Technicolor, Caremark, Interco, & Blasius:
William Allen Interview

MR. ROWE: We are here this afternoon with William T. Allen, the former Chancellor of the Court of Chancery of Delaware, who has been involved in his career as a judge in making an enormous amount of significant Delaware law, M&A law, and is the author of many of the opinions that are considered absolutely groundbreaking opinions in the field. Thank you very much for being with us this afternoon.

I'd like to start by taking you to a decision that you did not write; the Revlon decision. But you wrote a number of decisions interpreting it over the years, and I was wondering if you could give us some insight into what you were thinking about as you looked at the legacy of the Revlon decision as practitioners and judges were trying to, essentially, figure out what it meant and giving shape to it in cases like Barkan v. Amsted, Fort Howard, J.P. Stevens, and similar cases.

MR. ALLEN: Certainly. Well, I am happy to be here, Paul, and spend some time with you and to talk about the past in the development of Delaware corporation law. Although this is 2018 and you send me back almost thirty years, my memory, I am afraid, is not good enough to give great detail. But I, like I think, many lawyers – corporate lawyers, were surprised

by the cases of 1985 in the Delaware Supreme Court that upset the status quo: Revlon, Unocal, and others, Smith v. Van Gorkom being the first one. And to understand what all that meant was hard. It took, in fact, in the history, maybe ten years before it began to become clear. Or I say, it began, in my case, to become clear, in 1988. I didn't have any Revlon cases that I recall. I went on the bench in 1985, and I didn't have any cases that forced me to face the doctrine until 1988.

In a personal way, I thought that the Revlon case, specifically, was a radical holding. We had become, learned – I practiced law at Morris, Nichols, Arsht, & Tunnell; and we learned the corporation law under the guidance of the senior corporate partner in those years, Sam Arsht. And we understood the business judgment rule as foundational. And suddenly, in Revlon, we had a case where what looked like a disinterested board was not accorded the business judgment rule respect, but some other form of review was being applied, and it wasn't clear in the case – I mean it was a badly rationalized opinion. It wasn't clear whether there was a duty of care that had been violated or whether some other aspect of good faith was involved; loyalty? So, I didn't really deal with the case until 1988. And as you said, in 1988, as the takeover movement was very active in those years, a number of cases came into the court and to my desk. Amsted v. Barkan was probably the

first; it was a settlement case. And after that, there was a J.P. Stevens case, the Fort Howard case, the—

MR. ROWE: General Instruments?

MR. ALLEN: General Instruments case, you see how my memory is. [0:05:04] So, there were a series of them. And the Barkan case went up to the Supreme Court, and there, the Supreme Court wrote an opinion that famously said there is no one way to sell a company. Before that, plaintiffs were coming into the Court of Chancery and arguing that if you were going to sell the company, whatever sell the company meant, that was an issue, but if you were going to sell the company, you had to have an auction because there was language in Revlon that seemed to maybe suggest that. And I knew that couldn't possibly be the rule. And so, in Barkan, the court, affirming the Chancery Court opinion below, had this opinion that there was no one way to sell a company. The business judgment rule was something that was inescapably available to boards when they were faced with this most important type of transaction, if the board was fully informed and not conflicted.

Later – so, I tell my students, I teach, actually, corporation law at NYU these days - I tell my students that while that doctrine is called the Revlon doctrine, it could just as well be called the Barkan doctrine because Barkan is a truer representation of what the board's duties are with

respect to a change in control. So, those cases helped me to understand. I thought that Revlon had gone too far and should come back. And, indeed, the history, I think, has shown that the Revlon case was like a rocket going into the sky and then slowly emerging back to earth. And it emerged back by 1994 in the QVC case; it came back quite a bit. And finally, under the tutelage of the current Chief Justice, Justice Strine, it's been reformulated completely, both in Chancery, when he was in Chancery, and in the Supreme Court.

[0:07:34] So, we have now returned – those 1985 cases, Revlon particularly, has now been shrunk a bit in significance, and it's more clearly understood. In fact, we have academic writing now that sort of decries the fact that the Delaware Supreme Court has pulled that back to earth. But I think that is a mistake. I think that what the Supreme Court has done is, in 2014, 2015, and 2016, is very positive, and so, I am rattling on a little bit, but I think the history of the Revlon case is the history of an ill-conceived, that is ill-rationalized felt response to certain economic factors that took a long time for the bar and the courts to work out what it means. And what it means now is simply that when the transaction is as important as a change in corporate control, then the courts will demand attention to what's going on, not in a deferential business judgment way, but in the more

intrusive kind of reasonableness review. Let me stop with that.

MR. ROWE: Well, one of the things that has always interested me about the Revlon opinion, and is its, to me, it's partly an example of how when a court writes an opinion with very memorable language, that the language and the metaphors almost take over what the doctrine might be. So, just by using the word 'auction' and 'auctioneers,' that gave everyone a sense of well, we know what an auction is. You go out on the courthouse steps, and anyone can bid. And do you think that's not what they meant at the time? Or just that the metaphors they used got away with them – or - in effect?

MR. ALLEN: I think what you say is correct and the reason it's true, is that lawyers are advocates, so that one side or another will take whatever they can get and use in their opinion and use it as ammunition. I don't think they thought that deeply about what they were doing. I think they were dealing with what turned into an auction. And so, in expressing in their case, if there was an auction going on, they had language then about an auction case. But they didn't limit their holding to auctions. So, I think it confused a lot.

And in clarifying that, maybe this is a time for me to make a point that I made in some of these Revlon cases,

[0:10:52] which is that it was particularly interesting during this period that there was a kind of back and forth. And I think it's true today as well, between the Delaware courts and the corporate bar in New York City, principally in New York City, but also in Chicago and Los Angeles, and other places, in which the court was more or less talking directly to the corporate lawyers who were doing these transactions about how the courts thought they should be done correctly, but not by the mechanism of judgments against parties, but through language and opinions that tried to instruct the lawyers how to do it right. So, for example, I remember only because I reviewed the opinion in connection with this session, in the Fort Howard case, which was in 1988 and the Revlon case wasn't very old at that point, there were many things about the way that transaction, which was a management-affiliated buyout of Fort Howard Paper Company, there were many things that were less than perfect, I thought. The CEO was involved in picking the committee, the lawyers did this, that, or the other thing. But the transaction was negotiated, and there was a walk right, and there was enough time; the market knew about it, no one came in. It was not an appropriate situation to try and enjoin a transaction. But the way it was done was not perfect.

And so, I wrote in that opinion, well, this gives rise to suspicion. This gives rise to suspicion. And so forth,

and so on. [0:12:47] And this is just why – why does the judge say that? Who cares? Well this is just a direct message to the New York lawyers that don't do it this way. And I wasn't the only judge that behaved in this way. So, there was a way in which the opinions were meant to guide the bar to move towards a template of selling companies which would be reliable for the courts, and reliably deliver a transaction with integrity for the shareholders. So, for those who, for law students or others who think of law as just a kind of a blunt instrument in which there are judgments and damages at the end of it, the fact is that the law grows through a sort of a conversation in the opinions as well as through the strict damage remedy.

MR. ROWE: And that, actually, triggers a thought in my mind about another case, I think it's from 1990, Solash v. Telex, where, I believe, if I am remembering it right, you basically said in response to shareholder challenges based on Revlon-type claims that if there is no one offering more, I am not going to issue preliminary injunctions because that could hurt the stockholders. But in the course of that, because of the way a preliminary injunction standard works, you were able to say, here is what I think about the merits, and yet not issue an injunction, much less damages.

MR. ALLEN: Yes, exactly. That case, which I haven't thought of in a long time, was one of the first ones I

remember in which it became clear that we were not going to issue injunctions – preliminary injunctions unless there was another deal out there. Which was another way of saying that Revlon is an auction case, not a case in which you can get a remedy if there wasn't an auction going on. But yes, in that case, too, I used the opportunity to try and instruct as to how to go about selling the company in a way that judges would be more likely to find it unproblematic.

