

The Deal

VOICE OF THE DEAL ECONOMY

VOL. 9 NO. 13 SEPTEMBER 5 — SEPTEMBER 18 2011

the interview issue



From blood transfusions to poison pills

WILLIAM CHANDLER reflects on 22 years at Delaware's Court of Chancery and a new beginning at Wilson Sonsini

By **DAVID MARCUS**

WILLIAM B. CHANDLER III briefly sampled several possible careers before then-Delaware Gov. Michael Castle appointed him to the state's Superior Court in 1985. Chandler was only 33 at the time, and he says now, "Frankly, I wasn't sure that it was the right thing for me to do."

His uncertainty faded quickly. "Once I started serving on the bench," he says, "it became clear to me very quickly that this was the kind of work that I really enjoyed. It was the kind of life that I knew I would enjoy." The intellectual challenges of the job reminded him of the two years he'd spent teaching law at the University of Alabama. "In judging, it's the same thing. You're trying to find the right answer, the just answer, the legally required answer, and that is for me a very satisfying experience," he says. "I enjoyed it so much that I didn't want to leave."

He didn't have to. Castle appointed Chandler to Delaware's Court of Chancery in 1989, and he remained on the court for the next 22 years, the second-longest tenure since the 1850s, and one that came during a time of remarkable change in American corporate governance. When Chandler arrived on the court, the jurisprudence on hostile takeovers was still developing, and the majority of his tenure as chancellor, or chief judge, came after the 2002 enactment of the Sarbanes-Oxley Act, which many in Delaware saw as a threat to the state's dominance in the field of corporate law.

That threat never materialized thanks in part to Chandler's skillful leadership of the Court of Chancery from 1997 until this past June, when the judge retired and joined Wilson Sonsini Goodrich & Rosati PC as a partner. As chancellor, Chandler advocated for his court in the state legislature and was an effective administrator, spreading out important cases among the other four judges on the Court of Chancery and fostering a spirit of collegiality on the court.

Lawyers who practiced before Chandler almost unanimously praise

photograph by
BRAD TRENT

him for his fairness, his consistency, his civility and his willingness to listen to their arguments. Chandler, now 60, was generally cautious in his jurisprudence—a distinct advantage in a field of law where practitioners place a high value on predictability. A partial exception came earlier this year when Air Products and Chemicals Inc. sought to force Airgas Inc. to pull its poison pill. True to form, Chandler followed Delaware precedent by upholding Airgas' use of the pill. But he openly questioned the logic of that precedent in an opinion that showed how closely he'd followed the debate over takeover defenses and how deeply he'd reflected on it.

The judge spent his entire career on the bench not in Wilmington, the center of Delaware's corporate bar, or Dover, the state capital, but in Georgetown, a small town in the southern part of the state. Born in 1951 in Lewes, Del., just 15 miles from Georgetown, Chandler graduated from the University of Delaware in 1973 and the University of South Carolina School of Law in 1976 before earning an L.L.M. from Yale Law School in 1979. He then taught law at Alabama for two years, served as legal counsel to former Delaware Gov. Pierre "Pete" du Pont IV from 1981 to 1983, and then worked for two years as an associate with Morris, Nichols, Arsht & Tunnell LLP before being appointed to the bench.

Chandler will keep an office in Georgetown as a Wilson Sonsini partner, though he will also travel frequently to the firm's Palo Alto, Calif., headquarters to meet with clients. Chandler talked about his decision to join Wilson Sonsini, his tenure as chancellor, Airgas and key issues the Court of Chancery currently faces in a wide-ranging interview with *The Deal* magazine's David Marcus.

The Deal magazine: *What cases are you most proud of as a judge?*

William Chandler: Perhaps the most personally satisfying cases that I was involved with fell more often in what I'll call the traditional equity jurisdiction of the Court of Chancery. Those were the guardianship and will contests and trust and estate cases and contract cases, because fundamentally you were dealing with real human beings who reside right here in Delaware, and you frequently had an opportunity to make a difference in those people's personal lives.

