

**The Story of Paramount Communications v.
QVC Network: Everything is Personal**

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The Story of Paramount Communications v. QVC Network: Everything Is Personal

By Ehud Kamar^{*}

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“We build companies, we don’t give them to someone else.”^{**}

Background

State case law at the beginning of the 1980s recognized two forms of corporate mismanagement: breach of the duty of loyalty, and breach of the duty of care. Duty-of-loyalty breaches were relatively easy to spot because they involved a direct transfer of wealth from the corporation to those controlling it. Accordingly, while the legal standard governing these breaches of fiduciary duty left room for judicial discretion, courts generally did not tolerate them. Breaches of the duty of care, in contrast, presented a challenge for the courts because they involved no visible conflict of interest between the board and the shareholders. The judicial response to this difficulty was to back all decisions of conflict-free boards as long as the boards were informed.

Then came the takeover wave of the 1980s that ended the relative clarity. The takeovers, previously a rare phenomenon, were fueled by the emergence of high-yield bonds (“junk bonds”) that enabled acquirers to finance large acquisitions, and the presence of conglomerates and cash-rich corporations that could be restructured at a profit. Many corporations were bought: Most invited friendly bids, and some yielded to persistent bidders over the objection of the board. It was the latter type of takeovers — “hostile takeovers” — that raised new and difficult legal questions.

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^{**} Unidentified media mogul. Ronald Grover & Richard Siklos, *Egomania vs. Merger-Mania in the Media Biz*, Bus. Wk. Online Daily Briefing, Oct. 7, 1999, <http://www.businessweek.com/bwdaily/dnflash/oct1999/nf91007d.htm> (last visited Nov. 20, 2008).

How should a board react to an unsolicited bid for the company? Does it matter whether the bid came while the company was going about its normal business or when it was contemplating a merger? The answer was not obvious because it was hard to tell what motivated the board to favor one bidder over another. How would a court distinguish between a board making an honest effort to choose the best for shareholders and a board acting out of self-interest? While boards claimed to resist inadequate offers and welcome superior ones, it was possible that they simply rejected the bids that threatened their jobs. The courts could not readily classify entrenchment motives under one of the two familiar legal categories. On the one hand, they seemed to involve more than a breach of the duty of care. On the other hand, they did not involve a direct transfer of wealth, usually an element in duty-of-loyalty claims.

The takeover market demanded speedy resolution of contested acquisitions. Market conditions changed constantly, deal financing was hard to keep in place, and prolonged battles disrupted business, kept management from pursuing alternatives, and drove away valuable employees, trade partners, and customers. As a result, lawyers and judges worked around the clock to resolve complex takeover disputes in a matter of days, and trial court decisions were rarely appealed.

Even in Delaware, where most public companies are incorporated, there were only a few appellate decisions.¹ In 1985, the Supreme Court of Delaware decided *Unocal Corporation v. Mesa Petroleum*, in which it held that a board can defend the company against hostile bidders that pose a threat to it as long as the defense is proportionate to the threat.² Later that year, in *Moran v. Household International*, the court green-lighted a powerful defense, the “poison pill”, which consisted of a dividend of rights allowing all shareholders other than the hostile bidder to buy stock at a discount.³ In 1986, the court decided *Revlon v. MacAndrews & Forbes Holdings*, in which it chastised the board for using a takeover defense — in that case, an option granted to a friendly bidder to buy company assets at a discount — to protect a sale of the company for cash to a buyer intent on breaking it up.⁴ This sale decision, the court held, required the board to seek the best price available, rather than defend the company.⁵

¹ The survey in the text covers major decisions, not all of the decisions.

² See *Unocal Corporation v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). Applying this test to the facts, the court upheld an offer to exchange some of the stock not owned by the hostile bidder for more valuable debt. The Securities and Exchange Commission banned discriminatory tender offers soon thereafter. Securities and Exchange Commission Release No. 33-6595 (July 1, 1985) 50 FR 27976 (proposed rule on third-party offers); Securities and Exchange Commission Release No. 33-6596 (July 1, 1985) 50 FR 28210 (proposed rule on issuer offers); Securities and Exchange Commission Release No. 33-6653, 51 FR 25882 (July 17, 1986) (final rule).

³ See *Moran v. Household International, Inc.*, 500 A.2d 1346 (Del. 1985).

⁴ See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

⁵ Subsequent case law afforded the board wide latitude in deciding how to obtain that price. See *Barkan v. Amsted Industries, Inc.*, 567 A.2d 1279 (Del. 1989).

The last takeover decision of the 1980s, and the one that rang the opening bell for the Paramount acquisition saga, was *Paramount Communications v. Time*.⁶ The story behind the case reflected a decade-long feeding frenzy in the media sector in a quest to bulk up and combine content production with distribution channels.⁷ Time, publisher of books and magazines such as *Time* and *Fortune*, and owner of television networks Home Box Office (HBO) and Cinemax, also sought ways to expand. After ruling out a host of potential partners (including Paramount Communications), it signed a stock-for-stock merger agreement with Warner Communications. The deal would have given Time's shareholders 38 percent of the combined company, with representatives from both companies serving as joint chief executive officers and board members. To deter other potential suitors, the parties agreed that Time would not consider proposals from other bidders and that each party could exchange roughly 10 percent of its shares for the other party's shares. Shortly after the deal's announcement, media company Paramount Communications made a bid for Time. In response, Time and Warner restructured their merger as a cash tender offer by Time for half of Warner's shares followed by a cash and stock merger, enabling the parties to complete the transaction without the approval of Time's shareholders.

The parties soon found themselves before the Delaware Court of Chancery arguing whether the proper standard to review the Time board's refusal to talk to Paramount was the liberal standard of *Unocal* or the demanding one of *Revlon*. Expanding on the rationale given in *Revlon*, Delaware Chancellor William T. Allen held that *Revlon* did not apply and that the Time board was justified in ignoring Paramount because the deal with Warner would not wrest control from the shareholders of Time: The same disaggregated shareholders who owned Time, along with those who owned Warner, would own the combined company after the merger. This made the deal more like an expansion of Time than its sale and meant that the shareholders in the future could sell their stock to a bidder for the combined company and be paid for control at that time.

On appeal, Justice Henry R. Horsey of the Supreme Court of Delaware agreed with this result but based his decision on different grounds. Unlike *Revlon*, he explained, Time was not about to be broken up and so there was no need to seek the highest possible price for it.⁸

⁶ See *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1990).

⁷ Notable deals include Turner Broadcasting Systems' 1985 acquisition of MGM for \$1.5 billion, Sony's 1988 acquisition of CBS Records for \$2 billion and 1989 acquisition of Columbia Pictures Entertainment for \$3.4 billion, and Matsushita Electric Industrial Company's 1990 acquisition of MCA, parent of Universal Studios, for \$6.1 billion. See Calvin Sims, 'Synergy': *The Unspoken Word*, N.Y. Times, Oct. 5, 1993, at D1.

⁸ The Supreme Court also used *Time* to reject, albeit in dicta, prior Court of Chancery decisions that held that the board could not defend the company from a hostile takeover bid just because the price offered was inadequate. See *Time*, *supra* note 6, at 1152–53. An earlier opportunity to reverse those decisions had surfaced when one of them — *City Capital Associates v. Interco, Inc.*, 551 A.2d 787 (Del. Ch. 1988) — was

The Supreme Court's breakup test and the Chancery Court's change-in-control test share the same logic. Both complement *Unocal*'s principle that the board should decide when to sell the company with a definition of what amounts to a sale — and treat this event as a trigger of the duty to seek the highest price available. A breakup constitutes a sale because it leaves the shareholders without an interest in the original company. Not only is the company broken up, but typically the shareholders are cashed out in the process. Because this is the shareholders' last chance of being paid for the company, the board should seek the highest price. But a sale does not have to involve a breakup. An exchange of the company's shares for cash or debt is also a sale because it transfers the company to a new owner. Even a mere change in control of the company transfers a valuable piece of the company to a new owner and represents the last chance to be paid for this piece. This finality justifies a requirement that the board seek the best price it can find.⁹

