THE DELAWARE COURT OF CHANCERY: AN INSIDER'S VIEW OF CHANGE AND CONTINUITY

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I. INTRODUCTION

At this conference, we explore, examine, and celebrate the "change and continuity" of the Delaware Court of Chancery. As I reflected on it, it struck me at first that those concepts—change and continuity—are seemingly at odds. They are, facially at least, mutually exclusive. It could be, of course, that our endeavor together in this conference is merely to identify and consider those aspects of the Court that remain constant and those that have evolved. But, knowing Justice Jacobs, Professor Coffee, and Bill Savitt, I figured they had something more nuanced in mind. Perhaps they were intending to invoke the ancient Greek philosopher Heraclitus and his Doctrine of Flux and the Unity of

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Opposites—a central tenant of which provides that the only constant in life is change.[1]

Upon deeper reflection, though, I settled on something different. Consider this: at this very moment, we are each barreling through space at 67,062 miles per hour.[2] That is how fast the earth moves in its orbit around the sun. Yet we do not feel as if we are moving at all.

Those of us who have served on the bench in Delaware know that the Delaware courts strive to pull off the same trick. Corporate law is constantly changing. Every day Chancery faces new and challenging issues. At its best, the Court resolves those issues in ways that feel predictable and familiar, resulting in an evolution of the law that is incremental, cautious, and hardly noticeable.

As you all know, I spent the last twenty-six years as a judge, and the last fourteen of them as Chancellor. So I would like to offer a few insights from an insider's perspective about how Chancery attempts to resolve the rapid changes in the corporate landscape in a continuous and predictable manner. In particular, I submit that there are three primary forces at work: market participants, academics, and the courts. The first two of those forces are change agents and advocates. The third force, the courts themselves, must guard the purity and evenness of the law without preventing its evolution or growth.

II. MARKET PARTICIPANTS AS AGENTS OF CHANGE

I will begin with the most important aspect of this process—the market participants and their advisors. By this I mean corporations, shareholders, directors, managers, financial advisors, and lawyers. These market participants

[1] *See* KATHLEEN FREEMAN, ANCILLA TO THE PRE-SOCRATIC PHILOSOPHERS § DK22B12 (1983) (quoting the philosopher's famous admonition that "[o]n those stepping into rivers staying the same other and other waters flow").

[2] *See Earth Fact Sheet*, NASA (Nov. 17, 2010), http://nssdc.gsfc.nasa.gov/planetary/factsheet/earthfact.html.

are incredibly savvy, sophisticated, and creative. Working with skilled advisors, they proactively devise strategies and arguments they hope will change and refine the law in advantageous ways.

Consider, for example, the shareholder rights plan, or "poison pill."[3] The pill arose in the context of a problem for corporate boards. Control of companies can change hands either through a merger under Section 251 of the Delaware General Corporation Law ("DGCL")[4] or through a public tender offer, but the tender offer approach allows a would-be acquirer to bypass the board of directors. Reasonable folks were worried that raiders were using the tender offer process to underpay for corporations by exploiting both the collective action problem and the rational apathy inherent in disparate ownership.[5]

Enter the poison pill, an ingenious plan hatched by Martin Lipton and his colleagues that attempts to give the board a role in the tender offer process by essentially forcing hostile acquirers to negotiate with one cohesive body rather than with the shareholders en masse. And as we all know,

[3] For a description of the workings of a fairly standard version of a poison pill, see *Carmody v. Toll Brothers, Inc.*, 723 A.2d 1180, 1183–84 & n.5 (Del. Ch. 1998) (describing, among other features, the "flip-in" and "flip-over" provisions).

[4] *See* DEL. CODE ANN. tit. 8, § 251 (2011) (authorizing a merger of two or more corporations subject to board and shareholder approvals).