MR. ROWE: And one thing that changed, I think, the period where we're dealing with is really, say, 1986, when the Revlon written opinion came out until this late eighties period, and maybe three or four years. Well, one of the things that changed was at the beginning of the period, the cases are dealing with tender offers and unilateral board responses. Whereas by the end of this period, by the time you're talking about the cases that have been mentioned, we're talking about voted-on merger transactions with fiduciary outs in merger agreements. And so, at that point, I mean was it important to you that now that the stockholders basically have a veto – and this is something that is developed through Corwin and the cases you mentioned of the 2014 to 2016 period; but in a sense, the seed for that, in my mind, and I wonder if you agree, was planted when the types of transactions switched

from being tender offers and unilateral board responses to being challenges to friendly mergers based on a Revlon theory. [0:16:39] MR. ALLEN: You know, Corwin is a recent case from 2014, I think, which some people have criticized, which I have not criticized, and I think is a very good case. The Revlon – it's funny how people didn't seem to focus in 1985 to 1988 or '89 on these fundamental things; that Revlon is a case about auctions, for example. That it's not a case that requires an auction in all cases.

One of the things we also, it came out, I guess in this Roberts v. General Instruments opinion that I wrote, that in the early years, the plaintiffs were all complaining about the process that the board was going through in selling a company. And in Roberts, I said, well, we don't have to look at what the board did in selling the company; we have to look at whether it did an auction or a market check. We have to look at the time when the contract gets signed. So, if what the board did was such that by the time the contract will close, the market will have been thoroughly checked, that's good enough. So, it's the closing, not the signing that matters. So, that opened up the possibility that market checks were a way of satisfying any obligation to make sure you have good information from the whole market.

So, it was very gradual that piece got laid on to piece, and since they were all preliminary injunction cases, it came long before the vote. And I don't think, in those days, that judges felt that if the process had been flawed up to that point, that you needed to do nothing because of the shareholders, if they don't like the deal, can say no. Because the shareholder vote is a vote on whatever the board presents to them. And if the board is presenting – I think the feeling was, if the board was presenting a flawed option, it wasn't satisfactory that the shareholders could conceivably say, no, because by the time the vote occurs, you have a new group of shareholders, many of whom are arbitrageurs, first-time holders. A better policy is to make sure that the process, up until the signing, is fine so that the shareholders, when they do vote, vote on something that there is some – one has enough belief that it is a sound process. Have I responded, Paul, to your inquiry?

MR. ROWE: Oh, absolutely, yes. I think we should move to Time Warner, or Paramount Time Warner, whatever people want to – each of these cases has two or three different names. And that was certainly a case that gave you the opportunity to also interpret Revlon because Revlon didn't use the term change of control, it used terms like sale of the company and breakup and I think it's fair to say you

introduced and made the concept of change of control the linchpin in your decision at the trial court level, is—

[0:20:44] MR. ALLEN: Yes. I mean the two issues that Revlon raised, specifically, were what triggers this Revlon review? And, secondly, what does it entail? And those questions were not altogether clear because the concept of sale is – or sale or breakup - are not really technical legal concepts. Time Warner, to step away from your question a little bit, was one of the most intense opinions or cases that I had. And one of the reasons it was so intense was it was in the summer, and my wife and I had tickets to go to France. And you know when you're a judge, when you're a practicing lawyer, if the client makes you miss your vacation, you just charge the tickets to the client. But when you're a judge, if you paid for the tickets to go to France and you can't make it, you suffer a loss. So, I wasn't about to suffer a loss, and so, we scheduled that case.

It was very intense, multiple tracks of depositions going on and coming in and being filed, and I would read the depositions as they were coming in. And then we had an argument. In the argument, the court was filled with people and reporters, television and cameras were outside; they weren't allowed inside. So, it was very intense, and I had a long argument, and I can't remember exactly, I think maybe

Herb Wachtell might have made one of the arguments, I think Charlie Richards may have made an argument – good lawyers. And then I only had, I don't know, four or five or six days to write an opinion. So, in honesty, I had started writing up the uncontroversial aspects of the case before the argument, the facts. And as I went back and looked at that opinion the other day, I saw I had too many facts in there. I mean I could tell I wrote them, it was with plenty of time to write the facts up. As I say, the facts weren't very controversial, and I got them out of the depositions and stuff.

But then, I had to write the opinion, and I didn't have very much time. And I remember sitting in my kitchen table; I was so intent, I was dreaming about that case, believe it or not. I mean it was just – everything was in my brain. So, I wrote this opinion very quickly. And it had the Revlon issue and the Unocal issue. I won't go into the facts, I assume if there is anybody who may be so interested in this old history of this case, you understand the case, so I won't bother to tell you about it. [1:34:08] But the fundamental question was, well, does a, two public companies who have, with no conflicting interest, have decided to bring their companies together, originally in a stock-for-stock merger, and then, which requires a shareholder vote, and then before they can execute their strategy, a hostile third party makes

an all-cash offer. Should those companies be required to step away from their strategic alliance in order to give the shareholders a one-time opportunity to get a lot of cash? I mean it was a very large premium over the price.

And by this moment, those shareholders are to a large extent arbitrageurs, short-term investors. So, there is no question that if at this moment you say, okay, let's ask the shareholders; they own the company, what do they want? They would have said, we want the money. No question. So, what is the law required? And this immediately brings you to a philosophical question. What is this corporation for? What is it? And who gets the say? And the idea that the shareholders are owners and they always get the say is a simplistic understanding of the law. That is not the law. A corporation is, as I may have said in that case, a republican form of government, it's not a town meeting. The shareholders don't get to have a say every time they want to have a say.

And so, at that level, I thought the case – I knew the case would be unpopular if I held that the board could do this transaction, that it would be unpopular with the capital markets, with the investing public. But I thought that was the right thing. The doctrine is another level down. On the Revlon, I said, well this, [1:37:09] there is a Revlon case here, and the question is, is Time selling itself in this

transaction? Or, more correctly, is there a change in control, which triggers Revlon? Revlon meant what? Revlon meant that instead of having whatever time frame the board wanted to maximize future value, they had to maximize value now. So, if that's what Revlon meant, that this transaction required them to maximize value now, if they maximize value now, that means they have to go for the cash bid, which was clearly a lot more money.

And what Time said, and I think it was later affirmed, but I think it was obviously true, that there was no change in control over Time or Warner in that case, because there was no controlling shareholder in either company. Control was out in the market. And that after this transaction, all the standing shareholders would have stock in the market, so it was not a change in control. And so, that case helped to define a change in control. As a corollary of that, is that a stock-for-stock merger is never a change in control unless there is a controlling shareholder in the company. And I think the Supreme Court later held that in the Santa Fe case or, Larry, however, may actually tell us what the case was.

MR. ROWE: QVC.

MR. ALLEN: No, it was—

MR. ROWE: Oh, earlier—

MR. ALLEN: Earlier in Santa Fe. But, so there was a Revlon case, and then there was a Unocal because what happened, as anybody who is familiar with the stuff knows, that once the big Paramount bid came in, they could no longer get the shareholder vote. And they refashioned the deal as a tender offer by Time for the shares of Warner Communication. And an interesting issue was well, is it a breach of duty for the board to take steps to refashion a deal just to avoid the shareholder votes they know they are going to lose? Now, people around this table could disagree about that. I mean, I could understand somebody saying, well, look, just if you know what your shareholders want, and you know how they are going to vote, how do you refashion your deal to avoid their opportunity to do that? And that immediately brings you to the same philosophical question, you know, what is this institution of a corporation? And is it a town meeting? Do the shareholders own the company in that sense, that it's disloyal to refashion the company to take legal action that you are entitled to take in order to do a transaction that the board in good faith believes is a long-term, beneficial transaction, if you know the shareholders who currently own wouldn't approve of it.

And my answer was, no. And that's because the corporation is not a town meeting, it's an institution,

responsible, and the shareholders have power with respect to this institution, but it's not the same power that an owner has with respect to property he or she may own. So, as long as the board was acting in a good faith and informed belief that what it was doing was in the long-term best interest of the institution, it should have the power to do so.

And so, once you believe that, then it is pretty easy to take the Unocal test and say, is this reasonable in relationship to something? Because these words, reasonable in relationship to threat, you know, they're not – they don't apply themselves. They are driven by some conception of economic and moral utility. And so, what was driving the decision in the Time Warner case, on the Unocal side, was the vision that I just expressed about what the institution is about.

