


41. For example, Ronald Dworkin's work seems to have had a significant influence on Allen's thought. In several of his recent non-judicial writings on the nature of judicial reasoning, he has referred favorably to Dworkin's work. See, e.g., William T. Allen, Judicial Discretion and the Law/Politics Distinction in American Juris-
The opinions of the Delaware Supreme Court suggest that scholarship has little to contribute to judicial decision making. Its references to scholars criticize them for having misapprehended the court’s pronouncements, or simply note that scholars have adopted positions contrary to those of the court.

C. Judicial Philosophy

Chancellor Allen has begun to develop and articulate a theory of the judicial function. His recognition of the distinction between doctrine and theory and his acknowledgement of the importance of theory reflect his commitment to the goal of reasoned decision making.

Allen accepts the point, made by legal realists and others, that adjudication is not mechanical and that courts are sometimes required to make choices; in effect to create the law. Allen investigates the question of whether acknowledging that judges must create law undermines the distinction between “law” and “politics,” with all law being assimilated into politics, and concludes that it does not. He reasons that “the process through which judicial power is exercised and the professional culture in which lawyers and judges

prudence, Address at University of Delaware Chapter, Phi Beta Kappa Annual Meeting 10 n.13, 15 n.19 (Nov. 16, 1989) [hereinafter Judicial Discretion]; Competing Conceptions, supra note 13, at 27 n.71. Allen’s theory of statutory interpretation, with its emphasis on the necessity that an interpretation be both justified and “fit” existing legal materials, also reflects the influence of views that Dworkin expresses in Law’s Empire. See RONALD DWORKIN, LAW’S EMPIRE (1986).

This author believed that Allen exemplifies Dworkin’s model of the good judge, Hercules, though defending this claim is outside the scope of this article.

42. This is perhaps most apparent in Interco, where Gilson and Krakman’s then unpublished manuscript on Unocal’s proportionality standard seems to have so influenced Allen’s decision. Interco, 551 A.2d at 796 n.8.

43. See, e.g., Mills Acquisition, 559 A.2d at 1284 n.34 (referring derisively to “scholarly debate” about an issue that the supreme court said made “abundantly clear”).

44. See, e.g., Unocal, 493 A.2d at 955 n.10 (noting the court’s rejection of “managerial passivity” thesis in context of hostile tender offers). On occasion, the court cites scholarly material without indicating whether the court agrees with it or suggesting that the position has any relevance to deciding the case. See, e.g., Time, 571 A.2d at 1153 n.17.

45. Allen has articulated his theory of the judicial role in a systematic way in an address entitled “Judicial Discretion and the Law/Politics Distinction in American Jurisprudence.” Judicial Discretion, supra note 41.

46. Id. at 10.

47. Id. at 13.
are formed and sustained together constrain the actions a court may properly take."

The most significant part of the process is the necessity that a judge use "legal reasoning . . . to arrive at a ruling that supplies the best fit with available legal materials." While acknowledging that "legal reasoning" admits of no simple definition, Allen concludes that "the commitment of courts to the recognition of formal sources of legal authority, to consistency and to reasoned elaboration of decisions, places real boundaries upon the exercise of a court's discretion and constitutes the principal distinction between the exercise of judicial discretion and the exercise of political power." Though the processes of judicial decision making constrain judicial choice, they do not yield "the single right answer that a technically perfect application of legal analysis might hope for."

Allen's views on the nature of the judicial function thus clearly stand in need of greater development. But this fact is far less remarkable than his having devoted significant time and thought to such highly theoretical issues during a period in which he has been the presiding jurist in one of the nation's busiest courts. Allen's more significant contributions in the area of judicial philosophy are likely to come in the future, as the frantic case load of the 1980s slackens, and he is able to devote more time to reflection on the nature of the judicial function.

Allen's belief that adjudication is not simply mechanical leads him to place strict limits on matters that the court decides. In In re Shumosic, the parents of an individual who had sustained massive brain injury sought court approval for the removal of a gastric feeding tube that sustained their son's life. Though the child died prior to the court's ruling, the petitioners sought a judicial ruling in the hope that it might aid others. Although Allen expressed concern for the plight of the parents and others in similar situations, he declined to rule. In so holding, Allen noted that, while "judicial law creation" is sometimes forced upon a court by the necessity of deciding actual cases, occasions for such activity should be minimized, both because of the role of courts in the democratic process and because of the

48. *Id.*
49. *Id.* at 14.
50. *Id.* at 16.
51. *Id.* at 15.
53. *Id.* at *3.
54. *Id.* at *4.
limitations in their ability to gather and evaluate information relevant to important new issues.55

Consistent with Allen’s view of the judiciary’s appropriate role is his tendency to decide cases on relatively narrow grounds. But even when he decides a case on narrow grounds, he often attempts to influence the development of the law through extended dicta. This habit is most evident in TW Services, Inc. v. SWT Acquisition Corp.56 The vast majority of the opinion is devoted to an issue that Allen conceded was “raised by this case but need not now be decided in light of the particularities of the circumstances” presented,57 particularities that enabled him to decide the case on narrow grounds.

III. THE COURT OF CHANCERY OF THE STATE OF DELAWARE

“This court, being a court of equity, tries to bring to its function the most sensitive regard for the moral sentiments that lie below the surface of legal rules.”58

* * * * *

The general equity jurisdiction of the Delaware Court of Chancery is the same as that possessed by the High Court of Chancery.

55. Id. at *5.


In short, Credit Lyonnais stands apart from the earlier “trust fund” cases and rests on a different rationale. That rationale is articulated by Chancellor Allen in an extended footnote that already has provoked some controversy. Indeed, had the opinion stopped with its textual statements that there is a broader duty to the community of corporate interests, it would neither have the significance nor have provoked the controversy that footnote 55 has aroused.

Coffee, supra note 5, at 20.

in England at the time of the separation of the colonies.\textsuperscript{59} Though Allen’s theory of equitable jurisdiction appears to embrace traditional notions of equity, he has shown considerable creativity in applying these notions, often ensuring that limits on the court’s jurisdiction are strictly observed and narrowly construed. It is, therefore, useful to explore Allen’s conception of the actual exercise of the chancery court’s jurisdiction. Additionally, the fact that the nation’s principal corporate law forum is a court of equity raises questions about how a court whose traditional mission has been to render justice in the particular case can play such an important role in securing Delaware’s leadership in the race to attract incorporations.

\textbf{A. Allen’s Theory of Equitable Jurisdiction}

According to Allen, there are two principal sources of exclusively equitable jurisdiction, each existing because a legal remedy is either unavailable or inadequate. “The first such source of jurisdiction is the assertion of an equitable right.”\textsuperscript{60} One classic area in which

\textsuperscript{59} First Nat’l Bank v. Andrews, 28 A.2d 676 (Del. Ch. 1942); Del. Const. art. IV, § 10. Delaware’s Constitution of 1792 established separate courts administering the common law and equity. Dudley Cammett Lunt, Tales of the Delaware Bench and Bar (1963). Lunt maintains that the chancery court “does not derive, as so many lawyers are prone to assume, from an inheritance from the former practice in England. Not at all. It was dreamed up by some member of the Convention of 1792.” \textit{Id.} at 117. The first chancery court reports were published in 1876. \textit{Id.} at 119. The 1897 Constitutional Convention changed the tenure of Delaware judges, including the chancery court, from life to twelve years, but otherwise left the chancery court’s composition as it had been before. \textit{Id.} at 162, 168.

The number of vice-chancellors has steadily increased from the time of the enactment of Delaware’s Constitution of 1897, which called for only one vice-chancellor. Del. Const., art. IV, § 2. A fourth vice-chancellor, added in 1989, was needed “to help handle a caseload that has risen dramatically in recent years, due principally to the increase in corporate takeovers and takeover-related litigation.” \textit{Rise in Takeover Litigation Prompts Delaware Court to Add Vice Chancellor,} 21 Sec. Reg. & L. Rep. (BNA) 318 (Feb. 24, 1989).

In addition to the court of chancery’s general equity jurisdiction, Delaware statutory law vests the court of chancery with jurisdiction over certain other matters. For example, upon the application of any stockholder or director, the court of chancery may summarily order a Delaware corporation to hold a shareholders’ meeting, if the corporation has not held such a meeting within the statutorily specified period. Del. Code Ann. tit. 8, § 211 (1991).


equity has jurisdiction by virtue of the absence of a legal right is the fiduciary relationship between trustee and beneficiary. Only equity recognizes the rights of a beneficiary because at law the trustee, as legal owner, is entitled to deal with the trust property as his own. 61 Equity's jurisdiction over many corporate law actions brought by shareholders against officers or directors is largely explained by the fact that the relationship between a corporate officer or director and shareholders is analogous to the relationship between trustee and beneficiary. 62 Both exemplify "the 'special' aspect that will fit a particular relationship as one that, without more (i.e., without regard to the remedy sought), will support chancery jurisdiction." 63

The second source of exclusively equitable jurisdiction requires "the pleading of facts which, if true, would justify the issuance of an equitable remedy." 64 The court of chancery, thus, lacks jurisdiction over controversies for which there is a complete and adequate remedy at law. 65 In the corporate area, the relief that is often sought, an injunction, provides a basis for equity jurisdiction in addition to that provided by an allegation of breach of fiduciary duty.