[5] *See, e.g.*, Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 22–23 & n.16 (1977) (discussing the proliferation of cash tender offers and Congressional concerns about shareholder rights that led to passage of the Williams Act). *See also* Guhan Subramanian, *A New Takeover Defense Mechanism: Using an Equal Treatment Agreement as an Alternative to the Poison Pill*, 23 DEL. J. CORP. L. 375, 399 (1998) (noting that the "the poison pill effectively addresses the collective action problem that made shareholders so weak relative to acquirers"). *But see* Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 524 (1990) (arguing that collective action problems are "not insuperable for a broad range of issues" due to the increasing importance and activism of institutional shareholders).

the Delaware Supreme Court validated the pill in its 1985 *Household* decision.[6]

In the ensuing years, the law of pills has evolved. The market participants who use it have changed its features in creative and unexpected ways. The *Household* pill, for example, had a 20% ownership trigger—that is, a single entity or affiliated group had to acquire 20% of the company's stock to trigger the issuance of additional shares.[7] More modern pills have lowered the trigger. In *Airgas*,[8] for example, the pill had a 15% trigger, and in Vice Chancellor Noble's *Selectica*[9] case, a 4.99% trigger.

Now, Vice Chancellor Noble's decision (which was affirmed by the Delaware Supreme Court) was by no means an endorsement of such a low threshold generally. It was keyed to the specific facts of that case—where the board chose a low trigger in order to protect certain tax assets that would have been lost if someone acquired 5% of the company's stock.[10] Our law permitted use of a low-trigger pill because of the unique facts of the case, but the "etching"

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[6] Moran v. Household Int'l, Inc., 500 A.2d 1346, 1351–56 (Del. 1985) (concluding that "adoption of the Rights Plan was within the authority of the Directors").

[7] *Id.* at 1348. The *Household* pill could also be triggered by the announcement of a tender offer for 30% of the corporation's shares. *Id.*

[8] Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 62 (Del. Ch. 2011).

[9] Selectica, Inc. v. Versata Enters., Inc., C.A. No. 4241-VCN, 2010 Del. Ch. LEXIS 39, at *25 (Del. Ch. Feb. 26, 2010), *aff'd,* 5 A.3d 586 (Del. 2010).

[10] The tax assets were "net operating loss carryforwards" or "NOLs"—tax losses realized and accumulated by a corporation that can be used to shelter future or immediate past income from federal taxation. The Internal Revenue Code limits a corporation's ability to use its NOLs following a change-of-control transaction. For NOL purposes, a change of control does not require that a single entity gain majority control of the shares. Rather, whether a change of control has occurred is based on the total percentage of shares that changes hands over several years. In *Selectica*, the purchase of less than 10% of the company's outstanding common stock by a new shareholder would have triggered a change of control, hence the 5% pill. *See Selectica*, 2010 Del. Ch. LEXIS at *2–*5, *21–*22.

it made on our law will last, and clever lawyers now look for ways to exploit that new etching to their clients' advantage.

But more than just pill trigger levels have changed since *Household*. So too have the definitions of what counts as "stock" for purposes of reaching the trigger. Since the days of *Household*, pills have counted stock owned by one individual or entity *plus* any affiliates or others working together. This makes sense—otherwise a raider could simply split its ownership among various entities just below the trigger. That feature has remained, and was recently reaffirmed as proper in then-Vice Chancellor Strine's *Yucaipa* decision.[11]

But the financial markets continue to adapt, along with the players and the poison pill doctrine. Recent years have seen an increase in the use of derivative financial instruments.[12] We all have heard a lot about complex derivative products in connection with the financial meltdown and the mortgage mess. But a simpler type of derivative, known as the total return swap,[13] has affected poison pills. A new wave of pills now attempts to count, for purposes of beneficial ownership leading to the trigger, not just stock actually owned by an individual or entity, but also stock referenced in any sort of swap agreement or other derivative product.[14]

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[11] Yucaipa Am. Alliance Fund II, L.P. v. Riggio, 1 A.3d 310, 341 (Del. Ch. 2010) (noting that most rights plans define beneficial ownership using language taken from regulations under Sections 13(d) and 14(d) of the Securities Exchange Act of 1934).

