I feel more than a little conflicted about writing to commemorate Bill Allen's completion of his term as Chancellor of Delaware. Economists understand the inefficiencies that result when private and public benefits diverge: people seek their advantage even though the public bears more than offsetting costs. That pretty well describes the dissonance I'm experiencing about this event. The benefit to me of gaining a good friend as a neighbor, and to the NYU Law School community from the addition of this remarkable man as a colleague and teacher, are dwarfed by the cost to the entire corporate law community from losing one of the finest corporate law judges to grace any bench in a very long time. Twenty-five years ago Bayless Manning announced the death of corporate law "as a field of intellectual effort." By the sheer force of his intellect, Bill Allen has given substance to what Manning then described as "our great empty corporate statutes — towering skyscrapers of rusted girders, internally welded together and containing nothing but wind." Manning blamed corporate law's demise on the collapse of the nineteenth century notion that the corporation, like Pinocchio, was to be treated as a "real boy." Bill Allen has sought to rebuild corporate law on a more realistic and intellectually challenging foundation that recognizes the competing decision makers who contend for influence behind the corporate veil.

To be sure, Bill Allen found himself in the right place at the right time. The hostile takeover wave of the 1980s subjected the traditional structure of corporate law to the equivalent of a stress test. Driven by the most significant corporate restructuring in history, serious doctrinal cracks appeared, the most important of which concerned allocating final decision rights in the face of a hostile tender offer. As a matter of corporate law, the challenge was to apportion decision responsibilities among directors, shareholders, and courts. As a matter of social policy, the outcome

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*Charles J. Meyers Professor of Law and Business, Stanford Law School, and Marc and Eva Stem Professor of Law and Business, Columbia Law School.


2Id.

3See id. at 245-48.
would determine who governed the largest and most powerful private institutions in our society.\(^4\)

Bill Allen’s tenure as Chancellor spanned this momentous period. He became Chancellor in 1985, the year the Delaware Supreme Court decided *Unocal*.\(^5\) This seminal case announced an intermediate standard of judicial review of defensive tactics — directors had the burden of proving that such actions were reasonable in relation to the threat posed by the hostile offer. And this set the agenda for the Court of Chancery for much of Bill’s term. The choice of an intermediate standard which the trial court would use to distinguish between good and bad defensive tactics (rather than allocating that decision role either to shareholders or the board of directors) meant that the court would decide the outcome of these control contests. Thus, the Court of Chancery was left the task of not only working out just what proportionality review meant, but also of providing guidance to the legal and business communities about how the largest transactions in business history should be conducted. Discussions of the Court of Chancery’s remarkable efforts to rise to the occasion are familiar by now. On this occasion, I want to focus instead on the art of judging and the particular style Bill Allen developed.

The Court of Chancery is a peculiar institution for reasons beyond its sheltering the last remaining Chancellor in the United States. There is considerable literature about the art of judging, but beginning with Karl Llewelyn’s masterful *The Common Law Tradition*,\(^6\) most of the attention has been on appellate courts. This emphasis reflects the understandable intuition that trial courts decide cases, but that appellate courts make the law. One court focuses on the merits of a particular case, and the other shapes the rules that will influence the future behavior of a much larger number of people.

The Court of Chancery is a funny hybrid in that it unavoidably does both. Consider the spot that Bill Allen and the Vice-Chancellors found themselves in during the second half of the 1980s. Because of the high volume of acquisition activity, a large number of transactions were in the planning stage whenever a new opinion was issued. Planners promptly reflected a new opinion in pending transactions, and the Court of Chancery confronted the "next case" on a motion for preliminary injunction within a matter of weeks. Cases were often resolved under the

\(^4\)See generally Ronald J. Gilson, *Just Say No to Whom?*, 25 Wake Forest L. Rev. 121 (1990) (discussing the justifications for allowing managers to reject hostile tender offers over the objection of a majority of the shareholders).

\(^5\)*Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

pressure of market forces before the Delaware Supreme Court could hear an appeal. Thus, the Court of Chancery was, de facto, the court of first and last resort for many takeover contests and was restructuring corporate law on the fly. At the same time, the Court of Chancery had to remain sensitive to the views of a supreme court that was less experienced with the dynamics of control transactions, especially in this hectic period.