Outside the core areas, determining whether chancery has jurisdiction involves a subtle balancing. 66 On the one hand is equity's

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62. The duties that directors and officers "owe to shareholders with respect to the exercise of their legal power over corporate property supervene their legal rights, are imposed by equity and are recognized and enforced exclusively by a court of equity." Id. (citation omitted). See In re USACafes Litig., [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,056, at 90,322, 90,325 (Del. Ch. June 7, 1991) (holding that "corporate directors, even though not strictly trustees, were early on regarded as fiduciaries for corporate stockholders").
63. McMahon, 532 A.2d at 604 (emphasis added). Beyond these "classic" examples of equity's "ancient" jurisdiction over controversies in which the plaintiff possesses only an equitable right, Allen identifies other relationships over which equity has asserted jurisdiction for a similar reason, including general partners, administrators or executors, and guardians. Id. at 604-05. Most recently, Allen has held that the directors of a corporate general partner owe a fiduciary duty of loyalty to the limited partnership. In re USACafes, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,056, at 90,325-26.
64. Chase, No. 9276, slip op. at 8, reprinted in 14 Del. J. Corp. L. at 339.
66. Allen has stated that the balancing operations necessary to determine whether to grant a preliminary injunction (which requires a showing of irreparable harm) "are obviously not merely technical and certainly not scientific." Solash, [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,608, at 97,723, reprinted
traditional concern to do justice, which Allen vividly describes as "the protean force of equity," and its "ancient power to shape specific remedies where justice requires and the law is silent." On the other hand is the fact that chancery's jurisdiction is limited and "is not conferred by the incantation of magic words." Therefore, the court must look beneath the surface of a complaint to determine whether the jurisdictional requirements have been satisfied. If an inquiry into "the true motivating factor behind plaintiff's desire to have its claim heard in equity" reveals a desire to avoid a legislative restriction on plaintiff's pursuit of its action, then Allen will deny equitable jurisdiction.

Despite strict jurisdictional limitations, the traditional maxim that equity is not hampered by the mere absence of precedent means that equity can be flexible. Thus, Allen does not regard the fact that no Delaware case previously awarded the relief requested as dispositive of a plaintiff's equitable entitlement to that relief.

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in 13 Del. J. Corp. L. at 1254. In the context of a suit seeking a declaratory judgment that certain restrictive covenants were no longer enforceable in equity, Allen stated, "The decision as to whether equity lies in the continued enforcement of a restrictive covenant is a matter of weighing and balancing." Stewart v. Roemer, No. 7464, slip op. at 7 (Del. Ch. Dec. 18, 1985) (Allen, C.), aff'd, 515 A.2d 398 (Del. 1986).


68. McMahan, 532 A.2d at 603.

69. "Neither the artful use nor the wholesale invocation of familiar chancery terms in a complaint will itself excuse the court . . . from a realistic assessment of the nature of the wrong alleged and the remedy available in order to determine whether a legal remedy is available and fully adequate." Id.


71. The pattern just described is clearly evident in Delaware Trust Co. v. Partial, 517 A.2d 259, 262 (Del. Ch. 1986) (denying equity jurisdiction where plaintiff sought to avoid legislative policy against garnishment of funds held by Delaware banks "by the simple expedient of denoting the writ sought as one of injunction rather than one of garnishment"). See also Delaware Concrete & Masonry, Inc. v. Smith, No. 8820 (Del. Ch. Jan. 27, 1987) (Allen, C.), reprinted in 13 Del. J. Corp. L. 269 (1988) (same).

72. 1 Fred F. Lawrence, A Treatise on the Substantive Law of Equity Jurisprudence § 52 (1929).

While Allen uses the traditional concepts of chancery court jurisdiction, his application of those concepts appears to be in the direction of making it more difficult for certain plaintiffs to gain access to a court of equity. For example, a request for an accounting, even of a non-fiduciary, in complex matters has traditionally been a basis for equity jurisdiction. In \textit{McMahon}, Allen nevertheless denied that a request for an accounting invoked chancery jurisdiction in the particular case and suggested that it might no longer provide such a basis in any case: "Given the development of broad and liberal discovery rules in our law courts, it now seems likely that equity shall rarely, if ever, have to be resorted to in order to determine the state of accounts in a purely commercial relationship."\textsuperscript{74} Allen similarly interpreted two other traditional bases for equity jurisdiction, the request for an injunction and the claim that a multiplicity of suits would ensue if chancery did not take jurisdiction, in ways that significantly restrict a party’s access to chancery.\textsuperscript{75}

Allen’s views on equity jurisdiction have been influential. In a recent case,\textsuperscript{76} Vice-Chancellor Chandler substantially relied on Allen’s opinion in \textit{McMahon}, rejecting plaintiffs’ claims that equity jurisdiction was grounded on the requests for an accounting and an injunction, and on the claim that a multiplicity of suits would ensue if equity did not take jurisdiction.

\textit{B. Equity and the Role of Delaware as a State of Incorporation}

It is well known that Delaware is the state of incorporation for more large corporations than any other state.\textsuperscript{77} Why this is the case has been a subject of controversy.\textsuperscript{78} However, there is widespread agreement that one important reason is that Delaware offers a more

\textsuperscript{74} \textit{McMahon}, 532 A.2d at 605.
\textsuperscript{75} Id. at 605-08.
\textsuperscript{76} International Business Machines Corp. v. Comdisco, Inc., 602 A.2d 74 (Del. Ch. 1991).
\textsuperscript{77} Over 40\% of New York Stock Exchange firms are incorporated in Delaware. Jonathan R. Macey & Geoffrey P. Miller, \textit{Toward an Interest-Group Theory of Delaware Corporate Law}, 65 Tex. L. Rev. 469, 483 (1987). Chancellor Allen is well aware of this fact. At his confirmation hearing, Allen was questioned whether Delaware was slipping in "the incorporating business." He responded that he did not think that was the case, though he acknowledged that the state could not lose sight of the importance of businesses incorporating in Delaware. Confirmation Hearing, supra note 20, at 8-9.
certain and predictable body of law.\(^79\) While corporations allegedly favor Delaware for this certainty and predictability,\(^69\) most important corporate cases there are initially heard in a court of equity, a forum that might appear inhospitable to the development of a certain and predictable body of law. Recall that equity’s traditional concern is to fashion a remedy that is appropriate for the particular facts of each case, as evidenced by Chancellor Allen’s admonition: “The issuance of any form of equitable relief requires the exercise of judicial discretion informed by the particular facts and circumstances presented.”\(^81\) Therefore, equity’s very flexibility seems to make it unlikely that a court of chancery would be the nation’s foremost corporate law forum.\(^82\)

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79. The boilerplate language in proxy solicitations seeking shareholder approval of a corporation’s reincorporation from another state to Delaware invariably involves the claim that “the Delaware courts have rendered a substantial number of decisions interpreting and explaining Delaware law, thereby providing greater predictability with respect to corporate legal affairs.” Proxy Statement of Velobind, Inc. 13 (Apr. 20, 1988) (emphasis added). While such claims may be dismissed as self-serving attempts by management to disguise their real motivations for seeking Delaware incorporation, many scholars have offered a similar explanation for Delaware’s attraction.

A controversial but widely-cited article offered as a reason for Delaware’s eminence “the large body of precedent that has been built up since 1899—lawyers know what they are getting into.” Comment, Law for Sale: A Study of the Delaware Corporation Law of 1967, 117 U. PA. L. REV. 861, 894 (1969). See Lewis S. Black Jr., A National Law of Takeovers Evolves in Delaware, Legal Times, Nov. 25, 1985, at 6 (“The sheer number of matters that had been considered and decided gave Delaware law a completeness and certainty unmatched elsewhere.”). Scholars such as Roberta Romano have emphasized Delaware’s “store of legal precedents forming a comprehensive body of case law,” and its “well-developed case law with a pool of handy precedents . . . .” Romano, supra note 78, at 722, 723. Such factors make Delaware [corporate law] decisions more predictable than those of other states . . . .” Roberta Romano, Law as a Product: Some Pieces of the Incorporation Puzzle, 1 J.L. ECON. & ORGANIZATION 225, 277 (1985). See also Melvin Aron Eisenberg, The Structure of Corporation Law, 89 COLUM. L. REV. 1461, 1508 (1989) (asserting that Delaware’s rich case law increases predictability).

80. Thomas Jefferson noted the connection between equity and uncertainty when he stated: “Relieve the judges from the rigor of text law . . . and permit them, with praetorian discretion, to wander into equity & the whole legal system becomes uncertain.” NOONAN, supra note 27, at 59.


82. In a number of cases, Chancellor Allen has noted the connection between the exercise of equitable jurisdiction and the creation of uncertainty and lack of predictability. See, e.g., Greenhill Inv. Co. v. Tabet, No. 8301 (Del. Ch. Oct. 31, 1986) (Allen, C.) (involving the question whether the court should exercise its equitable power to remedy a commercial tenant’s failure to timely exercise an option
Despite this apparent limitation as a suitable forum for the adjudication of corporate law issues, certain features make the Delaware Chancery Court a hospitable forum for the resolution of such issues. For instance, corporations are attracted to forums that can respond quickly and effectively to changing business needs.83 "Responsiveness" is a different virtue than having a certain or predictable body of law, yet it is also important to corporations, particularly in times when they must respond to rapidly changing financial developments. A court of equity, with its emphasis on fashioning relief appropriate to novel circumstances, is uniquely positioned to respond to such new developments.84

Furthermore, a court of equity sits without a jury.85 This enables such courts to respond rapidly to parties' requests. The efficacy of this feature is most apparent in situations such as takeovers, where time is of the essence.86

Finally, equity's limited jurisdiction itself contributes to its desirability as a forum. Unencumbered by jurisdiction over legal matters, the members of the Delaware Court of Chancery have dockets in which a significant percentage of cases involve issues of corporate

to renew a lease due to simple negligence or inadvertence). Allen noted that an advantage of the traditional view that equitable relief is not available in such cases is that it protects the individual's right to contract with respect to his or her property and thus "maintains certainty and reliability in commercial transactions." Id., mem. op. at 14. Given the facts in Greenhill, Allen did not have to decide between the traditional view and an alternative view that would grant equitable relief in some circumstances.