All right, so that's all I have to say about that for the moment.

MR. ROWE: You mentioned earlier that there was a sense among you and other Delaware judges that it was useful to send messages or have a dialogue with the practicing M&A bar in New York.

MR. ALLEN: Yes.

MR. ROWE: And you also mentioned in talking about Time Warner that you sort of knew or expected that the capital markets might be critical of the outcome.

MR. ALLEN: Yes.

MR. ROWE: Were those sort of considerations – did that go both ways? Was that something that you think the courts during this period were sensitive to, how these decisions would be perceived and either criticized or acclaimed by capital markets participants?

[0:33:02] MR. ALLEN: No. That is – I generally believe, and I think most judges believe in, more or less, efficient capital markets. But that doesn't mean that I believe that the people who are buying – the individuals at Goldman Sachs or at institutional investors - are the audience for which you operate. I think the law should move towards efficient arrangements, but I don't think the capital markets necessarily, immediately, recognize efficient arrangements. They generally do over time. So, when I say that I think the capital markets would disapprove of the Time Warner result, it's because the guys at Merrill Lynch or Goldman Sachs are just market-oriented. They are not oriented towards legal rules and the long-term structure that legal rules create in which transactions and institutions are done and formed.

So, no, if the market goes down or it goes up, I don't think it should be a concern for lawyers or judges as long as they feel secure about the legal side of what they are doing. I think the legal stuff should be consistent with long-term wealth creation in the corporation law area. But any one transaction may not be. You're concerned about the rules for the system.

MR. ROWE: Did you have any particular reaction to the Supreme Court's affirmance in Time Warner and how they approached those issues?

MR. ALLEN: I am sure I did but... I might say, by the way, on the point about the – [1:45:05] when I left the bench in 1997, I don't know what year Time Warner was, from 1990 or something?

MR. ROWE: The opinion came out in 1990, the written opinion in the Supreme Court.

MR. ALLEN: I came up here to New York, and I was attending some event – a conference or something - and the guy who was the head of M&A at Goldman Sachs at the time, who I knew a bit, but not much, was up on the podium. And he used the Time Warner opinion as an example of how courts can get things wrong. And he used graphs of the stock price to show how it went up and how it went down and so forth. And he's perfectly right according to his paradigm, his market

paradigm. But I don't think Time Warner was a mistake; I think it was the right thing, although the arbitrageurs lost money. They would have made more on the Paramount transaction, but it's just a different paradigm. And if the question is what leads to long-term social benefit, well, we could argue about that. And I would say that the approach of the legal system is probably fine.

Now, remind me what the question was, I always get P-O'd at the Supreme Court. [0:36:41] Well, I am frank to say that the Delaware Supreme Court, in that period, from 1985, when I want on the bench, let me say until Norm Veasey became the Chief Justice, in some period, I don't know when; 1991 or 1992 or 1993. The opinions were mystifying, generally. For a long time, my own impression was, I had come from a very good – a high-prestige firm in Wilmington. And I had taken a high judicial office in the state - Chancellor, so it had high status. So, for quite a while I think the Supreme Court treated me with a certain amount of kid gloves; I had no reversals. At some point, I started getting reversed. And I couldn't understand, and I used to say this to Jack Jacobs, who was a Chancellor on the court when I was, about their opinions. I would say, let's listen to the music, not the words, not the lyrics. Because you could kind of try and figure out what they were getting at, but you couldn't – I

couldn't - parse the opinions. I couldn't parse that Supreme Court opinion. Although they went out of their way, and you will probably get to the—

MR. ROWE: Interco—

MR. ALLEN: -- Interco case, they went out of their way to address Interco. But their opinion on the Revlon side of the case, there is really not much point in trying to figure out what was going on there because the next time they got a chance, in Paramount – QVC, the plaintiffs in Paramount QVC relied explicitly on what they said in the appeal in Time Warner. And then, on the appeal in Paramount, the lawyer gets up and wants to – I saw a videotape of it - and wants to tell them about what they said in Paramount – in Time Warner. And Justice Moore said, but didn't we say, and something just – say that we are not going to apply that here. And so, then you see the opinion in Paramount - QVC goes back to essentially what I had said in the trial court in Time Warner, that the sensible way of figuring out whether it applies is whether there is a change in control and the change in control; a stock-for-stock deal is not a change in control.

And so, on the Revlon thing, they said some stuff, and even if I read it now, I can't quite understand it. I think there is a limited – it's not true of the court now, I am very happy to say. But Supreme Court opinions, what they

did from a political-economic point of view is quite defensible and probably good. From a doctrinal point of view, I don't think they cared about it, you know, there just wasn't much guidance, I didn't think, of how lawyers should proceed.

MR. ROWE: Let's talk about Interco, which is a case that has, I think, an enormous group of admirers among academics, and maybe among some judges—

MR. ALLEN: But not at Wachtell Lipton where we happen to be sitting right now.

MR. ROWE: And not, as you point out, in the Supreme Court in 1989 and 1990.

MR. ALLEN: Right.

MR. ROWE: So, was Interco a case where you had been thinking for a while about what the poison pill should be allowed to do and where it needs to stop and so forth? And that was just a case where you found enough of the facts, you know, an all-cash, all-shares offer. Or was this something that you developed in that particular litigation as you judged it?

[0:41:31] MR. ALLEN: Well, no, I didn't have an agenda when I came to that case. I was too busy to have like a list of things I wanted to accomplish. I was just trying to decide cases. And that's why I say I didn't really think about Revlon until 1988. It was out there, but I didn't have an occasion to

deal with it. Unocal was also something of a mystery to me. But the poison pill, it did seem to me a radical innovation. I said before I went on the bench, I was at some conference with Marty, or maybe I was a judge, but I said it really was audacious. And I think it was audacious. And history has shown it has had some utility and has not really done what free market-oriented thinkers thought it would do, which is stop useful merger transactions. The studies show that it doesn't really stop, and it may raise the prices a little bit, but it gives an opportunity for boards to bargain.

But, and this wasn't – Interco was not a just say no case. It was not a case where the board said, we're not talking to you, we're not doing anything, just go away. It was a case, and the reason you can't get a just say no case is because markets force, and because boards are made up of people who, to some extent, believe in the fundamental ideology of American capitalism, and they know they are going to be elected or not elected. So, when you get a big offer, and it stays out there for a while, the market forces them to do something. And so, when they didn't want to negotiate the deal, what they wanted to do in those days, and I don't know if you see that in the stuff today, they did a recap transaction. They say, okay, shareholders, you want to get the premium; we don't think that's really a good deal for us, for

you, but we will reorganize things that gives you like a big bunch of cash now as a special dividend, okay? A little meat to the lion.

Once you do that, this is what I thought, and still say, you have come up with an alternative transaction. A takeover says I want to give you a lot of cash now, or I want to give you stock and cash, and the board says, no, we want to stay in control; re-do things and give you smaller cash, stub share, some other stuff. So, you have two transactions; so, it's not just say no.

[0:44:49] In my mind, the pill was a perfectly legitimate device to give the board time to negotiate a better deal or to give them time to collect the – make another alternative that the shareholders may think is better. But it shouldn't be, and this is the normative point in which the Delaware Supreme Court said, eh-eh-ah-eh, you're wrong. It shouldn't be a thing that says, no, we're going to stop that and give you this. So that was my thinking. So, that meant that if you have enough time to get an alternative together, and if this other deal is not structurally coercive, then that is exactly the moment when you would say, okay, now is the time to pull the pill. And that's what happened in that case.

And then, two or three weeks later, Justice Duffy was appointed to Chancery, and he also ordered the pill to be

redeemed in the Pillsbury case. And Justice Jacobs may have had a case later in which he also required it; I don't recall. But this, obviously, was not what the creators of the pill had in mind. I say that because I know them personally. And because Michael Schwartz, who is really a brilliant and energetic lawyer, argued the Interco case to me. And he was not only brilliant but charming during the argument, as I remember; and then a day or two later, we came for the form of order conference, and we had to have it in the court because it was a big deal. And Michael was just so annoyed with me, I mean you could almost see his anger. So, the case was a big deal.