Because a sale always involves a change in control but not always a breakup, the reason for not requiring Time's board to seek the highest price available was, as the Chancery Court held, that the board did not plan a change in control. That the board did not plan a breakup was not a sufficient reason if *Revlon*'s rationale was to require the board to pursue the highest price available whenever the company is sold. By rejecting the Chancery Court's change-in-control test and using the breakup test instead, the Supreme Court suggested, without saying why, that a breakup was not only *a* trigger of *Revlon* duties but also the *only* trigger. Or at least so it was understood.¹⁰

A Marriage Made in Heaven

Martin S. Davis started his career in entertainment as an office boy at the Samuel Goldwyn Company in 1947.¹¹ In 1965, as marketing chief at Paramount Pictures, he was asked to help fight off Herbert J. Siegel, who was trying to take over the company. At the end of a yearlong legal battle, Paramount was sold in a friendly

appealed. See Beatrice E. Garcia, *Stay Is Granted on Ruling Against Interco Rights Plan*, Wall St. J., Nov. 3, 1988, at B8. But the appeal was never heard because the bidder dropped the bid. See Beatrice E. Garcia & Frank Allen, *Forstmann Little, Partners Quit Bidding for RJR; Rales Group Abandons \$2.51 Billion Offer for Interco*, Wall St. J., Nov. 17, 1988, at A1. According to media reports of the time, the Supreme Court had been prepared to accept the appeal. See William Meyers, *Showdown in Delaware: The Battle to Shape Takeover Law*, Institutional Investor, Feb. 1989, at 64.

⁹ The question is ultimately one of degree. Arguably, the merger between Time and Warner also represented a last chance of sorts for Time's shareholders because it fixed their stake in the combined company — and therefore their share of any future premium that a third party might pay for Time Warner. See Leo E. Strine, Jr., *Categorical Confusion: Deal Protection Measures in Stock-for-Stock Merger Agreements*, 56 Bus. Law. 919 (2001).

¹⁰ Media coverage of the case emphasized the difference between the Supreme Court's reasoning and the Chancery Court's. See David B. Hilder, *Ruling by Court on Time Inc.'s Merger Affirms the Power of Corporate Boards*, Wall St. J., Feb. 28, 1990, at A3.

¹¹ See Bryan Burrough, *The Siege of Paramount*, Vanity Fair, Feb. 1994, at 66, 129.

deal to Gulf and Western Industries, a conglomerate headed by Charles G. Bluhdorn.¹² Davis soon became Bluhdorn's right hand man and, when Bluhdorn died in 1983, his successor. Within a few years, Davis sold every division that was not related to media or entertainment and renamed the company Paramount Communications in 1989. Focused on a few related businesses and rich in cash, Paramount had become both a potential buyer and a prime target.

Davis spent the next few years searching for a deal partner. After an unsuccessful run at Time in 1989 (the story of *Paramount v. Time*), he talked to numerous media companies. All of these efforts were in vain. Some negotiations reached a deadlock when both sides wanted control, others failed because Davis's fearsome character scared away partners, and still other negotiations were called off by Davis. Even Time Warner, whose merger Davis had tried to crash in 1989, invited Davis to discuss a deal. But other than apologies for disparaging Davis in the 1989 fight, nothing came out of these meetings; the stumbling block, again, was deciding who would be the boss.

One person Davis talked to extensively was cable mogul John C. Malone. Malone was eager to combine Paramount with one of the companies he controlled — Tele-Communications Inc. (TCI), TCI-controlled Liberty Media, or Turner Broadcasting — and promised to help Davis replace its existing management. In June 1993, Malone provided Davis another reason to do a deal: The board of QVC, Malone leaked, had just authorized its chairman and chief executive officer Barry Diller to explore a hostile bid for Paramount. Malone was not bluffing. He was a QVC director (and was open with the QVC board about his conflict).

Diller and Davis were known for their mutual dislike of each other. The son of a wealthy Beverly Hills real estate developer, Diller dropped out of college in 1961 to become a mail boy at the William Morris talent agency.¹³ Soon he rose in the ranks, first at William Morris, then at the ABC television network, and by 1974 as head of Paramount Pictures. Unlike Davis, who was good at rationalizing existing operations, Diller was good at creating new ones. He invented the television-mini-series and the made-for-television movie at ABC, and oversaw the release of movie and television hits at Paramount.¹⁴ In 1984, however, personal clashes with Davis, the new head of the parent company, drove Diller to leave Paramount and join Fox, where he started

¹² See Alex S. Jones, *Chris-Craft's Feisty Chairman*, N.Y. Times, Jan. 22, 1984, at 36; Geraldine Fabrikant, *Shuffling Hollywood's Deal Deck*, N.Y. Times, Nov. 6, 1993, at 141.

¹³ See Bernard Weinraub, *What's Driving Diller to Play for Paramount*, N.Y. Times, Sept. 22, 1993, at D1.

¹⁴ See Richard Corliss, *The Barry and Larry Show*, Time Mag., July 11, 1994, at 48; Weinraub, *supra* note 12.

the first television network in years.¹⁵ He stayed there until 1992, when he realized that the controlling shareholder Rupert Murdoch would never share control with him. With the money he had, he purchased 12.5 percent of the home shopping network QVC (Quality, Value, Convenience) and became its chairman and chief executive officer. QVC's other big investors were John Malone's Liberty Media (with 23 percent) and the Roberts family's Comcast (with 12.6 percent).¹⁶ Headquartered in an industrial park outside of Philadelphia, the twenty-four-hour telemarketer had no Hollywood glam. But it was a good vehicle for acquisitions.

The clash between Diller and Davis was not only about power. It was also about style or, as *Vanity Fair* writer Bryan Burrough put it, the "ultimate clash between New York and Los Angeles."¹⁷ Both men were self-made, but in ways that could not have been more different. Davis was "the tough streetwise kid from the Bronx who fled a dysfunctional home at 14, rented a room on the Grand Concourse for four dollars a week, and toiled as a delivery boy when he wasn't stealing copies of *The Daily News* and hawking them for two cents apiece."¹⁸ He grew up to be "the most hated man in Hollywood," considered by his subordinates the ultimate "suit", "an icy dictator who terrorized L.A.'s creative community from his windswept Central Park aerie, far from the nattering crowds of Mortons and Le Dôme."¹⁹ Diller, in contrast, was "pure L.A., a playful rich kid from Beverly Hills," who "learned the ropes as the twentysomething wunderkind who invented ABC's Movie of the Week, and, at 32, was named one of the youngest studio chiefs." In contrast to Davis, a reclusive bibliophile, Diller was a "hypersmart, overweeningly arrogant, terrifyingly blunt" go-getter,²⁰ who was "running with a crowd that included [David] Geffen, Warren Beatty, and Calvin Klein."²¹

The news about Diller's hostile intentions made Davis see more clearly the need to strike a deal. But the thought of striking a deal with Malone did not appeal to him. Davis feared Malone, whom he considered the cable industry's Al Capone. "There's nothing John Malone would ever do that would shock me," Davis said. "Except perhaps send me a warm, affectionate note."²²

¹⁵ "He was acting like the goddamn protected species at the company," Davis would recall when asked about his relationship with Diller at Paramount. "I was sick of it. He was political, destructive, playing games, [and] trying to undermine me." See Burrough, *supra* note 10, at 129.

¹⁶ See Geraldine Fabrikant, *Tele-Communications Seen in Buyout of Liberty Media*, N.Y. Times, Oct. 7, 1993, at D1.

¹⁷ See Burrough, *supra* note 10, at 68.

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See Kurt Andersen, *Ego Is Paramount*, Time Mag., Oct. 4, 1993, at 71.

²¹ See Burrough, *supra* note 10, at 68-70.

²² See *id.* at 70. Vice President Al Gore, on the other hand, had famously called Malone the "Darth Vader of cable". See Albert R. Hunt, *Bell Atlantic-TCI: A Merger Democrats Should Like*, Wall St. J., Oct. 21, 1993, at A18.

A deal with Sumner M. Redstone's Viacom, on the other hand, seemed appealing. Redstone was an old friend. In 1965, as part of his effort to defend Paramount Pictures from a hostile bid by Herbert J. Siegel, Davis formed a shareholder committee and named Redstone, then an unknown Boston theater owner with a few dozen Paramount shares, as its chairman.²³ Born in Boston's West End to a drive-in theater owner, fiercely competitive Redstone started his adult life in the legal profession.²⁴ After graduating from Harvard, he clerked at a federal court of appeals, lectured at a law school, argued tax cases for the government, and practiced tax and antitrust law at a law firm.²⁵ By 1954, however, Redstone was ready for a change. He joined the family's business, and over the next two decades turned it into a nationwide theater chain. In 1987, Redstone staged a successful hostile takeover of Viacom (Video and Audio Communications), a treasure trove of radio and television assets that included MTV, Nickelodeon, Showtime, and The Movie Channel. He was officially a media mogul.