83. The Velobind Proxy Statement, for example, states, "Because of Delaware's prominence as the state of incorporation for many major corporations, both the legislature and courts in Delaware have demonstrated an ability and a willingness to act quickly and effectively to meet changing business needs." The Statement then goes on to mention "greater predictability" as an additional, but different, reason for reincorporating in Delaware. Proxy Statement of Velobind, supra note 79, at 13.

See also Romano, supra note 78, at 721 ("[A] state with a favorable corporation code must guarantee its code's continued responsiveness to be successful in the corporate charter market."). (emphasis added).

84. Recall also that Delaware waited several years after the decision in Edgar v. MITE Corp., 457 U.S. 624 (1982), before it enacted a second generation anti-takeover statute, Del. Code Ann. tit. 8, § 203 (1991). Thus, the balance between the legislature's caution and equity's flexibility enables Delaware to be particularly responsive to the needs of business.


86. Mary Williams, Delaware's Sedate Chancery Court is a Major Corporate Battleground, Wall St. J., May 10, 1984, at B37 ("[T]he chancery court, which never empanels juries, decides major cases quickly.").
law. Thus, they are able to acquire a greater expertise in matters of corporate law than judges on courts with greater diversity of jurisdiction. Allen noted the importance of this factor at his confirmation hearing when he observed that Delaware judges have developed "expertise in corporate problems." He continued:

If you're incorporated in Texas, New York or California, and you have a corporate problem, you have no way of knowing [which] judge is going to decide that. It may be one of five hundred trial judges throughout the state and you have no idea if he is going to have any expertise in corporation law at all. So that there is some thought that the Delaware Court of Chancery provides . . . a great benefit to corporations, not in the sense that the law is unduly beneficial to corporations, but in a sense that a judge familiar with corporate problems will address it.

Thus, the interaction of the chancery court's responsiveness and the chancellors' expertise plays a central role in explaining the Delaware Court of Chancery's prominence as a forum for the adjudication of corporate law issues.

IV. The Search for Certainty

The tide has no doubt long run away from a world of hard and fast rules with predictable outcomes and towards

88. Id. at 9. As stated by one commentator: The Delaware judiciary . . . has taken its special role seriously. The tradition of excellence developed in the Court of Chancery continues. Lawyers who appear before the chancellor and three vice-chancellors find judges who blend up-to-the-minute expertise in corporation law matters, including proficiency in takeover jargon and techniques of corporate finance, with small-town grace that seems especially fitting in the two small courtrooms where cracking portraits of former chancellors cover the walls. Black, supra note 79, at 6.
89. It is not surprising that Pennsylvania's effort to make itself more attractive to business includes not only a new "anti-takeover" law but also a proposal to establish a special chancery court (which is similar to the Delaware Court of Chancery) that specializes in business law. Leslie Wayne, Pennsylvania Proposes Plan for Business Court, N.Y. Times, Sept. 12, 1990, at D2. The proposal includes provisions which: (1) eliminate jury trials in commercial law disputes in which the amount in question exceeds $500,000, (2) call for judges to be picked according to a merit selection process rather than elected, and (3) require the court to follow the Federal Rules of Civil Procedure. Id.
a world in which it is common for courts to evaluate specific behavior in the light cast by broadly worded principles. Working amid such flows, however, courts must be wary of the danger to useful structures that they entail. To introduce the powerful abstraction of "fiduciary duty" into the highly negotiated and exhaustively documented commercial relationship between an issuer of convertible securities and the holders of such securities would, or so it now appears to me, risk greater insecurity and uncertainty than could be justified by the occasional increment in fairness that might be hoped for.  

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Much of Delaware's corporate law litigation involves claims that directors breached their fiduciary duties. While a director's fiduciary duty is a fundamental aspect of corporate law, it presents problems for both the actors who must conform their actions to the dictates of the law, and the judges who must decide whether those duties have been met. Chancellor Allen is concerned that the obligations that the concept of "fiduciary duty" imposes on corporate directors are so inherently vague and open-ended, and require the court to make such particularized judgments, that this concept's role in limiting directors' actions should be confined to circumstances in which more specific norms cannot reasonably be formulated.

While I have said that courts interpreting the meaning of our technical corporation law statute have a particular sensitivity to the utility of a technical and literal interpretation of that law when the words chosen are reasonably specific and clear, our law is the polar opposite of technical and literal when the fiduciary duties of corporate officers and directors are involved. In that setting, 'technical matters


91. Commentators have suggested that liability rules have a limited role in the context of fiduciary duties because of the difficulty of distinguishing performance of the duty from breach. See Daniel R. Fischel, The Business Judgment Rule and the Trans-Union Case, 40 Bus. Law. 1437, 1439-40 (1985).

are brushed aside so that the fairness of the underlying reality may be assessed.\(^93\)

To the extent that questions of this “fairness of the underlying reality” are involved, Allen has stated that “the ultimate judgment will be highly fact specific with little doctrinal guidance . . . beyond broad generalities concerning fairness or the duty to refrain from using corporate power to the disadvantage of minority shareholders.”\(^94\) Thus, those who rely on fiduciary duty to protect their rights, and those who seek to conform their actions to the requirements of fiduciary duty, are placed in a situation that lacks predictability and certainty.

This poses a dilemma for Allen, because he believes that corporate law and practice have a special need for certainty and predictability. Corporate actors need to know with some precision whether particular actions are likely to create legal liabilities, and the magnitude of any such liabilities. The need for certainty and predictability is magnified by the fact that corporate transactions often involve planning over a long period and include transactions and plans that are mutually dependent on one another.

Allen compensates for these difficulties by interpreting certain areas of Delaware law in a way that he believes will achieve maximum certainty and predictability. This Part focuses on three of those areas. First, it will evaluate Allen’s theory of the proper interpretation of certain provisions of the Delaware General Corporation Law. This theory is premised upon the belief that certain terms effectively function as “terms of art” in the corporate world, and that certainty and predictability are promoted by interpreting those terms literally. Second, this part will examine Allen’s belief that the Delaware statutory law includes a number of provisions that have precise objectives that are easily-statable and strictly-enforceable, and which limit the

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94. Stepak v. Tracinda Corp., No. 8457, 1989 Del. Ch. LEXIS 95, at *22 (Del. Ch. Aug. 18, 1989), reprinted in 15 DEL. J. CORP. L. 750, 763-64 (1990), aff’d, 567 A.2d 424 (Del. 1987). See also Stahl v. Apple Bancorp, Inc. (Stahl I), 579 A.2d 1115, 1125 (Del. Ch. 1990) (stating that “inquiries concerning fiduciary duties are inherently particularized and contextual. It is probably not possible to work out rules that will be perfectly predictive of future cases involving claimed impediments to the shareholder vote.”).
court’s authority to consider issues collateral to the statutes’ specific objectives. Allen theorizes that certainty is promoted by judicial interpretations of these provisions in ways consistent with their specific role in the Corporation Law. Finally, this part will evaluate Allen’s belief that the important goals of certainty and predictability in commercial relationships are better advanced by relying on principles of contract interpretation rather than importing notions of fiduciary duty into the issuer-bondholder context.

While Allen’s views in each of these three areas show his self-conscious adoption of the promotion of certainty as a basis for judicial decisions, they also demonstrate the extent to which he subordinates considerations of certainty when the interests of Delaware corporate law as a whole, and especially concerns of preserving its legitimacy, require him to do so.

Amidst these broad themes, we can also discern other currents in Allen’s thought. He is highly, indeed unduly, sensitive to any encroachments upon a board’s authority to manage the business and affairs of the corporation. In two cases discussed below, this concern not to intrude in even minor ways on a board’s authority leads him to fail to enhance the conditions under which shareholder voting has a legitimating role. Allen’s discussion of the rights of bondholders is also highly formalistic. Here, as elsewhere in his work, formalism results in the subordination of the demands of legitimacy and in the protection of corporations against the claims of their shareholders and bondholders.

A. The Interpretation of Certain Provisions of the Delaware General Corporation Law

Allen has stated his belief that the purpose of modern state corporation law statutes—i.e., “the facilitation of corporate formation and operation”[96]—is best served by a literal interpretation of the terms of such statutes.[97]

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[95] See infra notes 238-351 and accompanying text.
[96] Competing Conceptions, supra note 13, at 5.
[97] Allen’s position on the interpretation of statutes in the corporate area reflects the general position that those who must shape their conduct to conform to the dictates of statutory law should be able to satisfy such requirements by satisfying the literal demands of the law rather than being required to guess about the nature and extent of some broader or different restrictions at the risk of an ex post facto determination of error. Speter, 523 A.2d at 1008.
The utility of a literal approach to statutory construction is particularly apparent in the interpretation of the requirements of our corporation law—where both the statute itself and most transactions governed by it are carefully planned and result from a thoughtful and highly rational process.

Thus, Delaware courts, when called upon to construe the technical and carefully drafted provisions of our statutory corporation law, do so with a sensitivity to the importance of the predictability of that law. That sensitivity causes our law, in that setting, to reflect an enhanced respect for the literal statutory language. When the task is to construe the meaning of reasonably precise words contained in our corporation statute, such as “entitled to vote,” our preference, generally, must be to accord them their usual and customary meaning to persons familiar with this particular body of law.93

Two features of corporate law and practice require that the provisions of the corporate law be accorded a literal interpretation. First, the transactions that the corporate law governs, and the law itself, are the result of careful thought by knowledgeable and experienced persons. Accordingly, Allen favors a literal interpretation of commercial contracts on the ground that if the parties had not intended the words of the contract to have their usual meaning, they would have used different language. The analogous position in the statutory area is that if the knowledgeable and experienced drafters of the Delaware General Corporation Law had intended it to be construed in some way other than the literal, they would have used language that explicitly accomplished that objective.