But, I thought it would be appealed, and the Delaware Supreme Court would have their say. I mean, I had no desire to have my hand writing all the rules. I just did my part. An appeal was taken, but the plaintiffs were being financed in some way, and something happened to their finance; I heard rumors later. Anyway, they dropped the whole thing. So, the Delaware Supreme Court didn't have a chance to work their magic on that case, and it stood for a while. And you know, it was warmly embraced by academics, I mean, my friend Lucian Bebchuk is my friend because I wrote Interco, probably, you know, if for no other reason. But, so they didn't get a chance.

And then, Time Warner happened about a year or two later – the times are a little unclear to me. And so, if you look at my opinion in Time Warner, almost the first sentence in the opinion was, nobody is relying on a poison pill here. It's not an issue in this case. I had a suspicion that the Delaware Supreme Court might not like Interco. And then, on the appeal of Time Warner, even though the poison pill was not relied upon, the Supreme Court went out of its way to say, in some of its recent cases it's clear Chancery had fallen into error because – after I finish this, Paul, remind me to talk about this substantive course that I do – because it has taken upon itself to make the choice of what the company should do by forcing the pill to be redeemed. In which I thought was really an unfair characterization of what was going on because what was going on was the court said, no, now in Interco, now it's the moment for the shareholders to choose. [1:59:37] The court didn't dictate the result. And in that case, in Interco, the economics of the two alternatives, the recap, and the cash offer, were such, if you read the opinion, you know this, that reasonable people could have said one was worth more than the other was worth. The market was valuing things. So, it was not clear what the choice would necessarily be. Let me go back to substantive coercion—

MR. ROWE: To Gilson & Kraakman.

MR. ALLEN: Yes. So, really, I am not sure who the audience for this is but—

MR. ROWE: You can assume a wide variety of people of many interests and—

MR. ALLEN: People – I don't know who is interested but I'll tell you this. So, this is kind of amusing. Well, amusing in the way that anything on this subject can be amusing. I have been friends with Ron Gilson for 30 years. And my co-author for my book is Reinier Kraakman, and Kraakman and Gilson are friends. So, they sent me this when I was doing Interco or Time Warner, I have forgotten which. They sent me a draft copy of an article they were writing, and I looked it over; I didn't spend much time on it. Ron Gilson writes beautifully. Everything he writes, he writes well, and Reinier is a very, very sound thinker. So, at some point in one of those opinions, and maybe you can tell me which one, I cited their article. And the reason I cited it is, is not because it – I cited it more than once, maybe twice – I cited it because they were nice guys and they sent me the article; they were my friends, it was smart. I didn't disagree with it. And they had in there this concept of substantive coercion. Now, Gilson and Kraakman, to locate them on the intellectual—

MR. ROWE: Spectrum.

MR. ALLEN: Spectrum, thank you, Paul. They are not Bebchuk. They're not so shareholder-oriented as Bebchuk, but they are like all academics, they think shareholder choice is a good idea, and so they are trying to analyze things. And they say, well, if there – the pill should stay in place if you have coercion, but then they come up with this idea, this phrase – I can't say an idea, I just say a phrase – of substantive coercion. Coercion can be actual structural, or it can be substantive. What is substantive coercion? Well, according to the Supreme Court of Delaware, anyway, I'm not – remember what Ron and Reinier said, substantive coercion is that shareholders, when given the choice, may make the wrong choice. They may not follow the board's recommendation. In what sense that is coercion, I will never understand. And how people as bright as Reinier and Ron could use that word, coercion, in that context, I don't understand. It was a great mistake because they were not, from a policy point of view, they were not in favor of keeping poison pills in place forever or indefinitely. But they said that it could be substantive coercion.

[0:53:36]

Well, the Supreme Court grabbed hold of that idea and said that the Court of Chancery in some recent – said in the Time Warner appeal – the Court of Chancery has fallen into

the mistake of exercising its own judgment. But in fact, they shouldn't because the pill here is protecting against a risk of substantive coercion. That is that shareholders may not be smart enough to follow the advice of the company.

Well, I think that falls of its own weight. I don't see it, as I say, I mean, that I don't think is a system that we have in which because the board believes one thing that shareholders must – and now - I don't know how much time we have left, but—

MR. ROWE: As much as you want.

MR. ALLEN: So, this idea of substantive coercion, by the way, explains a bit of Blasius, which is the next case probably we're going to get to. Because what the Supreme Court said in Time Warner was that the board's judgment, if it's not followed, can be forced upon the board because the mistakes that the shareholders were making is being coerced by I don't know what—I really don't know what. So, that's how they reversed me in Time Warner.

Now, how does that relate to Blasius? I mean, I mean if you're not deeply into the weeds of this, you have already turned off this video. So, can I turn to Blasius then? Is that on your list?

MR. ROWE: Absolutely. It is. Very much so.

[0:55:48] MR. ALLEN: So, Blasius – I'll tell you, Blasius was an opinion that was maybe the hardest decision I had to make in the corporate law area. It had to do with a board of a company that had just gone through a reorganization and gotten rid of some businesses and had some other businesses, and they kept some gold mining businesses. So, Paul, you should have bought Blasius stock back in the day.

MR. ROWE: I should have bought their product.

MR. ALLEN: [*00:56:37*]. So, then you go into a reorganization, had a new president, a new CEO, and before they had gotten a chance to see how their reorganization was going to play out, was it the Rales Brothers? Anyway, it was some Drexel Burnham-financed guys, got control of the company called Blasius Industries, the, excuse me, the company was Atlas Mining or Atlas, something like that ... So, Blasius was controlled by some finance guys. They borrowed money from Drexel Burnham, and they came up with a plan in their own minds to reorganize Atlas. Borrow money, sell assets, reorganize things, you know, pay a big dividend; so, you're left with a smaller company, more highly-levered, and the shareholders had gotten cash out. So, that was their plan. And they owned nine percent of the company. And they approached the board, and they said, look, we got a plan; it's better than your plan. And guess what? The board said we're working

on our own plan. We have just reorganized the company. Give it time to see if it's going to play out the way we think.

[0:58:11] And the Blasius finance guys decided to do a consent solicitation. And the consent solicitation would do two things. It would increase the board from its seven members to fifteen members and appoint eight new members. So, they would take over the company. They begin this thing, and as soon as it's on the – the board knows about it – the board had been thinking about appointing two other guys to their board anyway. They moved up on that quickly and appointed two new directors. So, now instead of having seven, the board said, we have nine. The charter said you can't have more than fifteen. So, what? You can appoint six, but you can't appoint the eight, the two, and to appoint. So, that was the lawsuit. The lawsuit had two parts; that plus counting the votes in the consent.

And the question, the main question in Blasius was can the board act to fill in – to create two new directorships? A power that they had clear legal power to do. Could they do that when their purpose in doing it, or at least part of their purpose in doing it, was to stop the effectiveness of the shareholder consent that had just been redone? So, that was the issue.

What made the case difficult is I thought the board was absolutely acting in good faith. An intellectually dishonest opinion, of which there are many, would have simply said that the board was trying to entrench itself, and that was an improper purpose, and their action was invalid. But I thought that what they were doing was motivated by an honest belief that what the shareholders were proposing, what Blasius was proposing, was bad for the company. And I had a trial in that case. And there was testimony that the board believed, and reasonably so, that adoption of the plan that Blasius put forward would have put the company into bankruptcy. It was too much leverage, and the company would not have been able to pay the debt that Blasius proposed that they borrow.

[1:01:13] So, the board, from a point of view of corporate lawyers who are used to counseling corporate clients, this would have been an easy case to say that that's valid. But I was very bothered by the fact that a fiduciary was now acting to prevent something that the shareholders had a statutory power to do, and the justification was "we know better than you do."

Now, this is where Time Warner enters into the picture because substantive coercion in Time Warner, when there is a tender offer, the Supreme Court said, yeah, the board can know what's correct for shareholders even when

shareholders don't believe that. So, that principle is out there. Does that principle apply to voting? Because if that principle applies to voting, you know, where are we? I mean they can just – then corporate elections are not like the highest form of democracy ever, but if the boards can simply say, oops, you're going to elect some crazy board member, and they can interfere with that, that's—

So, I thought that the integrity of the process of corporate voting required a precedent that says the Time Warner/Unocal principle of substantive coercion cannot apply to voting. Nobody but me ever got that point. I mean, I think even Leo never – Justice Strine never – didn't get it. I think they thought that Unocal was the principle that should be applied. But in Time Warner, they said substantive coercion was a justification for board defensive action. And I didn't see how substantive coercion could apply. So, you needed a new doctrine with respect to voting.