In 1990, as part of Davis's many efforts to find a deal partner after losing *Time*, Davis and Redstone started to talk about a possible deal between their companies. The negotiations went on and off for three years with Herbert A. Allen, an investment banker specializing in the media sector, as a go-between. The parties could not reach an agreement, however, because both Redstone and Davis wished to control the combined company. "Finally it became clear," Redstone would later recall, "that Martin [Davis] simply could not bear to let go of the reins of Paramount. He had built and shaped and focused this company, he was having a wonderful time running it, and he was not emotionally prepared to part with it."²⁶

In April 1993, with more than a billion dollars in retained earnings, a series of disappointing movie releases, and a languishing stock price, rumors began spreading that Diller and Malone were weighing a bid for Paramount.²⁷ Robert F. Greenhill, then the president of the investment bank Morgan Stanley, saw potential. He called

²³ See Burrough, *id.* at 129; Sumner Redstone & Peter Knobler, *A Passion to Win* 176 (2001). In the late 1980s, however, Davis and Redstone had found themselves on the opposite sides of a bitter lawsuit over movie rights. See Laura Landro, Johnnie L. Roberts & Randall Smith, *Merging Media: Viacom and Paramount Get Together to Form New Industry Colossus*, Wall St. J., Sept. 13, 1993, at A1.

²⁴ Redstone's memoirs the following insight, which may have been colored by the outcome of *QVC*: "Why did I choose law? Because the law is based on reason and justice, two ideals I hold dear.... The law is based on neutral principles that are constant and not result-oriented. Courts that act in this way, legal scholars say, act with legitimacy. I admire that constancy, that legitimacy." See Redstone & Knobler, *supra* note 21, at 55.

²⁵ See Redstone & Knobler, *supra* note 21, at 58. On one occasion Redstone argued before the Supreme Court of the United States. See *Holland v. U.S.*, 348 U.S. 121 (1954).

²⁶ See Redstone & Knobler, *supra* note 21, at 178.

²⁷ See *id.* at 179.

Redstone and suggested they have dinner with Davis.²⁸ Redstone doubted anything would come out of the meeting, but did not mind trying. The dinner, in a private dining room at Morgan Stanley, went surprisingly well. This time, Davis agreed to let Redstone control the votes provided Davis remained the chief executive officer.²⁹

The following five months were spent by the two companies trying to resolve the remaining issues. The question of control having been resolved, the parties haggled over price, the stock option Paramount would grant Viacom to protect the deal, and the protection of Paramount's shareholders from a decline in the value of the Viacom stock they would receive. Twice the negotiations broke down but, helped by a rise in Viacom's stock price and by Diller's evasive answer when asked by Davis at an August lunch about his intentions, they eventually succeeded.

A key strategist for Paramount was Donald Oresman, the company's 67-year-old general counsel.³⁰ Back in 1974, when Paramount was called Gulf and Western Industries and Oresman was at Simpson Thacher & Bartlett, Oresman discovered that the lead partner representing Gulf and Western, Joel Dolkart, had stolen money from Simpson Thacher and from his previous firm. Dolkart was expelled and Simpson Thacher offered its resignation. Gulf and Western's chief executive officer Bluhdorn had a better idea: He made Oresman his main outside lawyer and, two years later, a director. When Bluhdorn died of a heart attack in 1983, Oresman convinced his fellow directors to choose Davis as his successor. Several months later Oresman joined Paramount.³¹

On September 12, 1993, Viacom and Paramount announced an \$8.2 billion (\$69.74 per share for each of its 118 million shares) merger in which Paramount shareholders would receive about \$9.10 in cash and Viacom stock valued at \$60.04 per share, with no protection against a decline in the price of Viacom's stock. The combined company would be named "Paramount Viacom International, Inc." and would be managed by Davis. Redstone, however, would control 69.8 percent of the voting power and have rights to 38.5 percent of the cash flow.³² The agreement required the Paramount board to make its poison pill inapplicable to the merger, promised Viacom a \$100 million termination fee if Paramount bailed out, and gave Viacom an option to buy 19.9 percent of Paramount stock at the deal price in cash or

²⁸ Redstone had known Greenhill from client development events Greenhill held annually at John Gardiner's Tennis Ranch in Carmel, California and, later on, from using Greenhill's services in a stock offering. See Geraldine Fabrikant, *Shuffling Hollywood's Deal Deck*, N.Y. Times, Nov. 6, at 141.

²⁹ See Redstone & Knobler, *supra* note 21, at 180-181.

³⁰ See Susan Beck, *A Corporate Courtship Gone Sour*, Am. Law. Corp. Counsel Mag., Mar. 1994, at 42, 42.

³¹ See *id.* at 47-48.

³² See Geraldine Fabrikant, *Giant Merger Set in Entertainment*, N.Y. Times, Sept. 13, 1993, at A1.

in Viacom debt. In addition, it prohibited Paramount from talking to a competing bidder unless the bidder made a bona fide bid with no material financing conditions and the Paramount board thought that its fiduciary duties required talking to that bidder.³³

With much fanfare, the parties announced that Viacom was “acquiring” Paramount,³⁴ and Redstone vowed in two of the better-remembered quotes of the time that “this marriage will never be torn asunder”³⁵ and that “it would take a nuclear attack to stop [the Viacom-Paramount] deal.”³⁶

Enters QVC

Redstone was wrong. On September 20, QVC countered the Viacom offer (whose value had shrunk to \$7.5 billion as Viacom’s stock dropped) with an offer to buy Paramount for \$3.5 billion in cash and \$6 billion in QVC stock³⁷ — “a purebred, over-the-transom bear hug,” as Diller put it.³⁸

Paramount and Viacom reacted dismissively. A day after QVC’s announcement, an “executive close to Paramount” was quoted asking, rhetorically, “How real is this offer? Can they finance it?”³⁹ Viacom’s Redstone was of the same mind. “I’m advised that it is not the kind of offer that could be considered by Paramount,” he told reporters, “because it leaves out critical elements, including financing arrangements.”⁴⁰ But not everybody on Wall Street felt that way. On September 22, the New York Hilton hosted the cable-television industry’s annual Walter Kaitz dinner. At the dinner, reported *The New York Times*, a long line of bankers lined up in front of QVC’s tables. “It was kind of amusing to see so many bankers groveling in front of QVC,” one witness to the spectacle said. “After seeing that, it is fairly ridiculous for Viacom to say QVC’s financing isn’t in place.”⁴¹

³³ See *QVC Network, Inc. v. Paramount Communications, Inc.*, 635 A.2d 1245, 1250–51 (Del. Ch. 1993) (Hereinafter, *QVC Trial*).

³⁴ See Laura Landro, Johnnie L. Roberts & Randall Smith, *Viacom and Paramount Get Together to Form New Industry Colossus*, Wall St. J., Sept. 13, 1993, at A1.

³⁵ See Mark Robichaux, *Paramount and Viacom Plan to Seek Investment from Regional Phone Firm*, Wall St. J., Sept. 24, 1993, at A5.

³⁶ See Laura Landro, Johnnie L. Roberts & Anita Sharpe, *QVC Network Readies Offer for Paramount*, Wall St. J., Sept. 20, 1993, at A3.

³⁷ See Geraldine Fabrikant, *TV Shopping Concern Makes Bid as a Battle for Paramount Begins*, N.Y. Times, Sept. 21, 1993, at A1.

³⁸ See Burrough, *supra* note 11, at 133.

³⁹ See Fabrikant, *supra* note 37.

⁴⁰ See Geraldine Fabrikant, *Viacom Spurns Aid in Merger*, Sept. 23, 1993, at D1.

⁴¹ See Kenneth N. Gilpin, *Scrabbling for a Role in Battle for Paramount*, N.Y. Times, Sept. 24, 1993, at D4.