It's an aspect of what the court does

that a lot of people don't know about and don't understand, but those kinds of cases, the blood transfusion cases in the middle of the night where a chancellor is called by the hospital because the parents are refusing a blood transfer for a newborn infant, those give you a sense of great satisfaction that you've been able to help someone. And so when I look back over my 22 years on the Court of Chancery, those are the ones that I think most about.

What did your work as chancellor of the Court of Chancery involve?

The chancellor has responsibility for all of the administrative matters of the court. That meant that even though I tried to include my vice chancellors in the decision making, I was responsible for the budget for the court, for all the personnel issues that come up for the roughly 50 people that work in the Court of Chancery. The chancellor is also responsible for equipment and office space issues. The chancellor serves on the state board of pardons that meets every month to consider pardon and commutation applications. That's a very time-consuming part of the work of the chancellor.

The other aspect is that the chancellor is the face of the court, and so he represents the court not only in the courtroom, but in the legislature and with the governor's office. Frequently, the chancellor has to go down to the legislature to convince them that certain legislation is valuable for the court.

How much time would you say it took you to assign cases?

On an average day, you're going to have to assign anywhere from five cases to a dozen cases, sometimes more than that. When you do that, you wanted to look at the complaint that was filed, see what kind of fuse it was on, how quickly it was going to have to be handled, how complicated it was going to be, what was the nature of the case, who were the parties involved. And then you have to figure out who was on deck to take that case. I would guess I had to spend an hour, an hour and a half, two hours a day with the assignment of cases and the motions to file under seal.

How much time did managing the political aspects of the Court of Chancery take?

It's hard to put a number on that because

there would be some weeks when you wouldn't be bothered at all, and then there would be other weeks when you would get calls from legislators or the governor's office or the secretary of state's office where they need you to go to Dover for this or Wilmington for that. If you averaged it over a year, you're at least going to get five or 10 hours a week of that kind of stuff.

Wilson is a very different kind of firm than many of those you dealt with as a judge. Was that part of its appeal?

Absolutely. That was probably the driving force. I had practiced law in Delaware with a very prestigious firm, Morris, Nichols, Arsht & Tunnell, and I could have probably gone back and practiced with Morris Nichols or another Delaware firm.

So the first question I had to ask myself was whether I wanted to go back and do what I had done before, or had I reached a point in my life where I wanted to do something totally out of the box for me that would be different, interesting, challenging. I opted for that because I had reached a stage in my life where I don't think I need to do again what I've already done. Once I made that choice, then I looked at the options I had and chose Wilson Sonsini.

They're a very respected firm whose base is in Silicon Valley. They're recognized as the leader in the technology field. I have a certain interest in the technology field. I wrote some opinions involved in that jurisdiction, and I thought it would be interesting to see from the other side. That was the interesting and sort of nervy aspect of this choice. The other aspect of the choice was the people at Wilson. The partners and the associates and all of the other folks I met at Wilson are just fantastic people.

You gave a talk at the Wilmington Club this spring where you mentioned several aspects of Delaware law that you would change if you could. Could you discuss what they might be?

Increasingly, we're being asked to decide very difficult complex financial issues in the Court of Chancery, either in an appraisal context or in an entire fairness case where you're trying to value the assets of a corporation at a given moment in time. Those are difficult decisions for trial judges, and particularly those who aren't steeped in financial literature, who aren't

perhaps schooled in corporate finance, so increasingly you have to rely on experts and expert testimony.

To the extent we increase the amount of effort that the trial judges in this area have to go through to decide these cases, we risk improvident and unpredictable decisions, and it's a very costly process. It was one of the areas where I said maybe we need to think about whether we should go back to what we had years ago. We had experts who were appointed as masters to serve as experts in appraisal cases who truly are schooled in corporate finance and difficult financial issues. Let them make the decision based on all of this financial information and the expert testimony and then have the Court of Chancery review that, almost like an appellate court would.

It seemed to me that it would be better for Delaware law going forward and better for the vice chancellors not to be involved in that as much, and you'd get more predictable results. That's one area, if I had to predict, I would predict that we ought to move the law and our procedures in that direction.