What merits comment — because it goes to the art and craft of a judge — is how Bill Allen managed this complicated position. On one hand, he provided guidance to the legal profession and the business community about how new types of multi-billion dollar transactions should be conducted and, on the other, he kept the Delaware Supreme Court at bay so that a coherent body of law could be developed and maintained. Readers may see in my comments a substantive preference for the Court of Chancery’s view on these matters, as opposed to that of the Delaware Supreme Court, and that is surely right. However, that is not the ax I mean to grind today. For now I mean only to praise the Herculean efforts of Bill and his colleagues.

Two examples serve to illustrate how this fine line was walked. The first is Bill’s practice of delivering lectures on how transactions should be conducted, even if the transaction whose review provided the opportunity for the lesson in dicta was not so flawed as to require judicial intervention. The second is his unsuccessful effort in Time-Warner to preserve the Court of Chancery’s takeover jurisdiction from incursion by the Delaware Supreme Court. Correctly reading the Delaware Supreme Court’s tea leaves, Bill declined to interfere with the transaction but carefully (too carefully it turned out) crafted the opinion to reach this result without doing too much damage to the decision-making allocation emerging from Court of Chancery opinions.

Transaction Planning Guidance Via Dicta

The task of providing guidance on how to conduct future transactions by means of lecture rather than outcome appears quite clearly in the Chancellor’s opinion in In re Fort Howard Corp. Shareholders Litigation. The opinion ultimately rejected claims that management manipulated the transaction process to favor its MBO proposal at the expense of a higher price for shareholders that might have resulted from

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a more even-handed process. However, the deficiencies in a transaction process were noted with care:

I am unable to conclude provisionally that the Special Committee was not motivated throughout to achieve a transaction, if there was to be one, that offered the assurance of being the best available transaction from the point of view of the shareholders. . . . Rarely will direct evidence of bad faith — admissions or evidence of conspiracy — be available. . . . [But h]ere, there are aspects that supply a suspicious mind with fuel to feed its flame.

It cannot, for example, be the best practice to have the interested CEO in effect handpick the members of the Special Committee . . . . Nor can it be the best procedure for him to, in effect, choose special counsel for the committee . . . . It is obvious that no role is more critical with respect to protection of shareholder interests in these matters than that of the expert lawyers who guide sometimes inexperienced directors through the process. A suspicious mind is made uneasy contemplating the possibilities when the interested CEO is so active in choosing his adversary.10

Fort Howard also provides evidence that the technique worked — i.e., that transaction planners took the Chancellor's "advice" seriously. Skadden Arps represented the Fort Howard Special Committee and could hardly have relished the opinion's implicit criticism of their advice. When the firm undertook the same role in the RJR-Nabisco transaction, the Fort Howard advice was scrupulously followed. In their account of the transaction in Barbarians at the Gate, Bryan Burrough and John Helyar explicitly credit this judicial lecture on how to properly conduct an MBO for the change in conduct.11

Such self-conscious attention to influencing the conduct of future transactions, independent of the case before the court, gives special meaning to the phrase "mere dicta." In the fast moving environment into which events thrust the Court of Chancery, traditional common law

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9 Id. at *6, reprinted in 14 Del. J. Corp. L. at 705.
accretion of precedent was too slow to help. The Chancellor’s instrumental use of dicta, directed explicitly at transaction planners, was a creative and elegant response to the problem of keeping the law moving at a pace at least close to that of the market.

Protecting Court of Chancery Doctrine from the Delaware Supreme Court

In Interco, Chancellor Allen laid out with some clarity an allocation of decision-making authority among shareholders and directors when confronted with a hostile takeover. Directors were allowed to keep a poison pill in place while alternatives were investigated but, in the end, shareholders had the final say over whether to accept the offer. Management’s job was to carry on the business of the corporation. In particular, management could exercise its business judgment concerning whether it was in the best interests of the shareholders to sell important divisions: the Chancellor declined to enjoin management’s proposed sale of Interco’s Ethan Allen division, even if that sale would discourage the hostile offer. The shareholders’ job was to decide whether to accept the hostile offer: the opinion required that the Interco directors redeem the pill. Then came Time-Warner.