A week later, on September 27, the Paramount board held a meeting to discuss the QVC offer. In addition to discussing the offer, Davis reported to the board on the interest of other companies and, incorrectly, advised the board that the agreement with Viacom banned negotiations with bidders that lacked evidence of financing (in fact, it banned negotiations with bidders whose bids had material financing conditions). Paramount's investment bank Lazard Frères & Co. compared the two competing bids, showing a slightly higher value for the QVC offer, and answered questions. The meeting was adjourned without taking any action.⁴²

On October 5, QVC's banker delivered to Paramount's banker documentation for \$4 billion financing from six banks, Comcast, and Liberty Media. Six days later, on October 11, the Paramount board convened to discuss this documentation. *The New York Times* predicted little would change as a result of the meeting: The Paramount board would approve exploratory talks with QVC, and management would move slowly to allow Viacom time to put together a higher bid.⁴³ This is exactly what happened. At the meeting, Davis told the board that Delaware law required the board to further explore the QVC proposal and reported that Paramount had engaged the management consulting firm Booz-Allen & Hamilton to compare the offers. Lazard Frères was not asked to perform a similar task. But although the board authorized management in the meeting to meet with QVC, management never used that authority. Instead, it corresponded with Martin Lipton of Wachtell, Lipton, Rosen & Katz, QVC's counsel, for a week and a half about the information QVC must provide before any meeting took place. Looking back, Redstone would recall: "While we were amassing a war chest, Paramount was dragging its heels in responding to the QVC offer."⁴⁴

The Trial

By that point, QVC had had enough. On October 17, it finally had commitments from the media company Advance Publications and the cable company Cox Enterprises to invest \$500 million each in a bid for Paramount.⁴⁵ On October 21, 1993, it sued Davis and Paramount's outside directors in the Delaware Court of Chancery and announced a cash tender offer for 51 percent of Paramount's stock for

⁴² See *QVC Trial*, *supra* note 33, at 1253.

⁴³ See Geraldine Fabrikant, *Paramount to Weigh QVC Talks*, N.Y. Times, Oct. 11, 1993, at D1.

⁴⁴ See Redstone & Knobler, *supra* note 21, at 108. In hindsight, he recognized stalling was a mistake: "The people at Paramount were entitled to ask legitimate questions about financing and regulatory problems, but for them to allow to linger and fester the perception that Diller was not being given sufficient consideration was a wrong strategic move." See *id.*

⁴⁵ See Geraldine Fabrikant, *Newhouse and Cox Join QVC in Hostile Bid for Paramount*, N.Y. Times, Oct. 18, 1993, at A1. Before financing QVC's bid, Cox offered to finance Viacom's bid at terms that Redstone did not accept. "I knew the Cox people pretty well and we at Viacom had had friendly relations with them. But apparently they thought that cutting my throat would help them." See Redstone & Knobler, *supra* note 21, at 209.

\$80 per share, to be followed by a second-step merger in which the remaining Paramount shares would be converted into QVC common stock of similar value.⁴⁶ The suit sought to prevent Paramount from completing the Viacom deal and lift the hurdles Paramount had placed in QVC's way: the poison pill, the stock option, and the termination fee.

Announcing a tender offer without actually making the offer was probably a tactical mistake. It allowed Viacom to make a tender offer of its own first and, since federal law requires that tender offers remain open for twenty business days, to close it first. Unless Viacom's offer was much lower than QVC's, Paramount's shareholders were likely to tender their shares into Viacom's offer in order to avoid receiving stock of uncertain value in the back end merger.

Viacom did just that. On Saturday, October 23, Paramount and Viacom reached a new agreement with Viacom restructuring the transaction as a cash tender offer for 51 percent of Paramount's stock for \$80 per share followed by a merger for Viacom stock of similar value. Because shareholders could not vote on the tender offer, the agreement allowed the Paramount board to terminate the deal if the board no longer supported it.

The next morning the Paramount board approved Viacom's offer.⁴⁷ For a special meeting scheduled to choose between two offers, the meeting provided the board with remarkably little information. Partners from Lazard Frères described the competing offers, computed their face value, and opined that Viacom's offer was fair. They did not evaluate and compare the offers. Michael J. Wolf, the 30-year-old head of Booz-Allen & Hamilton's media and entertainment group, did compare the offers and found Viacom's to be worth \$3 billion more. This non-expert opinion was based on public information only and described itself as a "first cut". Still, the board approved the agreement and the tender offer commenced.

Two days later, on October 25, QVC commenced its tender offer. Interestingly, the offer was conditioned, among other things, on obtaining sufficient financing.⁴⁸ This was not what Diller had promised Paramount in a letter two days earlier. He had stated "he would enter into a merger that did not contain any condition with respect to financing."⁴⁹

⁴⁶ Outside observers speculated that QVC did not sue Paramount's executives in order to drive a wedge between them and the outside directors. See Geraldine Fabrikant, *A Sweetened Offer Intensifies Battle to Buy Paramount*, N.Y. Times, Oct. 25, 1993, at A1.

⁴⁷ See Geraldine Fabrikant, *A Sweetened Offer Intensifies Battle to Buy Paramount*, N.Y. Times, Oct. 25, 1993, at A1.

⁴⁸ See *QVC Network, Inc. v. Paramount Communications, Inc.*, C.A. No. 13208, Brief of the Paramount Defendants in Opposition to the Motion of the Plaintiffs for a Preliminary Injunction, at 77-78 (Del. Ch. Nov. 14, 1993).

⁴⁹ See *QVC Trial*, *supra* note 33, at 1252.

On November 1, Paramount's general counsel Oresman met with QVC's outside counsel, Martin Lipton. It was the only meeting between Paramount- and QVC representatives since the original deal with Viacom was announced, and even this meeting was short. The clients were not present and the lawyers got little done: Lipton demanded an auction, Oresman refused, and that was it.

And so the bidding continued. On November 6, Viacom raised both the cash portion and the stock portion of its offer to \$85 per share. Within hours, the Paramount board approved the revised offer in a conference call. On November 12, a day after securing a \$1.5 billion investment from regional phone company BellSouth, QVC fired back by raising both the cash portion and the stock portion of its offer to \$90 per share offer.⁵⁰

On November 15, the Paramount board met to consider QVC's offer. Before the meeting, Paramount sent to all of its directors a three-page document highlighting uncertainties surrounding the QVC offer, such as the absence of binding financing documents and the presence of antitrust concerns related to Liberty Media and BellSouth's involvement. In the meeting, management circulated two comparisons of the offers it had prepared. They too emphasized conditions in the QVC offer, even when the Viacom offer had similar conditions. Lazard Frères again made a presentation, and again did not say how much each offer was worth. Nor could it say. Having been instructed not to meet with QVC, it had no information. Instead, it computed the values using prevailing stock prices (a method that showed a higher value for the QVC offer but was rejected by Lazard Frères as unreliable), speculated what might explain the higher value of the Viacom offer in the Booz–Allen & Hamilton report, and concluded that, at any rate, the Viacom offer was financially fair.

The following day, the parties met before Vice Chancellor Jack B. Jacobs in Wilmington. QVC was represented by Herbert M. Wachtell from the Wachtell Lipton law firm, who three years earlier had represented Time in its battle with Paramount. His argument was simple: Davis was happy to forgo QVC's higher offer — \$1.3 billion higher, based on the closing stock prices of the day before — because Viacom promised him job security. With the help of Oresman, Davis manipulated the Paramount board into backing him, and the board fell into the trap. The board never questioned the wisdom of dealing exclusively with Viacom, never made management

⁵⁰ Before supporting QVC's bid, BellSouth and its investment banker Bruce Wasserstein approached Redstone about supporting Viacom's offer. They offered to invest billions and demanded half of Viacom in return, threatening to get the same from QVC if their offer was turned down. It was turned down. See Redstone & Knobler, *supra* note 21, at 207.

meet with QVC, and never asked Lazard Frères to compare the bids. This was a breach of fiduciary duty not only under *Revlon*, but also under *Unocal*.⁵¹