Would you talk to your fellow judges about specific cases that you had?

It's very common. We confer and consult every day. We constantly would be on the phone talking about work. We constantly would circulate drafts of our opinions, getting the feedback and the comments of our colleagues. On important and significant issues, perhaps where there was a bit of ambiguity in Delaware law on a particular question, absolutely we would confer and consult amongst ourselves on each other's work.

One of the great secrets of the Court of Chancery is that although we are individual trial court judges, we work almost like an appellate court that sits en banc, in that we confer and consult about our cases. I don't think there's any other trial court in America where the judges do that, and have the ability to do that, but we're a small court, there are only five judges, and the docket is manageable enough where you can have that kind of daily interchange.

It helps us avoid making mistakes, but it helps assure that factor of coherence in the law—that we're not five judges and you have a case where one of us goes and decides something that goes off into left field. We'll save one another from making a mis-

take like that. That's just a very unusual aspect of the Court of Chancery.

Was that something that was true from the time you started on the Court of Chancery, or did it become more pronounced as the years went along?

It became more pronounced. It existed before I became chancellor. When Bill Allen was chancellor, we were a very consultative and collegial group, and I'm sure it was that way when Grover Brown was chancellor, and it goes on back. But I think it's become emphasized much more in the past decade, mainly because of the increasing workload and the complexity of the cases.

Airgas was your last major opinion. Was it one you would have written at that length had it not taken place toward the end of your career?

I don't think it would have mattered when it was written in my career. I think it was because that was the defining issue in Delaware law and had never been answered: When can a board just refuse to pull the pill even though shareholders appeared to want to take the offer and there is an offer on the table that has no contingencies, is fully financed and seems to be a good value? At what point can a board nevertheless say no to that offer and retain the poison pill even in the face of it?

That question had never been quite so starkly posed as it was in the Airgas case. So it was a question that no matter when it got posed, it was going to yield a long opinion that was going to try to figure out where Delaware law is or ought to be on that question.

It was clear in reading the opinion that you had thought very deeply about that question, but except for your decision in Unitrin, you hadn't had the chance to write about it until Airgas.

I got the views of all of my colleagues on the court on both the pill question, which was Airgas II, and on the bylaw question, which was Airgas I. They were very helpful to me in writing it and getting it out in a timely way. If the question is, "Would I have written this as long or in the same way?" probably not, because back when I wrote Unitrin in the mid-1990s, there hadn't been as much ink spilled by academics. You saw a lot of academic references in

the opinion, and that probably resulted in a slightly different approach to how to write it, because I was writing it for the parties but also acknowledging the views of various academics on this question from professor [Lucian] Bebchuk to others.

In the opinion, you said that if left to your own devices, you would have come to a different decision than the one you felt that Delaware law required you to reach. Why were you so outspoken in that opinion?

I was doing it for a couple of reasons. I think in retrospect that I probably overstated the case a bit. I think probably the actual result in the case was the right result and one that I fundamentally agree with, although my opinion signaled some ambivalence.

I was signaling my ambivalence because it struck me that the law in Delaware had not been completely transparent in this area. Because I thought there would be an appeal no matter which way I ruled, I was urging that if this is going to be our law, let's just be honest about it so that people will know going forward what the answer is. You don't have to redeem the pill in any instance. The board can always keep it in place, even after multiple election.

The second reason I did that was to signal that I wasn't sure in these circumstances which way this ought to go, but this was the way I thought Delaware law said it has to go now.

What makes me now, in retrospect, think that it was the right result? A stock of things. What happened to the stock price of the companies after the decision was reached, where Airgas went to \$70 [a share]. And second was the fact that the election of those two directors, the Air Products [nominees to the Airgas board] and their conversion to the position of the other members of the [Airgas] board after hiring their own experts and lawyers, probably makes this case a case that will be limited to its own facts. It also suggests to me that that's another reason to believe this was the right decision, not to redeem the pill at that point, because two new directors of the offering party agreed that it was still not a fair price.