[12] *See generally* Michael A. Penick, *The Development and Current State of Derivatives Markets, in* FINANCIAL DERIVATIVES: PRICING AND RISK MANAGEMENT 233–45 (Robert W. Kolb & James A. Overdahl, eds. 2010) (chronicling the rise of derivative markets in recent decades).

[13] *See* Daniel Bertaccini, *To Disclose or Not to Disclose?* CSX Corp., *Total Return Swaps, and Their Implications for Schedule 13D Filing Purposes*, 31 CARDOZO L. REV. 267, 269 (2009) (describing total return swap arrangements).

[14] This new wave of pills addresses so-called "empty voting" where an entity borrows shares solely for the purpose of voting and does not actually own the shares directly. *See* Henry T.C. Hu & Bernard S. Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL.

The reasoning behind this has to do with the way these swap agreements are typically structured.[15] Generally, they take the form of contracts between an individual or entity and a bank. The bank will agree under this contract to pay the individual whatever returns the individual would have made on a particular security—let's say the common stock of IBM. This allows the individual to expose himself to the economics of IBM stock without actually owning it. But the bank on the other side of the agreement has no interest in the exposure, so it is likely to acquire actual shares of IBM stock as a hedging mechanism. The fear that animated the new wave of pills seeking to capture derivative ownership was that the banks might be inclined to vote the shares they hold as hedges in accordance with their counterparties' wishes or that the banks might agree simply to sell the hedges to their counterparties.

These derivative pills were challenged in *LAMPERS v. Laub*,[16] a case that concerned a pill adopted by Atmel Corporation.[17] Plaintiffs brought a facial challenge, arguing that the definition of beneficial ownership was too vague to be enforceable. I refused preliminary relief, holding that the plaintiffs had done little more than conjure up doomsday hypotheticals where folks could not understand how the derivative pill worked. But directors face challenging, ambiguous situations all the time, and their duty under clear law is to steer their corporations through such tumult. Nevertheless, I recognized that derivative pills merited fuller consideration, so I encouraged the parties to prepare for a

L. REV. 811, 829–35 (2006) (describing the use of equity derivatives to gain voting power).

[15] *See* Bertaccini, *supra* note 13, at 276–79 (discussing a typical swap arrangement involving common stock and its potential impact on beneficial ownership of the underlying shares).

[16] *See* Verified Class Action Complaint, La. Municipal Police Emps. Ret. Sys. v. Laub, 2008 WL 4928520 (Del. Ch. Nov. 14, 2008) (C.A. No. 4161).

[17] The Atmel board of directors had modified an existing poison pill to include derivative interests in the definition of beneficial ownership, as well as to decrease the ownership trigger from 20% to 10%. *Id.* at *3.

full trial. Lucky for me, the case settled before that trial happened.[18]

Another aspect of the pill that has evolved over time concerns its ability to be removed. The *Household* pill was not a permanent fixture at the company—it could be redeemed.[19] When the Delaware Supreme Court upheld its use, it noted that one way a potential acquirer could get around the pill was to wage a successful proxy contest to replace the directors.[20] With a friendlier board in place, the pill could be redeemed.

Viewing this as a potential weakness, the defense bar responded by crafting a so-called "dead-hand" pill.[21] The dead-hand feature meant that a pill could *only* be redeemed by the incumbent board of directors. This defense, however, proved too much. In *Toll Brothers*,[22] then-Vice Chancellor Jacobs sustained a complaint challenging the dead-hand pill because a target board may not "erect defenses that would either preclude a proxy contest altogether or improperly bend the rules to favor the board's continued incumbency."[23] A dead-hand pill is a "show stopper,"[24] and our law put it permanently to rest.

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[18] *See* Settlement Agreement, *In re* Atmel Corp. Derivative Litig., 2010 WL 2464533 (N.D. Cal. June 8, 2010) (No. CV 06-4592-JF) (settling parallel actions in California state and federal courts as well as the Court of Chancery proceeding).

[19] Moran v. Household Int'l, Inc., 500 A.2d 1346, 1354 (Del. 1985).

[20] *Id.* (The "trial also evidenced many methods around the Plan ranging from tendering with a condition that the Board redeem the Rights" to "tendering and soliciting consents to remove the Board and redeem the Rights . . . . These are but a few of the methods by which Household can still be acquired by a hostile tender offer.").