Redstone and Davis, argued Wachtell, had been talking combination for several years without reaching an agreement because Redstone insisted on retaining voting control while Davis insisted on remaining the chief executive officer. A memorandum Redstone wrote to his investment banker in August 1993 is instructive in this regard. “My understanding,” it read, “is that it has been suggested that a meeting or meetings take place, not to discuss price, but to discuss management. I find this incredulous. Do you realize that this is exactly what we heard at our first dinner meeting in your office last April? And when I suggested that price was a critical issue, what I heard was that that was not the most important issue, that that could easily be resolved, but that management was the issue.”⁵² The deal materialized only when both executives got what they wanted: Davis got to stay the chief executive officer and Redstone got voting control.⁵³

Paramount was represented by Barry Ostrager from the law firm of Simpson Thacher & Bartlett. Ostrager dismissed the notion that management entrenchment was the motivation for the Viacom deal. Davis, he reminded the court, would be serving at the pleasure of the controlling shareholder Redstone.⁵⁴ Nor was Ostrager impressed with the higher value of the QVC offer. The low value of the Viacom offer, he claimed, reflected Viacom stock sales by traders who predicted a Viacom win. Because market price was not a reliable measure of value, the board had to choose the offer that promised a higher long-term value.⁵⁵ It thus had done everything right even under *Revlon*.⁵⁶

After lunch, Stuart J. Baskin from the law firm of Shearman & Sterling argued on behalf of Viacom. How could QVC expect to be taken seriously and accuse Paramount of stalling, he asked, when QVC had never gotten around to lining up the money for a deal? “We find now when we take our discovery as of last week that ever since they launched their tender offer on October 27,” he lamented, “they never even talked to their banks about financing it. They never even approached their banks about financing the tender offer. And that was days before their moving brief was due in this court. They sat around and they horsed around and they waited and let our

⁵¹ Wachtell also argued in passing that the board had breached its duty of care under *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) and *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345 (Del. 1993). Both his written brief and his oral arguments, however, focused on the applicability of *Revlon*.

⁵² See *QVC Network, Inc. v. Paramount communications, Inc.*, Civ. A. No. 13208, Transcript of a Hearing on November 16, 1993, at 20 (Del. Ch.) (quoting from Exhibit 85).

⁵³ See *id.* at 19.

⁵⁴ See *id.* at 96–97.

⁵⁵ See *id.* at 89.

⁵⁶ See *id.* at 138.

offer proceed.... They fell behind because they made conscious decisions to fall behind. And the best we know from Mr. Costello [QVC's chief financial officer] as we sit here today is that he is talking with his banks, and maybe someday he will get the financing, or at least he is highly confident he will. And maybe or maybe not his banks are as well. But the point is they were masters of their own timing."⁵⁷

Three days after the hearing, Diller sent to the Paramount board commitment letters from the six banks that had agreed to finance QVC's bid as well as a binding financing commitment from BellSouth. He also notified the Paramount board that QVC's bid had received antitrust clearance. The Paramount board did not budge.

Place Your Bets

On Thanksgiving Eve, November 24, the Chancery Court handed down its decision. QVC won.

It was not an easy decision to write. Not that the court had any doubt how it should come out. The original deal with Viacom was presented to the Paramount board on September 9. Since that day, the court found, "the mindset of the board has been patently unreceptive to gathering information by way of exploring or even discussing any alternative transaction."⁵⁸ It was this mindset, the court continued, that explained the board's refusal to consider QVC's sweetened offer even though it was worth \$1.3 billion more than the transaction with Viacom. In contrast, the court said, "the 'conditionality' of QVC's offer was more a pretext than a problem, which management (and the board) chose to hide behind in order to avoid obtaining information that might induce them to take a second look."⁵⁹

The court was clear also about what motivated the board to favor Viacom. In the case of the independent directors, the reasons were "not venal but laudatory," as these directors had "no demonstrated self-interest in the Viacom transaction, or in perpetuating Mr. Davis or themselves in office." Rather, they were driven by "a fervently and honestly-held view that the Viacom deal is the only valuable transaction that will serve the best interests of Paramount and its shareholders."⁶⁰ Management's motivations were different. Davis clearly cared a lot about continuing to run the company.

The court's more difficult task was squaring the legal result it deemed appropriate for these facts — holding that the board had breached its fiduciary duties

⁵⁷ See *id.* at 197.

⁵⁸ See *QVC Trial*, *supra* note 33, at 1268.

⁵⁹ See *id.* at 1269.

⁶⁰ See *id.*

— with existing doctrine. The problem was that *Time* rejected the notion that a control change triggers *Revlon* and instead held that *Revlon* was triggered if the company initiated — rather than was drawn into — an active bidding or a breakup. Presumably, since the Paramount board had not initiated the bidding or contemplated a breakup, its refusal to deal with QVC should be accorded deference just like the Time board’s refusal to deal with Paramount three year earlier.

Any attempt to avoid *Time* would have been tenuous. *Time* was a recent unanimous decision of the Supreme Court expressly rejecting the notion that what triggers the duty to seek the best price is a change in control. Two of the three justices who had signed *Time* were still on the Supreme Court and one of the parties in *Time* was a party in the new case. In fact, *Time* was the reason for the new case: Paramount signed a deal with Viacom because it had failed to buy Time three years earlier, and its board shunned QVC because it had been told in *Time* that a change in control was not a trigger of the duty to entertain all offers.

The court had two ways out. The first was to accept Wachtell’s argument that the board had failed to meet even the standards of *Unocal* when it thwarted QVC’s offer without consideration. However, although this may be the law today,⁶¹ in 1993 it seemed inconsistent with precedents. After all, the Paramount board merely followed in 1993 the script the Time board had written in 1989 in resisting an attempt to derail the deal it planned. If anything, the Time board had been more aggressive: It prevented shareholders from voting on the deal. If what the Time board had done was acceptable under *Unocal*, why should the Paramount board’s conduct be viewed differently?

The second solution was to review the board’s actions under *Revlon* despite *Time*. This was what the court chose to do. But it needed to tread carefully. It began by framing the question as one that is open to judicial interpretation. The case law did not really say whether a change in control triggers *Revlon*, the court explained. While pre-*Time* authorities suggested that a change in control has this effect, *Time* used the breakup of the company as the trigger.⁶² The authorities that the court cited, *Barkan v. Amsted Industries* and *Mills Acquisition v. Macmillan*, were two Supreme Court

⁶¹ See *ACE Ltd. v. Capital Re Corp.*, 747 A.2d 95 (Del. Ch. 1999) holds that *Unocal* requires the board to retain the right to consider superior offers to a planned merger. A corollary would be the duty to use this right.

⁶² See *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1287 (Del. 1988) (“As we held in *Revlon*, when management of a target company determines that the company is for sale, the board’s responsibilities under the enhanced *Unocal* standards are significantly altered. *Revlon*, 508 A.2d at 182. Although the board’s responsibilities under *Unocal* are far different, the enhanced duties of the directors in responding to a potential shift in control, recognized in *Unocal*, remain unchanged. This principle pervades *Revlon*...”); *Barkan*, *supra* note 5, at 1286 (“We believe that the general principles announced in *Revlon*, in *Unocal Corp. v. Mesa Petroleum Co.*, Del. Supr., 493 A.2d 946 (1985), and in *Moran v. Household International, Inc.*, Del. Supr., 500 A.2d 1346 (1985) govern this case and every case in which a fundamental change of corporate control occurs or is contemplated.”).

decisions that specifically referred to a change in control as a trigger of *Revlon*, albeit in the context of cash deals. These were not forgotten precedents. Both decisions were recent and famous. In fact, Justice Horsey, the author of the Supreme Court's decision in *Time*, had been on the panel that decided *Barkan*, and his decision in *Time* cited *Macmillan*. It was natural for Vice Chancellor Jacobs, who had been reversed in *Macmillan*, to remind the Supreme Court of that decision.⁶³

The court did not attempt to resolve this inconsistency in the case law. There was no need, it said. Regardless of whether a change in control *always* triggers *Revlon*, the change of control in the Viacom deal had that effect because it was the shareholders' last chance of being paid a control premium. Once voting control shifted to Redstone, they would lose forever the power to decide who will sit on the board, how the company will be run, whether it will be sold, and whether they will be allowed to remain its shareholders. Redstone could force the remaining shareholders to sell their shares to him in a cash-out merger and, even if he did not do so, his presence would preclude them from selling their stock at a premium.⁶⁴ Premiums are paid for control, and here control would have already been sold.⁶⁵

Viewed through the lens of *Revlon*, the board's conduct was clearly unsatisfactory. The problem was not so much in the early stages of the contest, when at least the cash portion of the two bids was similar, as it was in the final round, when the board dismissed a QVC bid that contained a lot more cash only because management trashed it in a three-page biased memorandum. Accordingly, the court ordered the board not to lift the poison pill for the Viacom deal and invalidated the stock option, which by trial day was worth about \$500 million.