Airgas was the first decision in many years regarding a poison pill in a hostile deal. On a practical level, how important is that issue for Delaware now as opposed to 10 or

15 years ago?

I'm not sure I'm the best one to answer that. There are fewer and fewer hostile deals. Most of them now are friendly, they're negotiated, they're not hostile, unlike the 1980s and early 1990s, when you had many more hostile deals. So it may not be as significant as a practical matter because you have fewer instances of it.

The question that I don't know how to answer, but maybe others do, is, Are there fewer of them because this is the answer? Delaware's not going to require the pill to be pulled, so you're wasting your time going down that path? Is that the reason? I don't know. It could be. But it may well be that this particular decision will not be very significant, because you're just not going to see hostile deals being done where the pill is at issue. I was hoping that [Air Products] would take this issue on up. If they'd taken it on up, maybe we would have gotten an answer to the question.

About six months after Sarbanes-Oxley came out, you and then-Vice Chancellor Leo Strine wrote a long article about the law and its potential interaction with state corporate law. How did that interaction play out over the next decade, and how did it affect your lives as judges?

Less than we predicted. The article suggested that the requirements and prescriptive rules that were going to evolve out of Sarbanes-Oxley would perhaps lead to an influx of derivative litigation in which shareholders would be complaining that their companies' directors had failed to abide by the rules that were generated by Sarbanes-Oxley. And that we would be called on to make decisions that opined about whether or not this requirement of Sarbanes-Oxley was in fact not followed by the board, or the board had failed to adopt a compliance program to make sure that this rule or regulation was complied with, or some other obligation was ignored or not complied with. It hasn't turned out to have generated that influx of derivative litigation.

Would you predict the same result for Dodd-Frank?

I would think that once the SEC and other agencies have issued all the implementing regulations under Dodd-Frank, there's the possibility that a particular company's

board's failure to abide by [a rule or regulation] and therefore be fined or prosecuted in some fashion, that those potential losses could then generate derivative litigation or class-action litigation, and we might see that in the Court of Chancery. I'm not sure. Dodd-Frank has a variety of things that directly intrude on Delaware law and essentially usurp our law, but that's the way in which it could affect the daily work of the Court of Chancery, the same way we predicted [might happen] under Sarbanes-Oxley.



How has the debate over proxy access and the shareholder rights movement more broadly affected your law and how you approach cases as judges?

I'm not sure it has in a specific way affected the way we decide cases. You're aware of this constant pressure for greater shareholder involvement in the decision making of the board and in the constitution of the board. Delaware responded to that legislatively, not through the courts, by allowing shareholders to adopt bylaws that would implement a proxy access mechanism and a proxy reimbursement mechanism. It hasn't really percolated into the courts, although the Delaware Supreme Court's Computer Associates decision did effectively approve of shareholders adopting bylaws like that.

We realize there is this tension between shareholders and directors and managers

over who should have more voice. That has existed for decades, and it will continue on. I think the judges on the Court of Chancery don't try to react to it. Our law is very clear that the board of directors manages the affairs of the company. Shareholders have the right to adopt bylaws, including bylaws that set up a proxy access mechanism by which they can choose who's going to be on the board. That's the resolution of the tension: Boards manage, shareholders don't manage, shareholders can adopt bylaws. We'll decide whatever comes out of that if there are disputes, but the proxy access debate and the SEC don't really influence how we decide these discrete issues.

And the D.C. Circuit's decision [in July] has thrown proxy access back into the SEC's court, so to speak. From Delaware's perspective, we've adopted the very thing that you can't seem to get adopted and have pass muster with the courts, so why not let it work out in Delaware?

HealthSouth has already done it under our law. They've adopted a proxy access provision and a reimbursement provision. So why not let the self-ordering, private-ordering mechanism of Delaware work itself out? See how that works before we do something prescriptive that's going to affect everybody? That would be my preference. It will be interesting what the SEC does now in response to the D.C. Circuit decision.

But it's very clear that if they would allow the Delaware system to work the way it's designed, it might solve this problem. At least we think it would.