[21] *See generally* Jeffrey N. Gordon, *"Just Say Never?" Poison Pills, Deadhand Pills, and Shareholder-Adopted By-Laws: An Essay for Warren Buffett*, 19 CARDOZO L. REV. 511, 523 (1997).

[22] Carmody v. Toll Brothers, Inc. 723 A.2d 1180, 1195 (Del. Ch. 1998) (finding that plaintiffs had sufficiently pled that the dead hand provision was coercive by forcing them to vote for the incumbent directors).

[23] *Id.* at 1187.

[24] *Id.* at 1187, 1195

The market responded by trying the "no-hand" pill, which effectively operates to delay a takeover by purporting to be unalterable and unredeemable for a specified period of time. Again, this particular bit of creativity could not move the doctrinal needle. In its 1998 decision in *Quickturn*,[25] the Delaware Supreme Court held that a board could not validly adopt a pill that the board could not remove at any time. Justice Holland's decision emphasized that Section 141(a) of the DGCL[26] endows the board with ultimate responsibility to manage the corporation and that devices that constrain the board's ability to do so are invalid.[27]

Ironically, the same line of reasoning that animated the Delaware Supreme Court's *Quickturn* decision has impeded other efforts by market participants to move the doctrine. In the controversial *Omnicare*[28] decision, for example, the Supreme Court halted a merger between healthcare companies NCS and Genesis because the deal was locked up by voting agreements entered into by certain officers and directors. The Supreme Court said that the voting agreements made the merger a *fait accompli* and that, in the absence of a provision that would allow the directors to back out of the deal should their fiduciary duties so require, the merger was invalid.[29]

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[25] Quickturn Design Sys. v. Shapiro, 721 A.2d 1281 (Del. 1998). A no-hand provision is one under which no newly elected board may redeem a rights plan for a specified period after taking office. *Id.* at 1287.

[26] *See* DEL. CODE ANN. tit. 8, § 141(a) (2011) (providing that "[t]he business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors").

[27] *Quickturn*, 721 A.2d at 1291–92 ("One of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation. . . . [The no-hand provision], however, would prevent a newly elected board of directors from completely discharging its fundamental management duties to the corporation and its stockholders for six months . . . [and] restricts the board's power in an area of fundamental importance to the shareholders—negotiating a possible sale of the corporation.").

[28] Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 918 (Del. 2003).

[29] *Id.* at 936.

Now, many folks in the market, in academia, and elsewhere have criticized this strand of Delaware Supreme Court precedent. Steve Bainbridge, for instance, has extolled the virtues of "pre-commitment strategies" in some of his scholarship.[30] Also, keep in mind that two justices dissented in *Omnicare*, questioning the utility of a rule that makes it impossible for directors to pre-commit fully without subjecting agreements to fiduciary escape hatches.[31]

Noting the "softness" in the doctrine on this point, the market continues to refine and adapt, and it has found some success. In an oral ruling in 2008, former Vice Chancellor Lamb—the same judge whose decision was reversed in *Omnicare*—noted that "*Omnicare* is of questionable continued vitality," and refused to halt the proposed acquisition of WCI Steel, *despite the fact* that the merger was effectively locked up as soon as it was signed by virtue of stockholder written consents.[32] Vice Chancellor Lamb reasoned that there is no required waiting period under Delaware law between the board's approval of a merger and stockholder approval. As written consents may be used in lieu of a stockholder vote, he was comfortable that the merger mechanics were legal.

Just weeks ago, Vice Chancellor Noble reached substantially the same conclusion in *OPENLANE*.[33] There, the proposed merger between OPENLANE and KARAuction Services followed a similar progression of board approval,

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[30] *See, e.g.*, Stephen M. Bainbridge, *Dead Hand and No Hand Pills: Precommitment Strategies in Corporate Law* (University of California, Los Angeles School of Law, Law and Economics Research Paper No. 02-02, Oct. 30, 2002), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=347089.