The second feature is the need for certainty. If statutory terms effectively function as “terms of art” in the corporate world, in the sense that they have a well-defined meaning “to persons familiar with” corporate law, then predictability is best served by according those terms their “usual and customary meaning.”99

Allen’s position on the interpretation of corporate law statutes is perhaps best illustrated by the case of Speiser v. Baker.100 Corporation

98. Id. (citations omitted).
99. Id.
100. 525 A.2d 1001 (Del. Ch. 1987).
A, a sole operating company, owned an issue of Corporation B’s convertible preferred stock “which, while bearing an unqualified right to be converted immediately into common stock of [B] representing 95% of [B’s] voting power . . . carry[ed] the right to only approximately 9% of [B’s] vote.”101 B, in turn, owned 42% of A’s common stock.102 Baker, an 8% holder of A’s common stock, sought to bar B from voting its 42% of shares in A on the ground that such a vote would violate the provisions of section 160 of the Delaware General Corporation Law.103 Section 106 states in pertinent part:

Shares of its own capital stock belonging to the corporation [here A] or to another corporation [here B], if a majority of the shares entitled to vote in the election of directors of such other corporation [here B] is held, directly or indirectly, by the corporation [here A], shall neither be entitled to vote nor be counted for quorum purposes.104

Speiser, another holder of A’s common stock, sought to defend B’s right to vote its 42% of A’s shares by focusing on the language “entitled to vote.”105 He said that A was not actually entitled to vote a majority of B’s shares; instead, A was only entitled to vote 9% of B’s shares, though it owned 95% of B’s equity through its ownership of B’s convertible preferred stock.106

Chancellor Allen responded, perhaps with tongue in cheek, “Speiser’s argument is cogent. It is a literal argument, but I do not criticize it for that.”107 Far from criticizing such arguments, Allen delivered an encomium in favor of literal interpretations of statutory corporate law. He concluded that because “entitled to vote” is one of the “reasonably precise words contained in our corporation statute,” it should be given its “usual and customary meaning to persons familiar with this particular body of law.”108 Accordingly, Allen held that in its unconverted state, A’s ownership of 95% of B’s convertible preferred did not “entitle it to vote” a majority of B’s stock.109

101. Id. at 1003.
102. Id.
103. Id. at 1007.
105. Speiser, 525 A.2d at 1007-08.
106. Id.
107. Id. at 1008.
108. Id.
109. Id.
Allen stated, however, that this determination did not end the discussion of the matter. He reasoned that the "entitled to vote" provision was a mere restriction;110 "the principal prohibition of the statute is directed to shares of its own capital stock 'belonging to the corporation.' This phrase is not a technically precise term whose literal meaning is clear; it requires interpretation."111 Allen reasoned that an interpretation of "belonging to the corporation" that barred B from voting A's stock was justified in the sense that it was more consistent with a core concern of corporate law, i.e., protecting the integrity of the shareholder vote in order to assure the legitimacy of the corporate structure, than would be an alternative interpretation:

Almost from the earliest stirrings of a distinctive body of law dealing with corporations, courts have been alert to the dangers posed by structures that permit directors of a corporation, by reason of their office, to control votes appurtenant to shares of the company's stock owned by the corporation itself or a nominee or agent of the corporation.112

Allen also showed that his interpretation of the statutory provision best fit the historical legal practice by tracing the history of the rule that evolved from these underlying concerns.113 Having surveyed a range of materials, he concluded:

Accordingly, attempting to read [the words "belonging to the corporation"] in a sensible way consistent with the underlying purpose of the enactment, I conclude that stock held by a corporate "subsidiary" may, in some circumstances, "belong to" the issuer and thus be prohibited from voting, even if the issuer does not hold a majority of shares entitled to vote at the election of directors . . . .114

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110. Allen explained that the clause did "not purport to confer a right to vote stock not falling within its literal terms . . . ." Id.
111. Id. (emphasis added).
112. Id. at 1009.
113. He noted that Chief Justice Taft, while still an Ohio trial court judge, had succinctly stated the rationale for the rule in 1888; that the earliest reported American decision on point (1826) was "even more succinct"; that the rule was reflected in Delaware's first general corporation law (1833); that the leading case dealing with the problem was decided in Delaware in 1934; and that the 1967 amendments to the statute had not altered the previous prohibitions on voting stock held in this manner. Id. at 1009-11.
114. Id. at 1011.
Speiser demonstrates both the significance that Allen attributes to literal interpretations of terms in corporate law statutes and the limits that he places on such literal interpretations. Given his understanding that "entitled to vote" has a customary meaning among persons familiar with corporate law, then certainty in corporate transactions would be promoted by construing that term in its customary way. Were certainty the only value in this context, Allen would have found for Speiser. But a finding for Speiser would have conflicted with corporate law's need to assure the legitimacy of the corporate structure by protecting the integrity of the shareholder vote. By interpreting "entitled to vote" as a mere restriction, Allen was thus able to engage in a decidedly non-literal interpretation of "belonging to the corporation," an interpretation that allowed him to reach a result consistent with his understanding of the overall objective of corporate law.

Pan Ocean Navigation, Inc. v. Rainbow Navigation, Inc.\textsuperscript{115} similarly demonstrates Allen's dual commitments. Plaintiff Pan Ocean Navigation Inc. (Pan Ocean), which claimed to be a stockholder of Rainbow Navigation, Inc. (Rainbow), sought an order permitting it to inspect the books and records of defendant Rainbow.\textsuperscript{116} Defendant's argument that it was entitled to summary judgment was "straightforward and [rested] entirely upon the statutory language of Sections 220 and 219 [of the Delaware Code]."\textsuperscript{117} Section 220 of the Delaware General Corporation Law affords stockholders the right to inspect the books and records of the corporation.\textsuperscript{118} Subsection 220(a) states that "stockholder" means a stockholder of record.\textsuperscript{119} Section 219(c) sets forth the means for determining who is a stockholder of record: "The stock ledger shall be the only evidence as to who are the stockholders entitled to examine . . . the books of the corporation . . . ."\textsuperscript{120} The simple fact was that Rainbow had no shareholder ledger; it thus followed that Pan Ocean could not be a


\textsuperscript{117} \textit{Id.}, mem. op. at 4, \textit{reprinted in} 13 \textit{Del. J. Corp. L.} at 367.


\textsuperscript{119} \textit{Id. §} 220(a).

\textsuperscript{120} \textit{Id. §} 219(c).
stockholder of record.\textsuperscript{121} Therefore, the defendant concluded that Pan Ocean had no right to inspect under section 220.\textsuperscript{122}

This case clearly created a conundrum for Chancellor Allen. On one side was his belief in "the utility of a strict construction of the statutory language limiting rights under section 220 to persons registered as stockholders on a corporation’s stock ledger . . . ."\textsuperscript{123} On the other side was the obvious injustice of permitting a close corporation like Rainbow to thwart the statutory intent by not keeping a stock ledger. Allen was unwilling "to suggest that where a corporation has kept no stock ledger at all a plaintiff’s petition under Section 220 must fail because he or she is not listed on the corporation’s stock ledger. In such circumstances, I believe the corporation is estopped from relying on that argument."\textsuperscript{124} A finding for defendants in \textit{Pan Ocean} would have been utterly at odds with a shareholder’s fundamental right under Delaware law to have access to the books and records of the corporation.

\textbf{B. The Role of Statutory Provisions that Provide for Narrowly Focused Hearings}

Allen has also established his belief that the Delaware General Corporation Law compensates for the inevitably controversial nature of claims of breach of fiduciary duty by including provisions that have precise objectives, easily-stateable and strictly-enforceable requirements, and limits on the court’s authority to consider issues collateral to statutes’ specific objectives. In describing such sections, Allen refers to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{121} \textit{Pan Ocean Navigation}, No. 8674, mem. op. at 2, 4 (Del. Ch. Feb. 18, 1987), \textit{reprinted} in 13 \textit{Del. J. Corp. L.} at 366, 367-68.
\item \textsuperscript{122} Id., mem. op. at 1, \textit{reprinted} in 13 \textit{Del. J. Corp. L.} at 365.
\item Allen stated this concern as follows: Corporations ought not to have to guess as to the identity of the person making demand nor, under the statute, should a corporation be put to the expense and trouble that would be occasioned by an investigation into such a person’s status. The statute’s requirements, by limiting rights to persons who are listed on the company’s stock ledger as a record owner of stock, provide a quick, fair and dependable way for the company to evaluate that aspect of a demand.
\item \textsuperscript{124} \textit{Pan Ocean Navigation}, No. 8674, slip op. at 6 (Del. Ch. Feb. 18, 1987), \textit{reprinted} in 13 \textit{Del. J. Corp. L.} at 368.
\end{itemize}
\end{footnotesize}
the role of certain statutory actions in the administration of the Delaware corporation law. In taking cognizance of only a narrow set of issues, Section 273 closely resembles several other sections of Title 8 of Delaware’s Code which provide for narrowly-focused proceedings. Through these provisions, our state’s corporation law creates a number of causes of action calling for expedited and, in some cases, summary adjudication when it may be detrimental to the orderly and proper governance of the corporation to delay adjudication. In such proceedings, this court may eschew collateral matters and strike otherwise possible counter-claims.125

Some examples of such sections include sections 211,126 220,127 225,128 262,129 and 273 of the Delaware Code.130 Allen’s interpretation of these sections as having a specific role in the structure of Delaware corporate law connects with his concern for certainty. In other words, the outcome of a proceeding with narrowly defined issues and procedures is more likely to be predictable than is the outcome of a proceeding involving flexible and open-ended standards, such as fiduciary duty. However, as in the case of Allen’s theory of statutory interpretation, his concern with certainty is ultimately qualified by an overriding concern about the legitimacy of corporate law, though he does not always draw out its full implications in the cases he decides.