The case was hard because I thought these people had acted in good faith. But I came to the conclusion that even if you are acting in good faith, you can't act to prevent the shareholders from voting. But then, I drew back from that. I said, well, unless there is some compelling justification – which was just a trapdoor - I didn't know what a compelling justification might be - I just didn't want to say for all

time that there wasn't something that would justify legal, authorized action by a board to interfere with voting. So, that's why I wrote it. I wrote the compelling justification. And I think I put a footnote in there saying well, maybe, if they were doing xxx– so, some footnote in that opinion trying to say what possibly a compelling justification may be.

[1:04:55] So, and later, in another case called Apple Bank, or Larry maybe remembers that; were you in that case? That's why I remember. There was a later – not – there was an occasion for me to actually use that compelling justification trapdoor to get out in which a man named Stahl, who controlled Apple Bank – I have forgotten if he controlled it or he was trying to take over the bank. Somebody was trying to take over Apple Bank, and the board resisted, resisted, resisted, would do nothing, and so they started a tender offer that had all the – or maybe they started a consent, do you remember, Larry?

Larry Hamermesh: Yeah, Stanley Stahl had gotten to like a thirty-three percent position before he launched the offer.

MR. ALLEN: What was the offer, a tender offer or-?

Larry Hamermesh: It was a tender offer, and the question was about the timing of the meeting, yes.

MR. ALLEN: And so, then, so, the takeover guy had gotten to thirty-three percent, and there was a meeting, and

it was clear that the company was going to go. And the company, then, moved the meeting back a month and said, okay, okay, okay; we will look for alternatives. And Mr. Stahl said, well, you can't move it, that's interfering with the shareholder vote at the meeting. You can't interfere with the shareholder vote by moving the meeting date back unless you have a compelling justification. And so, I said, well, it's just what I thought was, the company is gone. I mean, Stahl is going to take over the company. The outcome is just a question of whether the company can find an alternative or negotiate him up a few pennies. And so, I said that's a compelling justification.

But, these are all words, reasonable in relationship, compelling, and so forth. It's all whether the facts and what value is the court trying to achieve – I mean it's not that the words are unimportant, but they don't apply themselves.

MR. ROWE: That's what judges do.

MR. ALLEN: Yes. Subject to review.

MR. ROWE: Well, let's talk about review for a moment. The saga of Technicolor and Cede is lengthy and hard to reconstruct. But there is one little point in it that I'd like to draw your attention to, which is at one point, I think I have this right, I would characterize what you said in the

opinion, citing Learned Hand's case, Barnes v. Andrews, as essentially saying for there to be liability, there needs to be damage. And that seemed to me, and others, to be a somewhat unexceptionable principle and a healthy one, and the Supreme Court disagreed. I was wondering if you had any thoughts about that.

[1:08:12] MR. ALLEN: Well, Time Warner was, when I became a judge in 1985, the case was already pending. The deal was in 1982, I think. When I left the bench in 1997, I handed the case off to Chancellor Chandler, who - I had decided it, been reversed two or three times, sent it back to him, he tried it again. The stock had been selling – I'll get back to Barnes v. Andrews in a little bit. This will show you how ridiculous some things can be. The stock had been selling for nine to eleven. The company was in the business of making technicolor films, or colorizing film. It had been selling for nine to eleven, had just gone through a reorganization under Mr. Kamerman, I think, and had one four-percent shareholder, Kamerman was the CEO – active CEO, had about two percent; no other big shareholders, except the plaintiff, had about three or four percent. It started out as an appraisal case; it became an entire fairness case. It was tried. The testimony was from the plaintiffs, who brought in a man named Torkelsen, who I think later, I don't know if he went to jail; I think he

was indicted for something. Anyway, he was an economist of some type. And his opinion was, the stock selling for nine to eleven was actually worth about seventy-five dollars a share. You know, markets are not perfectly efficient. But it would be very unusual if they – if a stock selling for nine was really worth seventy-five.

The other side brought in a professor from – a dean, from the University of Chicago Business School, who said, it was selling for nine to eleven, it was worth nine to eleven. There was nothing wrong with the market. But they weren't really willing to rest on that. They also brought in an accounting professor named Rapaport from Northwestern, who was a very good professor, and he gave an opinion that it was worth twenty-three. And he had some elaborate rationale for that.

[1:10:54] And so, the takeaway, the first takeaway is I had a forty-seven-day trial. And talk about getting into the weeds; well, we got into the weeds. But what is a court supposed to do with that kind of a record? It's worth nine; it's worth seventy-five, it's worth nineteen. So, I went through an analysis of the record, and I came out with twenty-one or something like that. And it got reversed. And why did I get reversed? Well, you know, I no longer can quite remember but the important thing to remember about this case – well,

almost nothing, but... At the time, the important thing to remember about this case was it was an arms-length transaction. And it was accomplished prior to the date when Revlon was decided. No one had an incentive not to get the best price. And indeed, the CEO was an active, intelligent guy who was invested in the company; it was not an MBO transaction. It was selling for nine, gotten twenty-three or twenty-four.

On a superficial analysis, this was a pretty good deal. If you're starting from fundamentals, you should say this was a business judgment case. The board was not conflicted. But by the time it was decided, Revlon had been decided. The buyer was Ron Perelman. And Ron Perelman revamped the company; he sold certain things, and he paid about a hundred million dollars for the company, most of which was borrowed. He sold the company five years later, which was like 1987 or 1988, believe me, the case itself was in its teenage years about this point. But he sold it. He made five hundred million dollars. Or maybe he sold it for five hundred million, I forgot, but he made multiples of the price he bought it for and many multiples of what he put in. And so, it was a great deal for him. In fact, I think that was the source of the money he used in the Revlon transaction later.

[1:14:05] So, the question was, if there was no self-dealing, was there any negligence? I didn't see any. But one question was, who has the burden of showing and showing what? And I said - the plaintiff said there was lack of due care or something. And I said, well you have to prove that, and you have to prove that if there was a lack of due care, it proximately caused some injury. They got a good price here, so I thought. I didn't say that in the opinion that they got a good price; I just said, you have to prove it, and they didn't prove it. And the Supreme Court, speaking through Justice Horsey, reversed that and said, look, if the board did not exercise due care, if the board did not exercise due care [*01:15:08*] then they breached their fiduciary duty. And it's the board's obligation to show – I think this is what they said – the board's obligation to show that they exercised all their fiduciary duties, and, therefore, it was a mistake to put the burden on the plaintiffs to show breach of fiduciary duty. The board has to show itself due care. But I do think that that was a confusion.

The other confusion was that when Ron Perelman bought the company, he did it in a tender offer; he negotiated a deal in a tender offer with a follow-up merger. And within three months, they closed the tender offer and did the merger three months later. During the interim, he had started his

plan, which was to sell off assets and so forth. So, the question is, if you look at the merger, does he have an obligation, Perelman, as a defendant, have an obligation to show an entirely fair price? This is not like Weinberger or a parent-sub freeze-out merger. And I thought it makes no sense for the law – and I said, that if an independent board negotiates a two-step transaction, and then that transaction is effectuated promptly, and there is no evidence of a radical change in the market, it makes no sense to go through a trial for an entire fairness price with the second step. And I got reversed on that as well. They said, well, once he is a controlling shareholder, he has to show a fair price. And maybe they – I hope they relied on the fact that he had sold some assets. Because what – and this is a larger point - what the Court of Chancery does often enough is to be forced into figuring out what fair prices are. And when the judges do that, they end up with a profound understanding of the unreliability of that process. You just change any of the inputs if you use a discounted cash flow model, change any of the inputs – but the inputs all of which are guesses – and you can move that final price around quite a bit. The whole thing is intensely unsatisfying intellectually.