Assume with me that it was apparent that the Delaware Supreme Court, one way or the other, would allow Time management to complete the Warner acquisition even if Paramount was offering Time shareholders significantly more money for their shares than the post-acquisition value of the combined companies’ shares. How could the transaction be allowed to proceed without undermining Interco? The Chancellor gave up some ground in agreeing that Paramount’s hostile offer threatened Time’s interest in achieving its long-term strategy of a business combination with Warner. But he recovered it with his treatment of the proportionality leg of the Unocal test. The opinion repeatedly emphasized that Time’s defensive tactic consisted solely of implementing its business plan. The opinion stressed that nothing precluded Paramount from tendering for the combined Time-Warner other than the peculiarities of the particular transaction — specifically, the sheer size of

13Id. at 790-91.
14Id. at 800-01.
15Id. at 803.
such an offer, and the need for regulatory approval of the transfer of Time's cable franchises.\textsuperscript{17}

This may be quite an unusual result. Most business plans, however implemented, will not deter a hostile offer. If the plan is value creating, the bidder will continue it after the offer. If not, the bidder will terminate it after the offer, reducing its bid to reflect the anticipated loss. To actually protect a long-term strategy typically will require something more than merely its implementation.

That means a poison pill. And here the Chancellor's opinion directly tracks \textit{Interco}. In concluding that the Warner acquisition was reasonable in relation to the Paramount threat, he stressed that the defensive aspect of the transaction was self-implementing: "Because of the timing involved, the board has no need here to rely upon a self-created power designed to assure a veto on all changes in control."\textsuperscript{18} And lest anyone miss the point, Chancellor Allen appended footnote 22 to that sentence: "Thus, in my view, a decision not to redeem a poison pill, which by definition is a control mechanism and not a device with independent business purposes, may present [more] distinctive considerations than those presented in this case."\textsuperscript{19} In \textit{Interco}, he declined to enjoin the target's sale of a key division, finding that the sale was a reasonable response to the claim that the division was undervalued by the hostile offer, but still required that the target redeem its pill, an outcome that left the business plan without protection against a hostile offer. In \textit{Time}, he declined to enjoin the Warner acquisition, but stressed that pursuit of that business plan was not protected by a poison pill against a post-acquisition hostile offer.

This was a very clever doctrinal two-step. Unfortunately, it proved too clever because the Delaware Supreme Court never seemed to understand it. The Delaware Supreme Court began its \textit{Time} opinion by apparently misreading \textit{Interco}. Responding to the claim that inadequate value alone was insufficient to constitute a threat under \textit{Unocal}, the court, referring explicitly to "\textit{Interco} and its progeny," stated that such a position represents a fundamental misconception of our standard of review under \textit{Unocal} principally because it would involve the court in substituting its judgment as to what is a "better" deal for that of a corporation's board of directors. To the extent that the Court of Chancery has

\textsuperscript{17}\textit{Id.}

\textsuperscript{18}\textit{Id.} at 93,284, \textit{reprinted in} 15 \textit{Del. J. Corp. L.} at 749.

\textsuperscript{19}\textit{Id.} at 93,284 n.22, \textit{reprinted in} 15 \textit{Del. J. Corp. L.} at 749 n.22.
recently done so in certain of its opinions, we hereby reject such approach as not in keeping with a proper Unocal analysis.20

The Delaware Supreme Court’s understanding of Interco is right to the extent that the case is about allocating decision making in connection with a hostile offer. But it is flatly wrong about the parties among whom Interco chooses. Interco does not substitute the court’s judgment of a better deal for that of the board’s. Rather, it prevents the board from substituting its judgment on that subject for that of the shareholders.

Given the prologue of a confused swipe at Interco, the Delaware Supreme Court’s analysis of Unocal’s proportionality leg is especially perplexing. Chancellor Allen rested his conclusion that Time’s response was proportional on the fact that the acquisition did not foreclose shareholder choice — no poison pill prevented Paramount from making a post-acquisition offer. Like Interco, the issue was shareholder choice, not the Court of Chancery’s choice. But despite its misguided denigration of Interco, the Delaware Supreme Court then essentially adopted the Chancellor’s proportionality analysis: "The Chancellor noted that the revised agreement and its accompanying safety devices did not preclude Paramount from making an offer for the combined Time-Warner company . . . . Thus, the response was proportionate. We affirm the Chancellor’s rulings as clearly supported by the record."21

The two Time-Warner opinions demonstrate Bill’s mastery of another element of the art of judging: a trial court charged with the responsibility of remaking corporate law protecting the result from a less sophisticated appellate court. In this case the effort failed, but rarely has both the attempt and the reason for it appeared so starkly. Indeed, in time even the Delaware Supreme Court recognized the relative merits of the two opinions. When the Delaware Supreme Court returned to the issue of what triggers Revlon in Paramount Communications Inc. v. QVC Network Inc.,22 it was the Court of Chancery’s analysis that stood the test of time, in both senses of the word.

20Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140, 1153 (Del. 1990). (citations omitted)
21Id. at 1155.
22637 A.2d 34 (Del. 1994).