1. The Right to Appraisal and the (Qualified) Demands of Legitimacy

Chancellor Allen’s most important decision involving section 262, Delaware’s appraisal statute, is also the best example of his

127. Section 220 provides shareholders with a means to inspect a corporation’s books and records. Id. § 220.
128. Section 225 governs contested elections of directors and the proceedings to determine the validity of those elections. Id. § 225.
129. Section 262 is Delaware’s appraisal statute. Id. § 262.
130. Section 273 governs dissolution proceedings. Id. § 273. In determining the scope of review in a § 273 action, Allen identified the preceding sections and explained their limited application. Data Processing Consultants, No. 8907, mem. op. at 14-16.
view of statutory provisions that provide for narrowly focused hearings. In *Cede & Co. v. Technicolor, Inc.*, plaintiffs were former shareholders of Technicolor, Inc. who had been cashed-out in a January 1983 merger by which Technicolor, Inc. became a wholly-owned subsidiary of MacAndrews & Forbes Group, Inc. (The principal plaintiff in both actions was Cinerama, Inc., a substantial shareholder of Technicolor prior to the merger. Plaintiffs will be collectively referred to as "Cinerama.") Cinerama filed an action in March 1983 seeking an appraisal of the fair value of its shares under section 262.132

"After substantial discovery had occurred in the appraisal action," Cinerama filed a second action in January 1986, this time alleging breach of fiduciary duty and fraud.134 Cinerama claimed that only as a result of discovery in the appraisal action had it uncovered evidence showing that the Technicolor merger was not authorized by the required shareholder vote and was the result of fraud and various breaches of fiduciary duty.

Chancellor Allen construed the three motions before him as raising three related, "if not identical," issues:

First, is a shareholder who elects to pursue its appraisal remedy under 8 Del.C. §262 foreclosed by such election from thereafter bringing an action to rescind the merger, when at the time of making such election it did not know and had no reason to know the facts upon which the right to rescission allegedly rests? . . . .

Second, may a former shareholder simultaneously litigate to judgment—whether in the same action or in separate actions—a statutory action for the fair value of his stock and an action for fraud or breach of fiduciary duty seeking rescission of a merger? . . . .

[Third], when must a shareholder who neither knew or had reason to know of facts constituting a breach of fiduciary duty at the time he chose to exercise his right to seek an appraisal, elect between that remedy and the broader,

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132. Id., mem. op. at 1, reprinted in 13 DEL. J. CORP. L. at 229.
133. Id.
134. Id.
135. Id.
136. Id.
more flexible remedy available to redress a breach of fiduciary duty.\textsuperscript{137}

As to the first question, Allen held that in these circumstances, a stockholder who had filed an appraisal action would not be barred from filing an action seeking rescission or other equitable relief.\textsuperscript{138} There was no persuasive reason for distinguishing shareholders who sought appraisal from those who accepted the merger consideration and then sued for rescission or other equitable relief.

In claiming that petitioners' appraisal action foreclosed their later suit, defendants relied on \textit{Braasch v. Goldschmidt}\textsuperscript{139} alleging that because a shareholder who elects to pursue an appraisal action loses his status as a shareholder, he loses standing to assert rights as a shareholder, such as the right to sue for breach of fiduciary duty.\textsuperscript{140} Allen conceded that "\textit{Braasch} does hold that one who elects an appraisal may not thereafter sue seeking rescission,"\textsuperscript{141} but found that \textit{Braasch}'s holding was "\textit{not required} by [a Delaware Supreme Court decision which held that shareholders who seek appraisal become quasi-creditors of the corporation], \textit{nor does its supporting reasoning withstand close scrutiny}."\textsuperscript{142}

The flaw that Allen identified in \textit{Braasch}'s reasoning was that, for no apparent reason, it disadvantaged shareholders who sought appraisal in relation to those who accepted the merger consideration and then sued for rescission. Delaware case law recognizes that the latter shareholders have an economic interest in rescission and thus have standing to litigate claims of breach of duty arising from the merger, despite the fact that after the merger they are no longer shareholders.\textsuperscript{143} Similarly, shareholders who seek appraisal have an interest in a rescission remedy despite their lack of status as present shareholders. "In most material respects," shareholders who seek appraisal in ignorance of an arguable breach of fiduciary duty "are in the same position" as former shareholders who accept the merger consideration and thereafter, learning of facts arguably constituting

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\textsuperscript{137} \textit{Id.}, mem. op. at 2-3, \textit{reprinted in} 13 \textit{Del. J. Corp. L.} at 230.
\textsuperscript{138} \textit{Id.}, mem. op. at 2, \textit{reprinted in} 13 \textit{Del. J. Corp. L.} at 230.
\textsuperscript{139} 199 A.2d 760 (Del. Ch. 1964).
\textsuperscript{140} \textit{Cede}, Nos. 7129 & 8358, mem. op. at 8, \textit{reprinted in} 13 \textit{Del. J. Corp. L.} at 232-33.
\textsuperscript{141} \textit{Id.}, \textit{reprinted in} 13 \textit{Del. J. Corp. L.} at 233.
\textsuperscript{142} \textit{Id.} (emphasis added) (referring to \textit{Southern Production Co. v. Sabath}, 87 A.2d 128 (Del. 1952)).
\textsuperscript{143} \textit{Id.}, mem. op. at 11-12, \textit{reprinted in} 13 \textit{Del. J. Corp. L.} at 234-35.
\end{flushright}
breach of fiduciary duty, sue for rescission, "and thus, to that extent, should be treated similarly by the law." 144

As to the second question, Allen held that shareholders who initially sought appraisal should not be entitled to litigate both appraisal and breach of fiduciary duty actions to judgment. 145 Allowing plaintiff to pursue both actions to judgment "would destroy the distinctive nature of an appraisal action and would, I believe, result in an unwieldy form of action." 146

Given the significant differences between the two forms of action, Allen believes that the policies underlying the specific statutory right to appraisal would be significantly undercut were the court to permit plaintiff to pursue both actions to judgment: "In shaping the limited, statutory right to appraisal of shares, the legislature has narrowed the issues involved in order to provide a fair and economical remedy for a specific problem. There is utility in that limited, special form of action and in maintaining its distinctive features." 147 Allen presented three distinct cases for this belief. First, and most significant, in an appraisal action the court need find no wrongdoing to afford a remedy. In an action for breach of fiduciary duty or fraud, however, an equitable remedy is only available when the court has determined that a breach of fiduciary duty has occurred. Thus, "the issues for judicial determination at trial of the two forms of action can ordinarily be expected to be very different." 148 Second, there is a difference in the remedy itself. In an appraisal action, plaintiff is entitled to the fair value of the shares at the time of the merger. "In contrast, in a claim arising from a breach of fiduciary duty the remedy is plastic, limited only by the particular facts, broad principles governing equitable remedies and the imagination of court and counsel." 149 Third, in an appraisal proceeding the only proper defendant is the surviving corporation. 150 Thus, as the appraisal statute narrows the issues, remedies, and proper parties, an appraisal proceeding has a dis-

144. Id., mem. op. at 12, reprinted in 13 Del. J. Corp. L. at 235.
146. Id. (emphasis added).
147. Id., mem. op. at 20, reprinted in 13 Del. J. Corp. L. at 239 (emphasis added).
149. Id., mem. op. at 17, reprinted in 13 Del. J. Corp. L. at 237.
150. Cede, 542 A.2d at 1187.
tinctive, focused character. That character is jeopardized when the broader notions of issues, remedies, and parties appropriate to an inquiry into an alleged breach of fiduciary duty are introduced.

Having decided that the shareholders were not precluded from bringing an action to rescind the merger while also holding that the appraisal and rescission could not both be pursued to judgment, Allen then addressed the issue of when an election between the two remedies had to be made. Balancing the interests of the shareholders and defendants, and an independent public interest in efficient operation of the courts, Allen concluded that an election had to be made "no later than the time plaintiff announces himself ready for trial."\(^{151}\)

While Cede shows Allen's concern to promote the certainty that narrowly focused hearings provide, it also shows the extent to which considerations of legitimacy qualify and override this concern with certainty. Braasch stated a clear rule of law, upon which corporate planners may have relied. Yet Allen did not follow Braasch.\(^{152}\) Although he did not explicitly state that a concern for the legitimacy of corporate law underpinned his ruling, that ruling may be seen as flowing from a concern that such legitimacy would be threatened if certain groups of shareholders were disadvantaged in relation to others for no apparent reason.

However, in refusing to allow plaintiff to proceed to trial on both actions, Allen fails to draw out the full implications of his concern with legitimacy. Allowing plaintiff to proceed to trial on both claims would provide a decision based on the fullest information and would most thoroughly vindicate plaintiff's rights.\(^{153}\) While Allen

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151. Cede, Nos. 7929 & 8358, mem. op. at 21, reprinted in 13 Del. J. Corp. L. at 239 (by declining to dismiss plaintiff's fraud action and refusing to allow Cinerama to amend and enlarge its appraisal action to include its claim for rescissory relief, the Delaware Supreme Court affirmed Chancellor Allen's rulings). Cede, 542 A.2d at 1192. However, it reversed the ruling requiring plaintiff to make a binding election between the two actions. Id. The supreme court said that if the plaintiff prevailed at trial, the trial court would determine the appropriate remedies. Id. In reversing Chancellor Allen on this issue, the supreme court did not address and may not have understood his arguments regarding the role of certain statutory provisions that provide for focused hearings.

152. In this respect, Allen seems to have gone against the principle which states that courts generally adhere to clear precedent in order to promote predictability.