So, what the Chancery judges are driven to do is to try and look to the integrity of the procedures. Because they

don't want to have to find out if a price is fair. But what courts can do is they can see a price that is really unfair. They can see fraud. They can see real overreaching. If the price is twenty-three, they can't tell if a twenty-five dollar price would have been fair or an eighteen price would have been fair. They can't do it; the technology is not there; the information is not available. So, Chancery judges tend to look to the process. At least in those days - I don't think the same is true now - the Supreme Court sits on high and doesn't get involved in that level of complexity. If they had spent years on Chancery, as you know, Steele and Strine and other justices have, they know this. But if they have come from the practice and not really a corporate practice - I won't name names - they don't have that appreciation. So, they think, well, let's force them to show fairness. Let's force them to litigate the fair price. Then you end up with Technicolor being a fifteen-year case.

Okay, I think I was venting at that point.

MR. ROWE: I don't blame you. And I think we can talk now about – while all these cases have been highly influential, I think, possibly, if you ask directors generally, and corporate law practitioners which opinion you wrote has had the most – maybe I should say, practical influence, it's Caremark. Because that really introduced a

concept through the Delaware opinion-writing system that has had an impact on the way virtually every public corporation, at least in some ways, conducts its affairs at the board level and directly below. We should talk about Caremark substantively, but also one of the interesting things to a litigator is this is such an influential opinion, and it comes in the form of a settlement approval, as opposed to a litigated case. So, maybe you can comment on those thoughts.

[1:21:20] MR. ALLEN: Right. Well, I said before, I didn't have an agenda of things to... It wasn't entirely true because, with the duty of care, I did have a view, which had developed over the years that I was a judge. Caremark was like 1997, 1996 – or something like that. My view of the duty of care was that it was capable of doing a lot of harm, but that you needed to tell directors that they have to pay attention. But that it was not like the duty of care when you are driving a car. And that implementing it through a damage action - breach of care causes injury, and so forth - was a highly dangerous concept in corporate law. And the reason, and I wrote this out in a case called Gagliardi, which I wrote after I had already decided not to continue as a judge, but to go into teaching. So, Gagliardi was a case that came up; a small, ordinary case, but I used it as an opportunity to write something to say that the duty of care, if you implemented it

with a damage action, would – let me put it this way – would scare the hell out of directors. And they would get to the point where they would not accept risk. And the point of diversified investors was they wanted companies to accept economic risk. They wanted directors to pay attention, but they didn't want them not to accept risk; that was the whole way they were going to get economic returns.

So, the law had to supply a way to encourage directors to accept risk, and it does – and you can see this in many ways in which it protects directors; business judgment rule is the way the courts have done it. D&O insurance is a way legislatures have done it. Provisions like 141(e), which grants protection when you rely on outsiders, is another way the statute does it. And finally, 102(b)(7) in Delaware is another way you could put in your charter that there are no damages. So, you see how dangerous would this idea of the threat of damage actions be. The law provides fallback positions to protect directors from it.

So, I wanted to write in Gagliardi that the business judgment rule is meant to protect directors in order to serve shareholder interests. That doesn't mean that these directors should be completely – they are almost completely protected from liability unless they are self-interested. But you have to be aware that if you protect them so much, maybe they won't

do anything. So, how does the law solve this problem of incentivizing them to be engaged and attentive, but not scaring them with liability risks? Well, I just mentioned all the four ways Delaware law gives them protection. When it came to Caremark, I thought it was necessary and appropriate to goad the directors a little bit, but just a little bit. And Caremark was written against this opinion of 1966 or so, what's the name of it, Larry?

MR. ROWE: Allis—

Mr. MR. ROWE: Allis-Chalmers, Paul, everybody has a better memory than I have these days. So, Allis-Chalmers was a case in which the court said you know, that company had a big liability for anti-trust stuff that happened down in the bowels of the company, and the directors were sued. And Delaware did, then, what Delaware would do now; it said, no, you can't sue the board for that if they didn't know about it. But it had broad language, and it said, you know, only if they see red flags. The problem with the red-flag language, a propos your comments earlier, is it's too broad. And we now know, we knew then, probably, that boards have an ongoing obligation to try and keep the company operating effectively with respect to legal risk, but also with respect to every element of the business. That's what their job is. And it

shouldn't be that they have to see a red flag before this obligation hits them.

[1:26:58] So, Caremark was a case, much like Allis-Chalmers, in which Caremark, a healthcare company, down in the bowels of the business, some of the sales and marketing people had been bribing doctors to use their product and so forth. And when that was found out, they had to pay a two hundred and eighty-five million-dollar fine. Shareholders, the plaintiffs' lawyers, naturally sued and said, well, if you were paying attention, we wouldn't have to have paid that two hundred and eighty-five million-dollars; you pay us.

Well, to say, obviously, because it's obvious to anyone who thinks about it, if the directors are not putting money in their pocket, the system is not going to say to them, you have to pay two hundred and eighty-five million now because you weren't paying attention. How do you get there? Well, Caremark got there, everything that you are asking me about is the runup to say, well, unless you really didn't – unless you were involved, or you were paying no attention whatsoever, you don't have any liability. But to say that is to excuse them and to allow boards to be more passive. So, the runup was what was important. And it was the way the Delaware courts message American business. And so, what Caremark said was, you have a duty, boards. And the duty is to make sure

there is a reasonable system of information gathering so that information comes from all the parts of the business and moves up the chain to people that have authority to supervise, and ultimately, to the board. Ultimately, not – so, this filters, obviously.

And that was all meant to tell directors what they should be doing. And this backed the philosophy – this is based on the notion that corporate directors, by and large, are people who, if they do not have a financial interest in the matter – a financial interest opposed to the company – will both be a little bit lazy but will want to do the right thing. They are essentially good people. They need to be told what to do. And if they are told what their duty is, they will tend to do it.

So, this is not the bad man theory of law, which Oliver Wendell Holmes had; this is the good man theory, a good person theory, excuse me, I'll be run out of town on a rail. It's a good person theory of corporation law, which is if they are told what their duty is, they will tend to do it.

[1:30:13] So, Caremark lays out what their obligations should be with respect to supervening the company. And then, in the Roman II part of the opinion, it says, but, there is only liability if you have sustained or systematic ignorance of their obligation. Nothing actually new in Caremark, in my

opinion. These are all just foundational concepts, but it was a statement that you had this duty.

Now, institutionally, it was very useful because corporate lawyers have clients. And they want to keep their clients clear of getting in trouble. And they want opportunities to go to the board and talk to their clients and explain to their clients. And send their clients a statement for services rendered, too. So, when Caremark came out, all the corporate lawyers in America, not all, but many of them, went to their clients and said, look, when – and there were other things happening. This wasn't me creating something; this was just an opportunity to say something. And I said in that opinion what the other things were. There were changes. We were not going to be satisfied with boards being as passive as they had been decades before.

So, Caremark was one case, one force along with some others, that helped change the way boards behave. I take very little personal credit for the changes in corporate governance, but it was one force that helped move the good governance ball forward. But without really threatening liability – that was my point. I think the liability - the damage remedy is such a blunt instrument, it really has no place in corporate law except when there is self-dealing, or there is intentional – some bad conduct. But the negligence

concept just really – the only way negligence, I don't know how it's taught by other people; the only way negligence can fit is in these abandonment of office kind of cases where you know, you don't go to any meetings, you don't do anything. And then, maybe you say, yeah, you have to do something. Anyway, so, that's my take on duty of care and corporate governance. For another thing was restricted to that.

There was a later case which I tell my students – I read it – there is a case called, I forget if it's Goldman Sachs or Citicorp, Chancellor Chandler had an opinion in which he reached the result which you had to reach, you know, for any corporate lawyer who knows how the result would be. But he said in that; he tried to distinguish Caremark in a silly way. You see, Caremark had to do with legal liabilities, not how you run the company. That's silly because the principal obligation of the board has to do with the operation of the company. The principle that you have to have an information and reporting system in place with respect to the company is not a principle that applies to legal compliance, which is just a part of the corp — it's a principle that obviously applies to the business of the company. Any corporate lawyer that would say to a board, look, you need to have some reasonable basis to think that this, your most important divisions are running appropriately, but don't worry about

that, would be incompetent. So, the Caremark principle applies to everything, in my opinion, in the business.