This reasoning was appeal-ready not only in what it said but, importantly, in what it left unsaid. The logic of requiring the board to get the best price it can for transferring control to a single shareholder is compelling. Why give away something of value? What the court did not say, however, is that this logic applies *whenever* shareholders forfeit their ability to sell control at a premium. Why should it matter whether control will reside with a single shareholder commanding a majority voting power, with a group of shareholders bound by a voting agreement, or even with a shareholder holding less than a majority stake but enough to block acquisitions? The

⁶³ In an earlier decision that received less media attention and was not appealed, Vice Chancellor Jacobs had been explicit about the inconsistency in the case law. See *In re Wheelabrator Technologies, Inc. Shareholders Litigation*, 18 Del. J. Corp. L. 778, 794 (Del. Ch. 1992) ("As for when *Revlon* duties are triggered, the Supreme Court's pronouncements in *Barkan* and *Paramount* are not easily reconciled, for they appear to flow from different premises.").

⁶⁴ See *QVC Trial*, *supra* note 33, at 1265–67. The court noted that the agreement with Viacom did not guarantee a minimum price in a possible cashing-out of the public shareholders in the future. Even without a controlling shareholder, it is difficult after the fact to hold a party to a merger to expectations it created about its long-term plans. *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212 (3rd. Cir. 2007).

⁶⁵ In the event of a sale, the controlling shareholder is entitled to keep the premium to itself. See *Cheff v. Mathes*, 199 A.2d 548, 555 (Del. 1964).

answer is that it should not matter, but saying this would directly contradict the Supreme Court's decision in *Time* and risk a reversal on appeal. A trial court can at most alert the appellate court to problems in the case law. Fixing them is the appellate court's prerogative.

Flip-Flop

On November 29, Paramount and Viacom filed an expedited interlocutory appeal at the Supreme Court of Delaware. The hearing before the Supreme Court ten days later looked like a *Time* class reunion. The place was the same, the issues were the same, the majority of the panel was the same, some of the lawyers were the same, and even one of the parties was the same.

The only notable difference was that the panel did not include Justice Horsey, the author of *Time*, who had recently announced his intention to retire.⁶⁶ Instead, it included Chief Justice E. Norman Veasey, who had joined the court in the previous year after thirty-five years of practicing corporate law at one of the state's largest law firms, Richards, Layton & Finger. The two other members of the panel were Justice Andrew G.T. Moore II and Randy J. Holland — who had also been on the panel that decided *Time*.

Practicing law in a small state gives members of the legal profession many opportunities to meet in different stages of their professional life. This is what happened here. In his early years on the bench, Vice Chancellor Jacobs had decided several cases in which Chief Justice Veasey had been counsel. One of these decisions was *MacMillan*, in which he ruled that the defendants, Veasey's clients, met the requirements of *Revlon*. That ruling was reversed on appeal by a panel that included Justice Horsey. The appellate decision in *MacMillan* was the decision Justice Horsey cited in *Time* to reject the change-in-control test and Vice Chancellor Jacobs cited in *QVC* to embrace the same test. Now, in his new post at the state's high court, Chief Justice Veasey would have the last word.

On the morning of December 9, the day set for oral arguments, the Wilmington courthouse was packed full with lawyers, clients, reporters, and even members of the legal academy. But one did not need to be in Delaware to watch the drama. It was broadcast live on Courtroom Television Network (Court TV) and other channels that carried the feed, like CNBC and Dow Jones Investor Network. The two hours of live coverage provided traders nationwide an opportunity to respond instantaneously to the

⁶⁶ See Henry R. Horsey & William Duffy, *The Supreme Court of Delaware after 1951: The Separate Supreme Court*, at <http://courts.delaware.gov/Courts/Supreme%20Court/?history3.htm> (last accessed Nov. 20, 2008). Justice Horsey was on the panel in two appeals submitted after the submission of the appeal in *QVC*. See *Salter v. Salter*, 639 A.2d 74 (Del. 1994) (Table); *Burgess v. Bd. of Adjustment of New Castle County*, 637 A.2d 825 (Del. 1994) (Table).

developments in the courtroom without having to rely, as they had during takeover fights in the 1980s, on “rumors or frantic phone calls of colleagues outside courtrooms.”⁶⁷

The result was not only a fascinating case study of how quickly stock markets react to news, but also an illustration of how unsettled the law was. On the following morning, *The Wall Street Journal* published a diagram showing the stock price of Paramount at five-minute intervals mirroring the progression of the oral arguments. Had the law been settled, the court’s ruling would have been predicted and reflected in the stock price before the hearing began, and the stock price would have remained stable throughout the day to the extent that it was not affected by external factors. But this is not what happened. Rather, the price increased sharply shortly after 10:00 a.m., when the court began pounding Paramount’s attorney Barry Ostrager with tough questions, causing traders to believe that the Supreme Court would uphold the Chancery Court’s decision to give QVC a fair chance to bid. Another increase followed at 12:15 p.m., as Stuart Baskin, who represented Viacom, received a similar reception. The price decreased in the afternoon, as the court adjourned, but surged again in the last hour of trading, before the court’s post-trading decision affirming the decision of the lower court was announced. By the end of the day, the stock price had increased 3 percent, closing at \$82 a share. “It was sensational. It was high drama,” summarized one of the many arbitragers who had watched the broadcast.⁶⁸

Shortly after 4 p.m., the court reconvened and Chief Justice Veasey read from the bench a 12-page affirming order.⁶⁹ In the interest of time, the court did not give the reasons for its decision. Those, it promised, “will follow in due course”. In the following two months, as the takeover saga moved into a new phase of open bidding between Viacom and QVC for Paramount, speculation continued about how sweeping the decision would be.

On January 4, the decision came down. It was worth the wait. Free to reformulate its own jurisprudence, the Supreme Court did not have to limit the holding to the peculiar facts of the case, as the Court of Chancery had done to avoid reversal on appeal. The decision, written by Chief Justice Veasey, was broad and clear: Any transfer of voting control, to a person or to a cohesive group, triggers *Revlon* because it takes something valuable from shareholders and gives it to someone else. Shareholders will never get another bite at this apple, and so they deserve to

⁶⁷ See William Power, *Paramount-Takeover Hearing Glues Traders to TV Screens*, Wall St. J., Dec. 10, 1993, at C1.

⁶⁸ See *id.*

⁶⁹ See Johnnie L. Roberts & Randall Smith, *Paramount Is Told to Consider Offer by QVC*, Wall St. J., Dec. 10, 1993, at A3.

make the most of the only bite they have.⁷⁰ The Paramount board did not see to this. It took whatever offers Viacom threw its way instead of asking for more.

Moreover, the court added, this rule was nothing new. It was “established Delaware law” under the very precedents the Court of Chancery had cited, *Barkan* and *Macmillan*. Even the quotes from these precedents were the ones that the lower court had used to put *Time* in perspective. The difference was that the Supreme Court talked about these precedents with much less tentativeness than the Court of Chancery. To the Court of Chancery, they “contained language that supported the proposition that a change of corporate control triggers duties under *Revlon*.”⁷¹ To the Supreme Court, they were “clear in holding that a change of control imposes on directors the obligation to obtain the best value reasonably available to the stockholders.”⁷² The Supreme Court’s treatment of *Time* was similarly hesitation-free: Yes, the *Time* Court made a point of not using the change-of-control test when it was handed to it on a silver platter by the Chancellor, but the *Time* Court also said that the Chancellor’s conclusion was “correct as a matter of law” and that it used a different test “without excluding other possibilities.”⁷³

Was that so? Did *Time* restate the change-of-control test and no one saw it? There are reasons to think otherwise. While Davis and Redstone may have been obsessed with getting their deal done, they had some of the most experienced lawyers and bankers in the field. The last thing they wanted was to see the deal crater on legal grounds. The memory of the failed battle for *Time* was too fresh for them to ignore this risk.⁷⁴

The truth of the matter is that *Time* was anything but clear and that it was read by many as limiting the application of *Revlon* to 1980s-style leveraged buyouts, which typically involved a breakup of the acquired company and the sale of its parts. In retrospect, the Supreme Court’s insistence in *Time* to add value to Chancellor Allen’s decision by offering an alternative way of reaching his conclusion was a bad mistake.