153. Allen's decision might have given some incentive to majority shareholders to withhold material information in such situations, had it not been overruled. However, because it did not require a decision until discovery is completed, it is
concedes this, he believes that other considerations, particularly those relating to the utility of focused judicial proceedings, warrant requiring plaintiff to choose its action prior to trial. He states:

*If litigation of the two matters could easily and efficiently be done in a single action, there would be a strong argument to permit this election after judgment—so that it could be made on the fullest information. However, where discovery and trial would have such a different focus under each theory, the inefficiency and (public) expense involved in such an approach does not seem justifiable.*

In making this claim, Allen loses sight of the demands of legitimacy and overestimates the threat that allowing trial on both actions would pose to the focused judicial proceeding.

Allowing plaintiff to go to trial on both claims would not undercut the utility of the appraisal proceeding. From the corporation’s perspective, it already has to provide discovery relevant to both the appraisal and the breach of fiduciary actions, because plaintiff need not make an election until the eve of trial. The corporation must, therefore, be prepared to go to trial on either action and, prior to plaintiff’s election, cannot with certainty predict under what theory it may be found liable. From the court’s perspective, it is difficult to see how many more judicial resources would be expended in allowing plaintiff to go to trial on both claims. Of course, trial would likely be longer, since plaintiff would be permitted to present evidence relevant under both its appraisal and breach of fiduciary duty theories. But this alone would not substantially undercut the focused character

unlikely that it would have given majority shareholders a very significant incentive. The fact that Chancellor Allen permits plaintiff to defer its decision until after discovery has been completed shows that the value of promoting certainty underlying the focused statutory provisions is only one of the values that animates corporate law. Were it the only value, Allen would preclude plaintiff from initiating an action for breach of fiduciary duty after it had perfected its right to appraisal. The reason for this is that any possibility of initiating an action for breach of fiduciary duty after perfecting the right to appraisal tends to dilute the efficacy of the appraisal statute as an efficient, focused procedure. For example, allowing the filing of an action for breach of fiduciary duty gives a plaintiff who has perfected an appraisal right the incentive to expand and prolong the discovery process, in the hope of finding evidence of a breach of fiduciary duty. This possibility is outweighed by the need not to undercut the focused character of the hearing that the appraisal statute provides.

of the hearing that the appraisal statute provides. The jurists of the Delaware Court of Chancery are sufficiently experienced and knowledgeable to allow them to render judgment efficiently after a trial in which plaintiff is allowed to proceed on both its appraisal and breach of fiduciary duty claims.

2. Formalism and the Limits on Shareholders’ Rights to Inspect the Corporation’s Books and Records

Allen’s failure to fully draw out the implications of his concern with legitimacy is also evident in a case involving section 220 of the Delaware Code, another provision that he interprets as having a specific role in the structure of Delaware statutory corporate law. Section 220 affords stockholders the right to inspect a corporation’s books and records, provided they satisfy the statutory requirements. The section 220 issue in RB Associates of New Jersey v. Gillette Co. arose because of the increasingly complicated structure of ownership of stock, with layers of beneficial owners holding in their own names, brokers and banks holding in their own names shares of stock beneficially owned by their clients, and depositories holding vast amounts of shares in the names of such nominees as “Cede & Co.” This complex structure of ownership gave rise to a series of Delaware cases interpreting the phrase “list of stockholders” in section 220.

In Giovanni v. Horizon Corp. and Hatleigh Corp. v. Lane Bryant, Inc., the Delaware Court of Chancery held that a corporation that had obtained a “Cede breakdown” had to provide it to a stockholder who otherwise satisfied the requirements of section 220. This doctrine was expanded in Tactron, Inc. v. KDI Corp. when the court held that “a corporation could be required to have a Cede breakdown produced as part of a stock list inspection even if the corporation had not already done so.” Finally, in Shamrock Associates

159. Id. at *6-7, reprinted in 13 Del. J. Corp. L. at 1226-27.
v. Texas American Energy, the court held that a corporation that had exercised its right under federal law to obtain a list of certain non-objecting beneficial owners (NOBOs) of its stock from the banks and brokers who owned that stock in street name, "was obliged to produce a copy of such lists to a shareholder who had shown itself entitled to inspect the Company's stock list." The issue in RB Associates was whether the series of cases should be completed by requiring a corporation that neither had nor intended to obtain a NOBO list to do so in response to an otherwise proper shareholder request to inspect.

Chancellor Allen refused to require the corporation to obtain the NOBO list and provide it to the requesting shareholder. In doing so, he cited two distinctions between Cede breakdowns and NOBO lists. First, focusing on the ease with which a corporation may obtain a Cede breakdown ("in a matter of minutes"), Allen found that a corporation really did constructively "have" a Cede breakdown even when it did not literally "have" it:

[T]he Cede breakdown has been viewed as something that can; in effect, be produced instantly. It is, therefore, available to the corporation in a proxy contest immediately when needed, even at the last moment. Accordingly, it can fairly be said that such information is, in a real sense, in the possession of the corporation at all times. As a result, contesting parties cannot be put on substantially the same footing unless a stock list includes depository company breakdowns.

Allen went on to state that a NOBO list, in contrast, takes longer to produce—perhaps as long as ten days. However, other than the seemingly metaphysical issue whether the time necessary to produce a list determines whether a corporation already "has" it, it is not clear why time differences should matter. Furthermore, as technology

162. 517 A.2d 659 (Del. Ch. 1986).
164. Id. at *13-14, reprinted in 13 Del. J. Corp. L. at 1228.
165. Id. at *17, reprinted in 13 Del. J. Corp. L. at 1230.
166. Chancellor Allen seems to have concluded that because federal regulations permit 10 days for a response to a corporate request for a NOBO list, id. at *14-15, reprinted in 13 Del. J. Corp. L. at 1229, it follows that "such a list takes approximately ten days to produce." Id. at *17, reprinted in 13 Del. J. Corp. L. at 1230. This is a non sequitur.
develops, it is likely that NOBO lists will be producible almost as quickly as Cede breakdowns.

Allen’s second distinction was that while a Cede breakdown is central to a modern proxy contest, a “NOBO list plays no central role in a proxy contest.” This reasoning underestimates the role that non-written communications play in modern proxy contests while giving an undue advantage to incumbent management. Management may have means of knowing who the NOBOs are (not to mention the objecting beneficial owners) without having to request a formal NOBO list; such means may be unavailable to insurgents. Thus, neither of the distinctions Allen draws between a Cede breakdown and a NOBO list is compelling.

The legitimating role of shareholder voting is enhanced to the extent that the law enforces shareholders’ rights to obtain material, such as CEDE breakdowns and NOBO lists, that will assist them in proxy contests. Allen is surely aware of this. But he seems reluctant to require a corporation to obtain and give to shareholders a NOBO list, because doing so would involve forcing “a board to take an action to change the information in the Company’s possession . . . .” Allen treats this as too significant an encroachment on the board’s authority under section 141(a) of the Delaware Code to manage the corporation’s business and affairs. In so doing, Allen displays too great a deference to the board’s authority and too little concern about the way in which the legitimating role of shareholder voting may be enhanced by providing shareholders access to relevant, if not essential, materials.

167. Id. at *18, reprinted in 13 Del. J. Corp. L. at 1230.
168. The Second Circuit reached this conclusion when it considered Allen’s arguments in Sadler v. NCR Corp., 928 F.2d 48 (2d Cir. 1991). It stated:
Since compilation of a NOBO list is a relatively simple mechanical task, the fact that compilation takes longer than for a CEDE list is an insubstantial basis for distinction. As to both sets of information, the underlying data exist in discrete records readily available to be compiled into an aggregate list. Nor are the functions of the lists significantly dissimilar. Both facilitate direct communication with stockholders, in the case of a NOBO list, at least with those beneficial owners who have indicated no objection to disclosure of their names and addresses.

C. The Rights of Corporate Bondholders

The traditional view of the rights of corporate bondholders is that they are creditors of the corporation, to whom directors owe no fiduciary duty, and whose interests are protected solely by the terms of the trust indenture.171 On the other hand, stockholders, as owners of the corporation, are owed fiduciary duties of loyalty and care.

This distinction has recently come under attack. One commentator has argued that although the statements that corporate law is for stockholders and that contract law is for bondholders are """"tidy concepts, . . . they no longer serve modern corporate finance.""""172 He maintains that the trust indenture """"does not and cannot protect bondholders, that bondholders have no other source of protection when they need it most, and that directors should have a fiduciary duty to protect bondholders as well as stockholders.""""173 Likewise, another commentator argues that bondholders are inadequately protected by contract and that fiduciary duties toward bondholders should therefore be recognized.174 It is also claimed that the traditional treatment of corporate bondholders is assumed in modern case law and legal scholarship """"without meaningful analysis,""""175 and that those materials offer no more than the """"labels and the legal and economic fictions that pervade corporate analysis"" in support of this treatment.176

Chancellor Allen’s treatment of the rights of bondholders belies these claims. He believes that bondholders are adequately protected by contractual rights, but in reaching this conclusion he has not relied on labels or conclusory analyses. Allen’s decisions in three

171. See Mann v. Oppenheimer & Co., 517 A.2d 1056, 1061 (Del. 1986) (holding that """"[t]he rights of debenture holders are controlled by the terms of the indenture under which the securities are issued"""").

Whether rights asserted by the holders of preferred stock are protected by fiduciary duty, or by the law of contracts, depends on whether the matters at issue relate to preferences or limitations that distinguish preferred stock from common (protected by contract) or to a right shared equally with the common (protected by fiduciary duty). Jedvab v. MGM Grand Hotels, Inc., 509 A.2d 584, 594 (Del. Ch. 1986).