[31] *See Omnicare*, 818 A.2d at 942–43 (Veasey, C.J., and Steele, J., dissenting) (arguing that there was no need for the Court to establish a bright-line rule that would invalidate the joint action of a corporation's board of directors and controlling stockholders).

[32] *See* Transcript of Hearing on Motion for Preliminary Injunction, Optima Int'l of Miami, Inc., v. WCI Steel, Inc., C.A. No. 3833-VCL (Del. Ch. June 27, 2008).

[33] *In re* OPENLANE, Inc. S'holders' Litig., C.A. No. 6849-VCN, 2011 Del. Ch. LEXIS 156 (Del. Ch. Sept. 30, 2011).

signing of the merger agreement, and the execution and delivery of a majority of written consents almost immediately. Reasoning that the merger was not locked up by voting agreements, and that no other bidder was in the wings, the Court held that no fiduciary out was required and that *Omnicare* did not apply.[34]

I could go on. But as I think you can see, perhaps the most important force shaping Delaware's corporate law is the market's ingenuity. The clever lawyers and advisors who counsel market players identify shifts in the doctrine and actively employ strategies to push and hone the law to best suit their clients' needs. Through these iterative innovations, Delaware's corporate law is continually enriched and deepened.

III. BUSINESS LAW SCHOLARS AS AGENTS OF CHANGE

The second important force animating changes in Delaware corporate law is the work of scholars. The contribution of legal scholars is, to my mind, quite unique, because although it is not uncommon for law professors to comment on issues that come before trial courts, it is unusual, I think, for trial court judges to be able to make practical use of scholarly criticism. But Chancery has been able to do so—in large part due to the fact that there is an abundance of academic commentary on corporate law and M&A and, importantly, because much of it is produced in real-time.

Take the academic literature on takeover defenses. Let's stick with the pill defense. As you might have noticed, in *Airgas* I discussed in depth[35] an article penned by two

[34] *See id.* at *30–*31, *31 n.48, *56 (stating reasons why the merger was not a fait accompli).

[35] *See* Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 96–98 (Del. Ch. 2011).

professors, Ron Gilson and Renier Kraakman,[36] written around the same time that market participants like Marty Lipton and friends were attempting to extend our law to new limits with the invention of the poison pill. Adding to the market forces, the good professors were trying to push Delaware's law in a new direction, expressing their views on what constituted a "threat" for purposes of keeping a pill in place, on the meaning of the proportionality test for intermediate scrutiny, and on the outer limits of the pill as a takeover defense. Just as the market participants did, the academics too contributed to a shift in Delaware corporate law.

And speaking of *Airgas*, there's no better example of the give-and-take between the court and scholars than the bylaw decision. On the eve of the Supreme Court oral argument in the bylaw appeal, professors whose scholarship had been referenced in the parties' briefing responded by posting commentary on the Harvard Corporate Governance Blog. Literally the day before the Supreme Court argument, Lucian Bebchuk and co-authors, who have written extensively on staggered boards, posted their views on the case—a sort of "amicus blog," if you will.[37] In the post, the professors summarized their paradigmatic "Effective Staggered Board" and noted that they had essentially identified three ways to get around it: (1) increase the number of directors and fill the vacancies; (2) remove directors without cause; or (3) amend the bylaws when classification is established in the bylaws. (Air Products had come up with a fourth way—move the annual meeting.).

Now, what was really interesting to me is that *both sides* interpreted the professors' "amicus blog" completely

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[36] Ronald Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247 (1989).

[37] *See* Lucian Bebchuk et al., *The* Airgas *Case and Our Work on Staggered Boards*, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Nov. 2, 2010, 12:32 EST), http://blogs.law.harvard.edu/corpgov/2010/11/02/the-airgas-case-and-our-work-on-staggered-boards/.

differently. In a recent panel discussion at the University of Pennsylvania, Gary Bornstein, who argued for Air Products, said that at the time he had thought the post was great for Air Products' side—it reaffirmed that they had come up with a new and creative way around a staggered board that neither the professors, nor anyone else, had considered. Then right before the argument began, Ted Mirvis, who argued for Airgas, told Bornstein that he wanted to call Bebchuk as his first witness!