⁷⁰ In a footnote, the court hinted that *Revlon* might not apply if the dominant shareholder has less than absolute voting control, citing *In Ivanhoe Partners v. Newmont Mining Corporation*, 535 A.2d 1334 (Del. 1987). See *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 42 n.12 (Del. 1994) (hereinafter, *QVC Appeal*). Such a shareholder, however, can block bidders, stripping shareholders of their ability to sell their shares at a premium.

⁷¹ See *QVC Trial*, *supra* note 33, at 1264.

⁷² See *QVC Appeal*, *supra* note 70, at 46.

⁷³ See *id.*

⁷⁴ A reporter who happened to be with Davis when he received the Chancery Court’s decision and shared the news on the telephone with other board members and with Redstone, offers a vivid account of their genuine surprise at having lost the suit. See Burrough, *supra* note 11, at 136–38.

It confused everybody for three years and planted the seed for another legal battle, with Paramount as the seller.⁷⁵

The legal system eventually corrected itself, helped by additional experience and perhaps by personnel changes on the Supreme Court. It just refused to acknowledge this. An article footnote written several years later by the trial judges in the two decisions says it all: “Under the Chancery approach in *Time-Warner*, the later Viacom-Paramount merger would clearly have invoked *Revlon*. Under the Supreme Court’s *Time-Warner* opinion, it was far less clear that the Viacom-Paramount merger implicated *Revlon*. In *QVC*, the Delaware Supreme Court embraced the Chancery approach in *Time-Warner*, holding that the Viacom-Paramount merger triggered *Revlon* scrutiny, but disclaiming any responsibility for causing confusion among the transactional planners.”⁷⁶ Practitioners agree. “Unfortunately,” a popular treatise of takeover law laments, “while the Chancery opinion [in *Time*] did much to assist in [determining when *Revlon* applies], the higher court’s opinion initially set the process back considerably. Subsequent decisions have, however, focused more on the lower court’s rationale.”⁷⁷

The legal community, it turns out, cannot be persuaded to see clarity where none exists. The case law does not become consistent just because the court says it is well established, just as a court’s correction of its own mistakes does not mean they were never made.

Epilogue

The Supreme Court’s decision required Paramount to scrap the deal with Viacom and start anew. But the court did not instruct the board how to go about the sale. Under *Barkan*, the board was free to choose how to obtain the best price. In different circumstances, the board might have put itself as an auctioneer between the two bidders. The standard protocol in such cases is to invite the bidders to make offers, have the board choose one, allow the losing bidder to top the winning offer, and have the board choose again, until one bidder drops out of the race.

⁷⁵ A day before the hearing in the Court of Chancery, *The Wall Street Journal* asked prominent corporate law professor John C. Coffee, Jr. about the likely outcome. His view was that *Time* allowed the Paramount board to make a judgment about which bidder’s stock offered more long-term value and therefore “QVC cannot win by a nose, but Viacom can.” By this metric, he said, QVC had “almost no chance of winning.” See Johnnie L. Roberts & Randall Smith, *Sweetened Offer on Table, QVC Heads for Court*, Wall St. J., Nov. 15, 1993, at A3. Stock traders were also of that view. See Geraldine Fabrikant, *Wall Street Sees Higher Bids as QVC’s Hope for Victory*, N.Y. Times, Nov. 19, 1993, at D4.

⁷⁶ See William T. Allen, and Jack B. Jacobs, and Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 26 Del. J. Corp. L. 859, 864 n.11 (2001)

⁷⁷ See Lou R. Kling & Eileen Nugent, *Negotiated Acquisitions of Companies, Subsidiaries and Divisions* (2008), 4–62, § 4.04[5].

But after two successive losses in the same court on the same topic, as a buyer in 1990 and as a seller in 1993, the board preferred to take no more chances with the elusive *Revlon* duties and let the shareholders choose which offer to take. To one investment banker, the board was essentially “taking the court’s language and ‘Xeroxing’ it.”⁷⁸ Also, quite tellingly, from that moment on Oresman stepped back and put the negotiation in the hands of Richard I. Beattie of Simpson Thacher & Bartlett.⁷⁹

There was some grumbling over the process, when several board members pushed for establishing a special committee to handle the sale. It was only after a lively debate at the board that Davis managed to bury the special committee idea. Ironically, realizing he could no longer favor Viacom, Davis preferred a process that would minimize the role of the board so that Davis would not be seen as turning his back on his longtime ally Redstone if QVC won. It was a “graceful solution to a political problem,” in the words of one banker.⁸⁰ Still, it was clear that the honeymoon with Viacom was over. Right after the auction was announced, investor relations firm Kekst & Co., which had been representing both Paramount and Viacom, said it would continue to represent only Paramount.

The auction called for any interested bidder to structure its bid as a tender offer followed by a merger and submit the bid to the Paramount board. The board would then endorse one bid and all bidders would start their respective tender offers. Each bidder would be allowed to sweeten its bid, resulting in a ten-day extension for all tender offers. The first bidder to receive 51 percent of the shares would be the winner and would have to extend its offer for ten days to allow shareholders who tendered into the losing bid to withdraw their shares and resubmit them to the winner. The latter requirement was designed to discourage bidders from pressuring shareholders by front-loading the tender offer while keeping the consideration in the backend merger low.⁸¹

On the morning of December 20, as the bidding began, the market value of the Viacom offer was \$9.6 billion, and the value of QVC’s offer was \$10.1 billion based on existing stock prices.⁸² Later that day, QVC raised both parts of its offer, increasing the total value to \$10.3 billion.⁸³ Two days later, the Paramount board

⁷⁸ See Jonnie L. Roberts, *Paramount Opts to Put Itself Up for Auction*, Wall St. J., Dec. 15, 1993, at A3.

⁷⁹ See Beck, *supra* note 30, at 58.

⁸⁰ See *id.*

⁸¹ See Roberts & Smith, *supra* note 78.

⁸² See Johnnie L. Roberts, *Rules of Paramount Auction Indicate Bidding May Not End in One Round*, Wall St. J., Dec. 20, at A10.

⁸³ See Johnnie L. Roberts & Randall Smith, *QVC Raises Its Offer for Paramount, Topping Viacom’s Bid in Latest Round*, Wall St. J., Dec. 21, at A3.

signed an agreement with QVC.⁸⁴ On January 7, 1994, Viacom announced it was buying Blockbuster for \$8.4 billion and Blockbuster would increase its financing of its bid to \$1.25 billion, allowing Viacom to sweeten the cash component of its offer to \$105 per share. However, the value of the stock component dropped as a result of a decline in the price of Viacom stock, leaving the deal value at \$9.4 billion.⁸⁵ This was not enough. On January 12, the Paramount board turned down the sweetened Viacom offer and reaffirmed its support of QVC's.⁸⁶ A day later Paramount announced it would no longer encourage incremental bidding: Both bidders must submit their final offers by 5:00 p.m. on February 1, and the shares would be counted ten business days later, on February 14.⁸⁷ Viacom had no more cash. It was in a bind.

Four days later, at “a Sunday-afternoon skull session” in Robert Greenhill’s 49th-floor midtown-Manhattan offices, the bankers proposed a solution: Viacom would offer a “collar” that would pay Paramount’s shareholders extra cash if the value of the Viacom stock they received fell below certain thresholds within three years of the merger, potentially costing Viacom another billion dollars.⁸⁸ Selling the plan to the thrill-seeking Redstone, who had once “saved his own life by clinging to a window ledge with his right hand during a Boston hotel fire,”⁸⁹ was not difficult. He wanted Paramount and the alternative of raising the bid was too expensive. On January 18, Viacom announced the revised offer, containing \$107 a share for 51 percent of the shares and the remainder in securities, including the collar securities (labeled “Contingent Value Rights”). The total value of the offer was \$9.7 billion — lower than QVC’s, but safer for Paramount shareholders.