One of the issues that seems to have been the most troublesome for you and your colleagues in recent years is the rise in multijurisdictional litigation in shareholder suits arising from the announcement of a merger or acquisition. In a footnote to your decision in Allion Healthcare, you advocate an ad hoc solution where you call up the judge or judges in the other jurisdictions and together figure out who's going to handle the case. How severe is the problem of multijurisdictional litigation, and how much can it be alleviated in a federal system?

It's pretty severe. It's very costly and expensive. It now is a routine happening that you get litigation filed in Delaware and usually in the headquarters state. It's almost auto-

matic. It's costly to the company, it's costly to the shareholders of the company, and it's costly to the court systems because you have a limited amount of resources and you're spending them twice.

It's a significant problem, and the question is how you solve it. In the Allion case, I explain how I've solved it in the past. It's worked for me. Will it work for everyone? Maybe not. Will it work well enough that we don't have to think of any other way of solving this problem? Probably not. Is there another solution besides the one I suggested in Allion? I hope so, and I don't know what it is exactly. One solution might be if all the states entered into a compact, sort of like the federal multijurisdictional, multidistrict litigation. Maybe you could work out something where all of the states agree that there be some institution or agency that decides [where] it ought to be litigated if litigation is filed in two different states.

Maybe a compact among the states wouldn't work, maybe other states wouldn't agree to do it, maybe other states' courts don't want to have a system where they might lose cases to Delaware and vice versa. There's one article written by Mark Lebovitch [that proposes that when] a case gets filed in Delaware, a national notice be sent out notifying all the plaintiffs lawyers: There's a case in Delaware. Come join. You can come in and be part of this litigation. Mark's idea might work, too, or it might not, because the plaintiffs' firms in California might say, "No thanks. We'll file out here, because I can get a fee out here, and I can't get it there, or I might not get as much there."

One other solution that perhaps exists is the use of forum selection clauses in the charter or bylaws of the company. Some firms are apparently adopting such provisions in their charters when they go public or adding them to the charter later by asking shareholders to approve such provisions. If those provisions are adopted, they might very well prove to be an excellent solution. But until we find

a solution, Allion is my only practical recommendation.

Given the decline in hostile bids and given changes in the governance landscape, how does Delaware matter now as compared to a decade or 15 or 20 years ago?

When I joined the court in 1989, that was the tail end of the takeover era, and cases of that kind were just beginning to taper off. And now, even after Airgas, because of the infrequency of hostile deals, we just don't see those kinds of transactions coming into the court, which were always sort of the bread and butter of the court, what it was known for, how it made its reputation.

What we're seeing more of is disputes between corporations. They've got agreements, joint venture agreements or partnership agreements, or transactions they're doing together. And they get into disputes, and they're bringing them to the Court of Chancery. That's what I see as the evolution in the type of work we're doing. I don't think it's a bad thing. I think it's a recognition by corporate America that that's a good forum. We can get a sophisticated decision, a nuanced decision, and we can get it quick. And so that, coupled with the arbitration and mediation powers that the Court of Chancery now has, I think that's likely to be the future of the court.

How do you think Chancellor Strine's approach will differ from your own?

I don't really think there will be a whole lot of difference. We're two different people, and naturally we have differences in style and technique, but he's a very careful, thoughtful jurist, and he gives maximum attention to every case. He's a hard-working jurist, so I think he's going to approach the court the same way I did and Bill Allen did. I think he'll be great. ■



AS FEATURED IN
The Deal
magazine

WWW.THEDEAL.COM

The Deal (ISSN 1545-9878) is published biweekly except in August and December by The Deal, LLC.
© Copyright 2011 The Deal, LLC. The Copyright Act of 1976 prohibits the reproduction by photocopy machine or any other means of any portion of this publication except with the permission of the publisher. The Daily Deal is a trademark of The Deal, LLC.

WSGR

Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

650 Page Mill Road, Palo Alto, California 94304-1050
Phone 650-493-9300 | Fax 650-493-6811 | www.wsgr.com