173. Id.


175. Id. at 1174.

176. Id. at 1167.
recent cases involving bondholders' challenges to corporate action suggest a rationale for this approach.

If a relationship is governed by contract law, the parties can determine their future relationship by bargaining over the terms of the contract. They know that, should a dispute between them end up in court, the court will not have to apply a broad and extremely general standard, such as fiduciary duty, to resolve the dispute. Rather, it can look to the intentions of the parties, as manifested in the terms of the contract. Though the parties cannot foresee all possible contingencies, they can indicate how they would want those contingencies that they can foresee resolved. In commercial contexts, where a relationship can be governed by contractual principles rather than the fiduciary duty standard, there is value, in terms of certainty and predictability, to enforcing the terms of the contract. By adopting these principles, Allen thus avoids importing notions of fiduciary duty into the bondholder context. However, he has been a leader in the development of the concepts of implied covenants of good faith and fair dealing as further protection for bondholders within the framework (and thus with the relative certainty) of contractual law.


178. Cf. Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 691 F.2d 1039, 1048 (2d Cir. 1982), cert. denied, 460 U.S. 1012 (1983) (noting importance of uniformity in interpretation of boilerplate provisions in indentures to ensure certainty and efficient working of capital markets); Broad v. Rockwell Int'l Corp., 642 F.2d 929 (5th Cir.) (en banc), cert. denied, 454 U.S. 965 (1981) (holding that when interpreting contracts, courts must give due consideration to the purpose of the parties in making the contract, and that a fair and reasonable interpretation consistent with such purposes must guide the court); Metropolitan Life Ins. Co. v. RJR Nabisco, Inc., 716 F. Supp. 1504, 1520 (S.D.N.Y. 1989) (holding that a court cannot ignore market expectations that the terms of an indenture will be upheld, and that "a court will not, sua sponte, add new substantive terms to that indenture as it sees fit"). But see Mitchell, supra note 174, at 1225 (arguing that a standard that retains uncertainty is to be preferred since it would disable boards from complying technically with the letter of the standard rather than its spirit).

179. "Broad and abstract requirements of a 'fiduciary' character ordinarily can be expected to have little or no constructive role to play in the governance of such a negotiated, commercial relationship." Simons, 542 A.2d at 786 (emphasis added).

180. See, e.g., Robert M. Hart & Ilse Padegs, Protection of Debt Holders is New Focus, N.Y.L.J., Sept. 10, 1990, at 5, 6 (noting that cases such as Katz, with its emphasis on duties of good faith and fair dealing, "may be harbingers of expanded debtholder rights").
Allen’s success in developing a contractual framework for the analysis of the rights of bondholders is, however, another matter. The “hypothetical bargain” approach he favors does not appear to be capable of achieving any greater certainty and predictability than would the apparently more diffuse fiduciary duty approach. Moreover, when it comes to an actual application of the concepts that are intended to protect bondholders within a contractual framework, i.e., the concepts of implied covenants of good faith and fair dealing, Allen’s highly formalistic analysis provides more protection to corporations than to bondholders.

1. Bondholders and the Trust Indenture

Allen’s position is based on the belief that bondholders can be protected by the trust indenture. Unlike commentators who are highly doubtful that bondholders have the ability to protect their interests when the bond contract is negotiated and executed, Allen believes that bondholders are adequately protected at that stage. “Arrangements among a corporation, the underwriters of its debt, trustees under its indentures and sometimes ultimate investors are typically thoroughly negotiated and massively documented. The rights and obligations of the various parties are or should be spelled out in that documentation.” In the case of a public offering, Allen maintains that underwriters of debt securities, and to some extent indenture trustees, have an interest in negotiating protections on points that the ultimate purchasers of those securities regard as material. Allen also asserts that, in private placements, the purchaser has a similar

181. See, e.g., Mitchell, supra note 174, at 1178-86.
183. Simons, 542 A.2d at 786, 791. Allen may overestimate the protections afforded by the involvement of investment bankers and indenture trustees. Investment bankers are competing to obtain the corporation’s business and therefore have an incentive to offer it highly favorable terms. The involvement of investment bankers may only set a floor on the terms of the trust indenture, since if the terms are too favorable to the corporation, the investment bankers will be unable to sell the bonds. But see Jeffrey N. Gordon, The Mandatory Structure of Corporate Law, 89 Colum. L. Rev. 1549, 1563 (1989) (asserting that the efforts the parties put into negotiating the terms of senior securities “strongly suggests that they expect these terms to be priced”).

The role of indenture trustees is almost exclusively ministerial and they are typically more concerned with protecting their own interests than with protecting the interests of potential buyers of the bonds.
interest. The ultimate purchasers, particularly large institutions, will either obtain the protections they seek or require a higher rate of interest to compensate for the additional risk. Allen also notes that the development of indenture covenants, such as anti-destruction and anti-dilution provisions, "attests to the relative effectiveness of this mechanism of defining rights and obligations of issuers."

Therefore, because Allen believes bondholders are able to obtain protection through contractual arrangements, he is unwilling to introduce the notion of fiduciary duty, with the "congeries of duties that are assumed by a fiduciary," into the bondholder/corporation relationship.

2. Bondholders and Implied Covenants of Good Faith and Fair Dealing

Commentators have been disturbed by the possibility that a corporation will shift wealth from bondholders to stockholders by transactions that were not foreseeable at the time the indenture agreement was executed. Bondholders are thus seemingly left to the mercy of predatory stockholders. Chancellor Allen is not insensitive

184. Simons, 542 A.2d at 786. But see Mitchell, supra note 174, at 1183 (asserting that underwriters are ineffective to protect bondholders because their self-interest lies more with pleasing management, while also maintaining that indenture trustees are equally ineffective because of their concern with indemnification provisions).

185. Simons, 542 A.2d at 786 (stating that "the purchaser of such debt is offered, and voluntarily accepts, a security whose myriad terms are highly specified"). But see Mitchell, supra note 174, at 1181-92 (concluding that, even if potential bond buyers can read and decipher the bond contract, they must take it as written). Allen's argument seems to presuppose that every term of a trust indenture is perfectly priced. This view does not seem consistent with the way in which the terms of a trust indenture are negotiated. Furthermore, it bespeaks a faith in market efficiency that Allen himself has doubted. See Time, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,514, at 93,277, reprinted in 15 Del. J. Corp. L. at 733.

186. Simons, 542 A.2d at 791. But see McDaniel, supra note 172, at 424-29 (concluding that because indenture covenants have not worked to protect bondholders, they are increasingly omitted).


188. On the other hand, where the parties foresaw the possibility but did not include a term relating to it in the contract, a court is unlikely to find that the term is implied by the requirements of good faith and fair dealing. This is especially true when the parties have expressly bargained over the term in dispute. This was the case in Metropolitan Life Ins. Co. v. RJR Nabisco, Inc., 716 F. Supp. 1504 (S.D.N.Y. 1989). In such circumstances, the court was unwilling to allow "an implied covenant to shoehorn into an indenture additional terms plaintiffs now wish had been included." Id. at 1519.
to such possibilities, but he has dealt with them by implied covenants of good faith and fair dealing. The test he has devised is this:

[I]s it clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had they thought to negotiate with respect to that matter. If the answer to this question is yes, then, in my opinion, a court is justified in concluding that such act constitutes a breach of the implied covenant of good faith.

Allen’s position on the role of implied covenants of good faith and fair dealing in protecting bondholders is most fully developed in Katz v. Oak Industries, Inc.

In Katz, Oak Industries made an offer to exchange cash or stock for its outstanding debt securities. The offer was conditioned upon a sufficient percentage of tendering bondholders’ consenting to certain

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189. See Katz, 508 A.2d at 879.
190. A developing area of inquiry concerns the respects in which an implied duty of good faith and fair dealing differs from a fiduciary duty. Chancellor Allen has been concerned with this question from his initial judicial encounter with the question of the rights of bondholders. At the oral hearing in Katz, Allen asked plaintiff's counsel, "How would the covenant of fair dealing implied into these kind of [indenture] instruments differ from a fiduciary duty to bondholders?" Counsel responded, "Well, I think that a fiduciary is generally held to a very special, high standard of care and a higher duty perhaps than in a contract, although I think it becomes very blurred when you deal with a covenant of fair dealing to distinguish it from a fiduciary duty type of claim." Argument on Plaintiff's Motion for Preliminary Injunction at 21-22, Katz v. Oak Indus., Inc. (Del. Ch. 1986) (No. 8401) (Allen, C.) (hereinafter Argument) (transcript of hearing on Mar. 7, 1986).

Professor Coffee, while noting the similarities between the two duties, has observed that the central conceptual difference between them is that "a contracting party may seek to advance his own interests in good faith while a fiduciary may not . . . ." John C. Coffee, Jr., The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role, 89 Colum. L. Rev. 1618, 1658 (1989).

Chancellor Allen has also noted the similarities between an implied contractual duty of good faith and fair dealing and a fiduciary duty of fairness and loyalty, Glinert v. Wickes Cos., No. 10,407, 1990 Del. Ch. LEXIS 42, at *14-15 (Del. Ch. Mar. 27, 1990), reprinted in 16 Del. J. Corp. L. 754, 775 (1991), though he has observed that "Delaware law has not had occasion to focus upon the question just how similar or dissimilar these duties may be." Id. at *27 n.6, reprinted in 16 Del. J. Corp. L. at 781 n.6 (citing Coffee, supra, at 1653-64).

192. 508 A.2d 873 (Del. Ch. 1986).
193. Id. at 876.
amendments to the underlying indentures. Plaintiff (a bondholder) argued that linking the offer to purchase with the granting of consent constituted a breach of an implied contractual duty to act in good faith. Consistent with the test enunciated above, Allen reviewed the three provisions from which it might be inferred that, had the parties negotiated with the exchange offer and consent solicitation in mind, they would have expressly agreed to prohibit the linking of consent with the purchase and sale of the security.