MR. ROWE: Following up on some of the discussion we had about the Time Warner case, I imagine you will recall that there was a major theme that Time presented that there was a culture at Time, they called it the "Time Culture," which had significance for the case because preserving that culture was a desirable, in their view, legitimate corporate goal that the board was following. Was that an argument that had much of an impact on you? Or did you have a view about whether it was an effective way of them presenting the Time side of the case?

[1:35:30] MR. ALLEN: Well, I think if one looks at the opinion, the opinion genuflects, if you know that word, genuflects a little bit to that argument. It had no effect on the outcome of the case. But during those years, the question of what is a corporation and what's it meant to do socially, and should it be something that can be broken apart at any moment if somebody comes in and offers a higher price in the market, say. Or is it something else? Is it something that is an institution that is responsible, in part, to the employees and the customers and the communities and all of that? Both of these views of the corporation as just a piece of shareholder property or as a communal institution have arguments that are reasonable. It's not for courts to decide. And what the

Delaware court, insofar as I could see during those years, was doing was juggling, and trying to offer enough respect to both political views so that they would be content that there was an honest judicial institution that was hearing the arguments and considering them, and not going one way or the other so completely as to leave a part of the community feeling that this institution was in enemy hands. Now, that's a high-level political kind of statement.

I didn't think that the Time culture argument was very persuasive. I mean, the guy who argued it was from Simpson, I think, from Paramount's side; Mel—

MR. ROWE: Cantor.

MR. ALLEN: -- Cantor. And he said you should call it the "People culture case," People Magazine. I don't think – it might have been taken seriously by certain of the old-time directors at Time, but I didn't see it very much in – I mean they were merging with Warner Communications, with Steve Ross, so, no. But in the opinion, I said words to the effect that, look, there are people who spend their lives in these institutions and think of them as something more than just a stockholder interest, and that deserves some respect. But increasingly, that's not true. I mean, in the DuPont Company in Delaware, from 1914 to 1990 – or, maybe I should go back to when the Dow merger occurred, there was an institution that

people spent their lives in and meant something to the community. But that day is passing, so, I don't buy much the culture argument. There's a culture of Google now, the culture is enforced by high-vote stock, so the courts don't have to deal with it, and who knows if the culture is good; I am not sure.

MR. ROWE: One question, a follow-up about Blasius. It is, interestingly enough, the plaintiff, in that case, lost the vote.

MR. ALLEN: Yes.

MR. ROWE: And so, in light of that, I suppose it would have been possible to never—

MR. ALLEN: To skip all the other stuff?

MR. ROWE: Yes. Doctrine would be much poorer had that happened—

MR. ALLEN: Yes, I mean I could have said assuming that the first half of the opinion, we get to the vote. I didn't – I wasn't tempted to do that. As I said, doctrinally, if you think about it, the problem had to do with the existence of the power of the board to take over the shareholder position. And while Time Warner had established the substantive coercion idea, empowering the board to override the shareholder choice in the tender offer context, we thought it was important to have a principle out there that

said, but, that didn't necessarily apply to voting. So, it was an opportunity to say that.

MR. ROWE: And talking about opportunities, I have heard from some of the attorneys who handled the Caremark settlement approval hearing that it was, I think—

MR. ALLEN: Surprising to them.

MR. ROWE: Precisely. And so, that raises the question of, what was it about the case or the time of, the time we were at in that particular month of that particular year, what was it that created this opportunity to speak on the subject? Was it something that had been brewing for a while? Was it the facts of the case? Or some other—

MR. ALLEN: I had a more academic interest in the field than most judges. And so, I would read a little more broadly in law. Actually, I don't do it anymore. But, so, I was just – there were issues in my thinking that were sort of teed up, and if the case would come along, I was ready to do it. An example, there's some case I – oh, I can't remember now, I put a footnote in – this can be edited out, my blathering, I suppose. [1:42:11] I had a case with Paretti – oh, the zone of insolvency case, Larry, whatever that was. It was just the stuff would appear, and I would have been thinking about these things either in the last three months or six months or something, and the opportunity was there, I

would just write up what then turned out to be a fairly academic – not academic in the sense of citing all of the articles, but if something was a little deeper than just getting the work off the desk and it was because I had this academic interest in corporate law, I think.

MR. ROWE: And thinking, again, about the Cede Technicolor saga, and I know we could be here all evening if we went into it in more detail, but again, having spoken to some of the attorneys involved on the plaintiff side, did you feel that by coming in at such a high value, sixty, seventy-dollars per share, that they lost credibility with you? Or was it just a function, as you said, of when you do discounted cash flow analyses, and you move a discount rate, well, you can get a range as wide as Texas is, as a judge once said.

MR. ALLEN: It was that, I should say, that was the wittiest thing I ever said in an opinion. In Technicolor, the answer, yes, it is a mistake. In Time Warner, Wasserstein had given an opinion that the value of the Time Warner transaction, five years out, five years out, assuming there was no nuclear winter in between, who knows, would be between two hundred and six hundred dollars. And as I said, this was a very intense moment for me, and I was writing – I lived on Rockwood Road then, down the street from Mr. Hamermesh, and I was writing at my kitchen table, longhand, and I wrote this

out and then I put "a range that even a Texan would feel at home on." And I stopped, and I thought that's amusing to me. So, what was the question—

MR. ROWE: You've answered it—

MR. ALLEN: It was too — let me say a word more about it. [1:45:03] Judges in Delaware, they know their areas, you know. And unless, if there is no problem with the market – in Technicolor, there was an active market in the shares - nobody has to believe in the efficient market hypothesis to nevertheless believe that unless there is some unusual explanation - of course any plaintiff's lawyer will find, oh, my case is unusual - you know that it's a hundred percent wrong is one thing. That the price of ten dollars a share should be twenty, oh, maybe; is there something the market didn't know, but that the price of ten dollars a share in actively-traded market should really be seventy is almost incredible. I mean there could be a fact that, you know, there was actually uranium underneath the plant or something like that. But generally, what they do in those cases is the plaintiffs think they are creating a bargaining range, so they go as high as they can, think the court will slice the baby, as I used to say before I was a father, and now it's too difficult for me to say slicing a baby. And it brings me to one of my other things that happens in appraisal cases, that

exactly happens in appraisal cases. And in one case, I thought, this is really an absurd way of deciding appraisals. So, I told in a pretrial conference, and all on the record, I told the parties, look, I'm going to accept one expert's discounted cash flow or the other, hook, line, and sinker. And I thought by saying that to them, that would drive them into a narrower range, which would be helpful to the court. So, instead of getting nine dollars and seventy-five dollars, you know, I might get nineteen dollars and twenty-nine dollars. Having said that, in one of the cases, the Supreme Court of Delaware said, no, you cannot do that. It's a judge's job to figure out the appraised value, and I thought baseball arbitration would be much more efficient than trying to have a judge do this.

MR. ROWE: Talking about the Supreme Court and sometimes differing from your views, I was reminded that there was a moment in Cede Technicolor when – you said in one of your opinions something along the lines of, I'll assume arguendo gross negligence, but nevertheless; and then, the Supreme Court said the Court of Chancery assumed gross negligence.

MR. ALLEN: No. The Supreme Court said "found."

MR. ROWE: Found, I'm sorry.

MR. ALLEN: Just intellectual dishonesty. I can't say – I can't put more of a – I mean maybe you can't read; that was, again, Justice Horsey, I think who wrote that. I mean they do – there's a discipline in the trial court, or in the intermediate appeal court that any Supreme Court doesn't have; that is, they don't get reviewed. And for the strong judge, the intellectually strong judge, she will not have to play games with the record. But for some, they write what they want in order to justify their opinions. I mean, Professor Hamermesh wrote an article, Why I Don't Teach Van Gorkom. I don't teach Van Gorkom either. Delaware lawyers are too close to it. I mean, I talk about it in class for fifteen minutes, from the political economy point of view, and it's an important case from a historical point of view. And even from a jurisprudential point of view, it's very interesting. I mean, I ask my students, there's a riot going on in the street. If you pick out some guy running down the street and hang him in the square, the riot will stop. And so, is that what we should do? Hang that guy? Innocent man. It has a good effect, no riot anymore. That was Van Gorkom, to my mind. I mean, it was the Delaware Supreme Court beginning a change in corporate governance and treating a board who sold a company exactly as people sold companies in those days and treating it like it was gross negligence. And they got a good price.