Now these are two world-class litigators, so it is unsurprising that they both argued that the post supported their position. The point, though, is that this blogpost was referenced—the very day after it was posted—during the Supreme Court oral argument, and each side actually used the professors' commentary to support its position.

After the ruling came down reversing the Chancery bylaw decision,[38] Professor Bebchuk released a study analyzing the stock market reactions to both Chancery's decision and the Supreme Court decision,[39] which was then cited later in the *Airgas* pill decision.[40] What goes around comes around!

My point is that Chancery judges consider carefully these scholarly articles. They also spend a significant amount of time attending conferences like this one, participating on panels, teaching at various law schools and seminars, and even writing monographs and articles. The academic world provides an extremely relevant and timely voice as an agent of proposed change in the corporate field, and Chancery is indeed fortunate to have forged a close relationship with academia and the world of ideas. Much of the credit for that close relationship goes to Bill Allen, my predecessor, who really forged it during his term as Chancellor.

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[38] *See* Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182 (Del. 2010).

[39] *See* Lucian Bebchuck, Alma Cohen & Charles C.Y. Wang, *Staggered Boards and the Wealth of Shareholders: Evidence from Two Natural Experiments* (NBER Working Paper No. w17127, June 2011), *available at* http://ssrn.com/abstract=1866087.

[40] *Air Prods.*, 16 A.3d at 78 n.180.

IV. THE MODERATING ROLE OF JUDGES

So, if the market players and their advisors actively seek to push the doctrine in particular ways to meet certain business objectives, and if the academics advocate for doctrinal shifts to meet certain ideological agenda, how do judicial officers fit into the mix? What roles do—and should—judges play in this conversation? How is it that the Court of Chancery is supposed to resolve an ever-shifting landscape in ways that do not jar and startle the market?

In my experience, at least, the judge's role, especially a trial judge's role, can be, in a word, precarious. On the one hand, judges are directly responsible for the shape of the law, and they can and do have more power over doctrinal developments than anyone else. Their opinions inform the market and influence corporate actors—whether those actors are before the court in a particular case or not.

At the same time, however, the role of a court is to answer the specific question before it: Is this action legal? May this merger go forward? Have the directors breached their duties? The role of a judge is to say "yes" or "no" and to explain to the parties why that answer was reached.

In this way, judicial opinions—and our adversarial, common law process—may be called a rather imprecise way to form a coherent body of law. Judges are rightly focused on just the facts and parties before them when they rule and state their reasons. The Court of Chancery—a court of limited jurisdiction—is only empowered to hear certain types of questions and order certain kinds of relief.

One could imagine other legal systems where courts were expected and encouraged to consider the broader impact of what they do and were given broader powers to effectuate their views. But I submit that the limited, common law, adversarial approach to the development of our corporate law has worked well for years, and it should continue to work well in the future. As a court of equity, Chancery must be attuned to the broader implications of what it is doing. Before the Court grants equitable relief, it generally considers the public interest. At the same time, by ruling only on the facts in front of them, judges are able to keenly

attune themselves to one narrow, difficult problem at a time. This prevents courts from making rulings too broad or too harsh. If anything, the Court's rulings are likely too narrow, though this makes it easier to retreat from an inadvertent misstep.

I'll underscore the point this way. The development of the law surrounding the use and form of pills was slow and cautious over twenty-plus years. If the *Household* pill had set a 4% trigger or included derivative swap agreements in the definition of beneficial ownership, it is hard to imagine that Chancery would have felt comfortable at the time blessing its use. When the Delaware Supreme Court approved the *Household* pill, it made clear that the adoption of the pill was a reasonable and justifiable response to protect the company against "coercive acquisition techniques."[41] But pills today are used to ward off more than two-step offers stuffed with junk bonds on the back-end. The Airgas board successfully blocked an all-cash, premium bid it believed in good faith was simply too low,[42] while the *Selectica* pill was a defense against possible adverse tax consequences rather than a threatened takeover.[43]

Chancery is a trial court, and each judge hears cases on his own; they don't sit in panels or en banc (aside from ceremonially). But that doesn't mean that Chancery judges are five separate galaxies light-years apart. To the contrary, they are constantly interacting with one another. Any time I had an important case, I reached out to my colleagues, soliciting their input and counsel, which was always given unstintingly and graciously. This may sound odd about a trial court, but judges on Chancery discuss their cases, circulate draft opinions amongst their colleagues, and routinely collaborate on difficult questions—perhaps more so than judges on some appellate courts.