First, certain indenture provisions granted bondholders the power to veto modifications in the indenture. Allen found nothing in such provisions suggesting that Oak Industries was not permitted to offer an inducement to bondholders to approve such amendments; indeed, he found such a suggestion to be "wholly inconsistent with the strictly commercial nature of the relationship."

Second, a contractual provision prohibited Oak Industries from voting debt securities held in its treasury. Plaintiff asserted that allowing Oak Industries to condition its offer to purchase debt on the giving of consents had the effect of subverting this provision. Allen found that the intended effect of the provision was to prohibit persons with a financial interest (other than that of a bondholder) from modifying the indenture. But Oak Industries' linking of the exchange offer and the consent solicitation did not give a say in the decision to modify to anyone with interests adverse to those of the bondholders.

Third, certain contractual provisions gave Oak Industries the power to redeem the debt securities at a price set by the relevant indentures. Allen again rejected plaintiff's claim that the exchange offer (which was at a price lower than the redemption price) violated an implied covenant of good faith and fair dealing. He emphasized that the success of the exchange offer ultimately depended on the

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194. Id.
195. Id. at 878.
196. Id. at 881. It was nevertheless important to Allen that the same offer had been made on the same terms to each holder of the affected security. The implication is that the original contractors would not have agreed to a term allowing inducements to be made to only some bondholders, or to all bondholders but on different terms.
197. Id. The plaintiff asserted that the conditional offer permitted Oak Industries to "dictate" the vote on securities which it could not itself vote." Id.
198. Id.
199. Allen again emphasized that the incentive to consent was "equally available to all members of each class of bondholders." Id.
200. Id. at 881-82.
issuer's ability and willingness to extend an offer that would be a financially attractive alternative to the bondholders retaining their bonds. This process is hardly the functional equivalent of the unilateral election of redemption and thus cannot be said in any sense to constitute a subversion by Oak of the negotiated provisions dealing with redemption of its debt." Allen concluded that the plaintiff had failed to demonstrate that the terms of the exchange offer violated any covenant of good faith and fair dealing associated with the indenture.

Katz sets a high standard for finding a violation of an implied covenant of a debt indenture. This is consistent with Allen's view that determining whether a transaction violates an implied covenant is a matter of "informed speculation." Given the inability to base the decision on a more firm basis, it is appropriate to require bondholders who challenge proposed corporate transactions to make a strong showing that, had the negotiating parties foreseen the proposed transactions, they would have included a provision restricting the corporation's ability to enter into it.

A high standard is also consistent with Allen's emphasis on the importance of certainty and predictability in commercial transactions. While the absence of a contractual provision specifically dealing with the corporate transaction the bondholder challenges will not necessarily bar a grant of relief, relief will be granted only where it can confidently be shown that, had the negotiating parties confronted

201. Id.
202. Id. at 882.

The advocates of fiduciary duties running to bondholders do not necessarily disagree with the results Allen reached in Katz and Katz. Professor Lawrence Mitchell specifically states that he agrees with the result in Katz, though he would reach that result "through the application of principles that openly protect bondholders' interests and express aspirations towards a higher level of corporate conduct." Mitchell, supra note 174, at 1227.

Simons also involved a plaintiff's claim that a transaction that left holders of convertible bonds with only the right to convert to $12 in cash constituted a violation of an implied covenant of good faith. Because he rejected plaintiff's argument on other grounds, Allen did not reach the merits of his claim. Simons, 542 A.2d at 792.

the issue, they would have resolved it in a way that reflects the plaintiff's present claim. Only if such a condition is required can the bondholder's claims to fairness and the issuer's need for certainty and predictability be adequately reconciled.

However, in the highly complex realm of the negotiation of bond terms, Allen's hypothetical bargain approach is unlikely to yield greater certainty than the fiduciary duty approach. It may, for example, be exceedingly difficult to decide whether the negotiating parties would have permitted the challenged corporate transaction had they directly confronted the issue at the time of initial bargaining. There may be no one way that they would have decided the question. Directly confronting that particular issue may have led to a new round of discussion of trade-offs, with the result that we could never say with certainty whether the parties would have permitted the challenged transaction.

While Katz reflects the significance Allen attributes to certainty in commercial transactions, it also displays a formalistic mode of analysis that serves largely to protect corporations against the claims of bondholders. Surprisingly, the opinion analyzes the three provisions of the indenture individually, without attempting to discern their cumulative significance. For example, even if no one provision individually considered could be interpreted to bar Oak's proposed transaction, it is possible that when considered together the three provisions implied that the contracting parties had agreed that Oak would be barred from conditioning participation in the exchange offer on giving consent to the amendments.

Even considered individually, Allen's arguments are unduly formal; this is especially apparent with respect to the provision prohibiting Oak Industries from voting treasury securities. Allen maintained that Oak's actions did not subvert this provision, the intent of which was to prohibit persons with a financial interest other than that of a bondholder from modifying the indenture. This is true, but only in the very formal sense that only bondholders were given the right to consent to the modification. Plaintiff's counsel argued that the consents were in fact being solicited from individuals who, if the exchange offer succeeded, would no longer have an interest as bondholders, while bondholders who did not participate in the exchange would be left with modified indenture provisions:

What makes [Oak's offer] so extraordinary is that the consents will be given by people who no longer have any interest in the very transaction that they will be consenting
to, because at the cashier's window with one hand Oak is holding out the cash behind its back and says, "Sign this consent and you get this cash. But, of course, you have got to give us that instrument." So the consent undermines the very instrument which is being given up by the debenture holder. He no longer has any interest in the transaction.\footnote{205}

Oak's actions effectively divided the bondholders into two classes with conflicting interests: those who accepted the exchange offer and gave their consents, and those who did not accept the offer and would be left with bonds containing modified provisions if the offer succeeded.

Allen's formalistic treatment of this voting provision connects with his surprising insensitivity to plaintiff's claim that Oak was effectively coercing bondholders into the exchange because of the consequences of being left with bonds with modified indenture provisions. "Coercion" figures prominently in recent Delaware law, and its application to a tender offer is a virtual guarantee that a court will uphold the target's response to the offer. Delaware courts seem to have accepted the view that a partial tender offer, i.e., a tender offer for less than all of a target's shares, is coercive per se.\footnote{206} Yet at the oral hearing on Katz's motion for a preliminary injunction, counsel for Oak stated that Oak's exchange offer was "no more coercive than, shall we say, a partial tender offer."\footnote{207} To deal with the problem created by the fact that Oak's offer could be regarded as coercive (at least in the way that partial tender offers are coercive), Allen employed a theory concerning the role of claims of coercion.

Allen regards the core meaning of "coercion" to be "the utilization of physical force to overcome the will of another . . . ."\footnote{208} In contexts that do not involve this core meaning, Allen believes the concept has "limited analytical utility."\footnote{209} Once "coercion" is accepted as covering acts "designed to affect the will of another party by offering inducements to the act sought to be encouraged or by arranging unpleasant consequences for an alternative sought to be discouraged,"\footnote{210} then only some kinds of coercion are legally problematic.

\begin{footnotes}
\footnote{205}{Argument, supra note 190, at 9 (emphasis added).}
\footnote{206}{See Interco, 551 A.2d at 797; Unocal, 493 A.2d at 956.}
\footnote{207}{Argument, supra note 190, at 50 (emphasis added).}
\footnote{208}{Katz, 508 A.2d at 879.}
\footnote{209}{Id.}
\footnote{210}{Id.}
\end{footnotes}
Thus, for purposes of legal analysis, the term "coercion" itself—covering a multitude of situations—is not very meaningful. For the word to have much meaning for purposes of legal analysis, it is necessary in each case that a normative judgment be attached to the concept ("inappropriately coercive" or "wrongfully coercive", etc.). But, it is then readily seen that what is legally relevant is not the conclusory term "coercion" itself but rather the norm that leads to the adverb modifying it.211

The merit of this view on "coercion" is that it emphasizes the need for justification. Without an understanding such as Allen's, the term risks being used as a conclusory label, requiring only a court's labeling the action as "coercive" in order to defend a target's response. Allen's analysis requires the court to justify what it is about the action under consideration that warrants calling the influence legally impermissible.

While Allen states that the legally relevant consideration is whether the coercion was improper, he does not consistently apply this position. In contexts involving possibly coercive effects on decisions by shareholders, whether the decision be to tender shares212 or to approve a proposed issuance of stock,213 Allen looks only to the question whether the shareholders have been coerced. Only in contexts involving possibly coercive effects on bondholders does Allen ask the further question whether the coercion is "permissible." The effect of this distinction is to give a board substantially greater latitude to take actions that effectively (though not "impermissibly") coerce bondholders.214

211. Id. at 880.
212. See Interco, 551 A.2d at 794.
213. See Lacos Land, 517 A.2d at 276-79 (holding it impermissible for a corporate director to influence the shareholder vote by threatening that, if the shareholders failed to approve a proposed action, the director would take actions constituting a breach of the duties he owed to the shareholders).
214. As in other areas, Allen's views on the question whether only equity holders are owed fiduciary duties appear to be in transition. In a case decided several years after Katz, Allen assumed, for the purposes of deciding a motion to dismiss, that directors owed fiduciary duties to warrant holders, even though they were not (yet) stockholders. Glinert, 1991 Del. Ch. LEXIS 215, at *108, reprinted in 16 Del. J. Corp. L. at 780-82. In several recent addresses, moreover, he has suggested that American corporate law reflects two competing conceptions of the corporation: One conception sees directors as owing fiduciary duties only to stockholders, while the other calls for consideration of other interests, including those