Anyway, no more about Van Gorkom, sorry, you can take that out of the story.

[1:50:21] MR. ROWE: Looking back on your years on the bench, were there advocates who you felt were particularly effective in structuring and arguing some of these major cases?

MR. ALLEN: Well, Chancery was blessed with having good lawyers appear in the court, and the lawyers who tend to argue these cases often appear frequently, and so, they know how it should be done. So, yes, there were. And as follow-up questions, well, what is the characteristic of the good lawyers that appeared? And I always thought Bruce Stargatt was a very good advocate. I thought Larry was a good advocate. I thought your partner, Ted Mirvis, was a good advocate. And actually, there were a handful of Delaware lawyers that are good. What makes them good are first, they are reliable. They won't exaggerate. They talk about the facts in the case. They don't have to talk very much about the law, usually, in these kinds of cases. The Chancery judges know this law. I mean, they genuflect towards this case or that case cited, but ordinarily, it's the facts of the case that matter and not the legal treatment. They are understated; they don't exaggerate.

The characteristics of the bad lawyer are they do exaggerate. And they act emotional when they shouldn't. The

judges who are doing this professionally, they don't need to be emotionally involved in the case; it's a big mistake to try and get the judge emotionally buying in. I saw this, by the way, when I was a law clerk for Judge Stapleton right out of law school. He would read some of the plaintiff's briefs where the – shoe pounding on the table, and the most effective briefs, I remember in those days, were from the Justice Department in Washington, who were very cool, were very assured, very authoritative, and emotionless. And so, I think understatement is vastly, vastly underrated as an effective advocacy tool. I mean, it can't be so understated that they don't hear you. But exaggeration is just a sign of weakness, in my opinion, in arguing.

But my ideas of advocacy are different, even in a good advocate. I mean, I would be, as an advocate, I would be much more understated than most of the people that argue. [1:53:39] The second thing that advocates need is imagination. And I used to say this to new lawyers when I would talk to the new lawyers each year in Delaware, that they had to be able to frame their case in a way that they should win. That a person who is knowledgeable about the law and well-motivated will want their side to win. Now, what motivates them, what motivates the judge, are facts in the case. But he has to apply those facts to a certain legal framework. So, you have

to pick the framework. Are we talking about this is a shareholder's right to vote issue? Or, are we talking about this is a board right and responsibility with respect to their running the company issue? If I look at it that way, maybe I come out one way. So, framing is like the most important issue.

So, there are many good lawyers. I'll tell you the most amusing line, one or two lines I have heard in court. Rod Ward, who I think you might have interviewed in this process, one time in a discovery dispute; it wasn't before me, but I was in the court at the time, and the other side said that, you know, that in Delaware the judges weren't, until recently, anyway, they weren't so busy that you could actually go to court and argue a discovery motion. I don't know if that is still true or not. But anyway, there was a discovery motion being argued, and Rod Ward got up and said, well, if what my friend said was true, then this court is like Kipling's land; somewhere East of Eden where the best is like the worst, where there ain't no Ten Commandments and a man can raise a thirst. I thought that was – and, Rod, of course, is very urbane, you know him, a very urbane guy; I thought very effective advocacy, in my opinion.

Another advocate who had that same kind of, I don't know what you want to call it, urbane approach was Bill

Wiggin, who was at Richards, Layton & Finger at the time, and he was appearing before Marvel, I was also in the courtroom. And the Chancellor said, well, Mr. Wiggin, we can object to something, and Marvel said, Mr. Wiggin, this is just an informal session of the court. He said, Your Honor, if I had known it was that informal, I would have worn Bermuda shorts.

So, humor in advocacy is really the ultimate thing to use with such restraint and such lightness that it cannot be done often; it cannot – and it must be done well. But if it is, it's so charming that it moves the judge towards you in some way or other, but hard to do. The same in writing, and it can't be done much.

MR. ROWE: I thought we might end with a question that some judges and former judges like to answer, and some don't; so, I will leave it to you. But I think people are often interested in knowing, when you think back on all the cases you had, which was the most difficult or the hardest case to decide?

[1:57:31] MR. ALLEN: Yeah, I said that maybe the most difficult corporate case was Blasius. But there were other cases involving human beings that were more weighty. And the most difficult – there was one about a guy who was committing suicide by not eating in the prison. And the question whether his bodily autonomy was such that he shouldn't be force-fed.

There was another one involving a woman who was pregnant and had to have a Caesarean, the doctor said, a C-section, but it was like the day before Thanksgiving and didn't want to have it. And they called up the Chancery Court for a judge to have a hearing to order a guardianship temporarily to consent to it. And I have a high value on autonomy. And I knew I would have difficulty forcing a woman to have a C-section who she says she didn't want to have. I didn't know if I could do that. But the hospital said the baby was going to be injured. So, taking the coward's way out, I assigned the case to then Vice Chancellor Carol Berger, who was a mother. I gave her the case, and I asked her to please go out to the hospital and hear it.

So, the next day, she came in, and I said, what happened? And I had all these big issues of human autonomy in my mind. And she said, well, I talked to this woman, and she didn't want to have the C-section because the next day was Thanksgiving and she wanted her mom to come in, and she was happy to have the C-section the day after. But the doctor said, you know, the baby was not getting air; it was going to be brain damaged. And being a practical person and a mother, she had no problem with human autonomy. She said, give her the – she signed the thing and give the... So, and that was obviously the right thing to do. But I would have had

difficulty on some philosophical principle basis. So, that wasn't a hard case for me, and it wasn't a hard case for her, but it was possibly a hard case.

[2:00:22] But the one that really sticks in my mind was a case of a man named Arnold Shimosek, who was a twenty-three-year-old bodybuilder in the Army and on a weekend pass down in North Carolina had been drinking and driving a car; crashed into an oak tree, went through the windshield, hit the tree, was taken to the hospital, and they had to take half of his brain out. They didn't think he would live. They didn't put the skull bone back on. And they sent him home to Delaware where he continued to live. And his brain wasn't working, and he assumed a fetal position in the bed, in the VA hospital, and he was on life support, and his parents petitioned to remove the feeding tube.

And the Delaware Attorney General at the time resisted that for some unknown reason. So, we had to have a hearing about it. And this man had been a two-hundred-forty-five-pound bodybuilder, was down to a hundred and thirty pounds or something. I went to the hospital; I saw him just pathetic. And had a hearing, listened to the mother. The father was too upset to talk, you could see; women are stronger than men in these kinds of situations. And I listened to the doctors and so forth. And I was convinced that the

right thing to do was to allow the termination of his life. I was a little bit worried that you know, that's the right thing in this case; the next case may be an eighty-year-old woman with no relatives and there are people asking to pull the plug, or nephews who are going to inherit her money; so, it was a weighty decision for me. And I held off deciding it for a week or two. And during that time, he got an infection. And then the attorney general came and asked for permission because the parents wouldn't give it to give intravenous medications to fight the infection. And I said, no, let the parents decide about that. And so, that was a hard case. [2:03:16] And it puts in perspective these corporate cases. I mean, there are other cases involving blood transfusions and things and so forth, but it puts in perspective these corporate cases because no individual in Time Warner was affected at all like the Shimosek family was. It's true that many, many millions of people were affected by the financial consequences, but in a small way.

So, when I was Chancellor, the legislature asked me, should we remove some of this jurisdiction from the Court of Chancery, so you could just do the corporate cases? And I said, no, I don't think so. I think it's good for the Chancery judges to have some element of these human cases so that they remember that they are a court doing things in addition to

these kinds of cases; they are doing other things, and it makes the job different and better and keeps them more grounded, I think.

MR. ROWE: Well, that's a great way to conclude. If there is any thought that you would like to add, otherwise—

MR. ALLEN: No, it's been a long time. It was a nice job, a wonderful job, and a chance to, I hope, do some good during those years. The people who are doing it now are great, almost universally. And I'm happy I had the chance. I wish Hamermesh would have had the chance; he would have been perfect for the job as well. But no, I'm content. Thanks, Paul, for going through this work and preparing these questions.

MR. ROWE: Well, thank you.

#####