As I worked my way through major decisions, and as my colleagues did the same, we kept in close contact. That

[41] Moran v. Household Int'l, Inc., 500 A.2d 1346, 1357 (Del. 1985).

[42] *Airgas*, 16 A.3d at 56.

[43] *See* Selectica, Inc. v. Versata Enters., Inc., C.A. No. 4241-VCN, 2010 Del. Ch. LEXIS 39, at *32–*33, *63 (Del. Ch. Feb. 26, 2010).

collaboration helps preserve a certain quality and evenness in the Court's decisions, and it effectuates the judicial obligation to develop the law with fidelity and care. It also helped us to navigate the cognitive dissonance experienced when trying to decide only the cases before us while keeping the development of our law consistent and reasonable.

V. CONCLUSION

Delaware corporate law has developed over many, many years, through the commingled actions of market players and their lawyers, academic scholars, and the courts. The tumbling interaction of all three kinetic forces together carves its way through the doctrinal landscape. In the middle, far from the edges, flow the most ordinary of deals, transactions, and interactions—the deals you never read or hear about.

But on the margins—at the edges of corporate law doctrine—market participants clash with one another. And the judiciary, guided by the parties' arguments, academic insights, and a rich body of precedent, must decide how the law should evolve. The Court does its best to oversee and navigate the changes in a consistent, incremental, and sensible manner. It has been the singular honor of my life to have played a small role in this process over the last quarter of a century.

The Court of Chancery, as you know, is changing again. I stepped down as Chancellor this past June. Leo Strine was elevated to replace me as the Chancellor, and Sam Glasscock was appointed to fill the vacant seat and is now the newest Vice Chancellor on the Court. I could not be more confident in the skills, dedication, and diligence of these two and of their three colleagues. Vice Chancellor Glasscock is, in a word, brilliant—a gifted writer, with a razor-sharp intellect, and, most importantly, guided by a judicious, even-keeled, and remarkable sense of fairness. He will fit right in on an excellent bench. As you all know from having worked with them for years now, Vice Chancellors Noble, Parsons, and Laster are at the very top of the field, and daily produce high quality, insightful, and robust decisions. And Chancellor

Strine is a man who wakes up every day thinking passionately about Delaware law; about the Court; and about his colleagues and their collective responsibilities to the state's corporations and their stockholders, managers, and directors. I served with Chancellor Strine for thirteen years. I can tell you this about him: there simply is no bolder intellectual force in the field of corporate law. He will bring to the seat of Chancellor unparalleled wit, energy, and cerebral firepower. All of the qualities that made him such a great colleague and a personal friend will make him an equally great Chancellor.

As for me, well, I have been very fortunate over the past two-plus decades as a judge in Delaware to have had gifted, bright, and deeply loyal people surrounding and supporting me—academics, practitioners, staff, law clerks, and judicial colleagues. You have all touched my judicial career, making it immensely enjoyable and deeply satisfying. As I now start my second go-round in private practice, I look forward to continuing our collegial relationship. Although I've been a member of Wilson Sonsini Goodrich & Rosati for only a short while now, it has been very busy, very exciting, and very rewarding. I don't know exactly what the years ahead will bring, but I look forward to the adventure and to sharing it with the same, close-knit legal community. For all the changes that surely will come, I am confident that one thing truly will remain constant: I can count on all of you—lawyers, professors, judges and my friends in Delaware and elsewhere—to keep pushing and challenging me and one another as we rocket around the sun and around the doctrines of corporate law together.