The “Diller-killer,” as one of the participants in the meeting called the plan, worked. Diller could not, or would not, increase his bid. He had just returned from a year-end cruise onboard the rented yacht *Midnight Saga* off St. Barts, which he had spent poring over Paramount documents and running the numbers. “When I came back on Jan. 3,” he would later recall, “I said, ‘We’re not going to exceed our offer. The company is — with a real stretch and some real hard work — worth what we’ve offered, but I’m not going to offer any more.’ It would have been irresponsible, I thought, and I held to that belief.”⁹⁰

⁸⁴ See Johnnie L. Roberts & Randall Smith, *Paramount and QVC Sign Takeover Pact*, Wall St. J., Dec. 23, at A3.

⁸⁵ See Johnnie L. Roberts, Randall Smith & Laura Landro, *Viacom Bid Doesn’t Appear to Win Paramount Race*, Wall St. J., Jan. 10, 1994, at A3.

⁸⁶ See Randall Smith & Johnnie L. Roberts, *Paramount Rejects Offer from Viacom*, Wall St. J., Jan. 13, at A3.

⁸⁷ See Randall Smith and Johnnie L. Roberts, *Paramount Moves to Tighten Rules for Takeover Bids*, Wall St. J., Jan. 14, 1994, at A2.

⁸⁸ See John Greenwald, *The Deal That Forced Diller to Fold*, Time Mag., Feb. 28, 1994, at 50; Randall Smith & Laura Landro, *Viacom Raises Paramount Bid to \$9.7 Billion*, Wall St. J., Jan. 19, 1994, at A3.

⁸⁹ See Greenwald, *id.*

⁹⁰ See *id.*

Instead of raising the price, at 4:59 p.m. on February 1, one minute before the final bidding deadline, QVC increased the cash portion of its offer from \$92 to \$104 per share while reducing the stock portion to keep the total value unchanged and without matching Viacom's collar. At the same moment, Viacom sweetened the securities portion of its offer while keeping the cash portion unchanged. Though the exact value of each offer was hard to ascertain, both hovered above \$10 billion.⁹¹ In the ten days remaining until the share count, Diller and Redstone each intensively lobbied money managers for their shares: Redstone talked up Viacom's stable of assets, and Diller touted his managerial track record.⁹²

Late Monday, February 14, the word came out that more than 60 percent of the Paramount shares had been tendered into Viacom's \$9.7 billion offer of cash and securities, compared to the less than 10 percent of the shares that had been tendered into QVC's offer.⁹³ The final tally of the shares tendered by midnight confirmed the results. With more than 50 percent of the shares, according to the agreed-upon bidding rules, Viacom was the declared winner.

The next morning Redstone was busy thanking people who called to congratulate him, including Vice President Al Gore and Time Warner chief executive officer Gerald M. Levin. Diller also called. "I'm sorry you won, but congratulations," he said. "Thanks," Redstone replied, "but I'm sorry you cost me \$2 billion." In an interview for the *Hollywood Reporter* in his New York office that afternoon he paraphrased The Grateful Dead. "It's been a long, strange trip."⁹⁴

Wall Street loves punchy quotes almost as much as it loves big deals. The next morning's newspapers provided such a quote of wry Barry Diller summing the five-month saga: "We lost. They Won. Next."⁹⁵ The market, however, did not view this as so terrible a loss. While Viacom's stock dropped 5.5 percent on the news of its victory, QVC's edged up 3.5 percent. "Diller proved that he wasn't imprudent," one securities analyst explained to reporters. "Basically, he did what he said he was going to do, which wasn't to destroy shareholder value to get this deal done."⁹⁶ By

⁹¹ See Geraldine Fabrikant, *Rivals Sweeten Paramount Bids at Last Minute*, N.Y. Times, Feb. 2, 1994, at D1; Randall Smith & Johnnie L. Roberts, *Paramount Bids Raised Slightly by Rival Suitors*, Wall St. J., Feb. 2, 1994, at A3.

⁹² See Laura Landro, *Viacom and QVC Debate Who Would Be Better Parent*, Wall St. J., Feb. 9, 1994, B1.

⁹³ See Randall Smith & Johnnie L. Roberts, *Viacom Appears to Have Won Paramount War*, Wall St. J., Feb. 15, 1994, at A3.

⁹⁴ See Barry Layne, *Viacom Wins Paramount: Redstone Heads World's No. 2 Media Company*, *Hollywood Rep.*, Feb. 16, 1994, at 1.

⁹⁵ See Johnnie L. Roberts, *The Paramount Takeover: The Drama Ended, Two Stars Get New Scripts*, Wall St. J., Dec. 16, 1994, at B1.

⁹⁶ See *id.*

comparison, Viacom's bet on its pricey new purchase paying off in the future was received with skepticism.⁹⁷

Davis, for his part, did not see the sale of Paramount to his favored buyer at \$2 billion more than originally planned as a cause for celebration. His strategic vision for the company was about to materialize, but he would not head the company when it happened. "The turning point was very clearly the Delaware court system," he said, not hiding his disappointment. "The Delaware court is creating new law ... to fit the climate. The Delaware decision is one that I respectfully and at the same time vehemently disagree with."⁹⁸ For Davis, the ruling was a response to a takeover lull that some attributed to *Time*, and to growing criticism of *Time* as overly deferential to the board.⁹⁹

Once the parties replaced exclusivity with competition, something happened to Davis's and Redstone's expectations: Davis was precluded from favoring Redstone, and Redstone lost his commitment to Davis. "Because the Paramount deal had evolved from a merger of equals into an auction," explained Redstone, "Martin Davis, through no fault of his own, could no longer be assured of his position in the new company."¹⁰⁰ But why, one may ask? What do the price and the method of payment have to do with selecting the best management for the combined company? If Davis was the right person to head Paramount Viacom International under the original agreement with Viacom, was he not still the right person after the bidding? To Redstone and Davis, apparently, the answer was clearly no.¹⁰¹ Moreover, the bidding in this case directly contributed to Davis's ouster: Viacom agreed to buy Blockbuster so that it could use Blockbuster's cash to finance the bid for Paramount, and replacing Davis was a condition that Blockbuster's chief executive officer Wayne Huizenga demanded. Huizenga insisted that Viacom's chief executive officer Frank Biondi run the combined company instead.¹⁰²

⁹⁷ See Laura Landro & Johnnie L. Roberts, *Now the Hard Part: Viacom Is Set to Grow Into Media Colossus*, Wall St. J., Feb. 16, 1994, at A1.

⁹⁸ See James Bates, *Paramount Deal: As Show Closes, a Look at the Script*, L.A. Times, Feb. 16, 1994, at 1 (quoting Martin Davis). Redstone expressed similar frustration, saying: "The Delaware Supreme Court went out of its way to state it was *not* premising its decision on the same grounds [as the Chancery Court].... Since the "dissolution or breakup" of Paramount was not contemplated in the Viacom merger, we not only considered that language helpful to our case, we viewed it as decisive." See Redstone & Knobler, *supra* note 21, at 223.

⁹⁹ See, e.g., Gregg A. Jarrell, *A Victory for Shareholders*, Wall St. J., Dec. 1, 1993, at A20 (commentary blaming *Time* for the slowness of the takeover market in the early 1990s); *A Change in Time*, Wall St. J., Dec. 3, 1993, at A12 (editorial calling on the Supreme Court to overturn *Time*).

¹⁰⁰ See Redstone & Knobler, *supra* note 21, at 247.

¹⁰¹ For a study finding that parties to mergers of equals receive lower premiums when their managers assume greater power in the combined company, see Julie Wulf, *Do CEOs in Mergers Trade Power for Premium? Evidence from "Mergers of Equals"*, 20 J.L. Econ. & Org. 60 (2004).

¹⁰² See Landro, *supra* note 95; Geraldine Fabrikant, *Who Would Survive a Merger?*, N.Y. Times, Jan. 10, 1994, at D1.

And why was the name chosen for the combined company not retained in the final agreement? The name, “Paramount Viacom International”, had been premised on Paramount’s strong brand.¹⁰³ That justification did not change, and yet the final agreement named the combined company “Viacom”. As in the case of choosing who will run the combined company, the selection of name, at least in this deal, was more about deal politics than about marketing.

Looking back, the battle over Paramount lends support to the view that non-pecuniary motivations can sometimes explain battles for corporate control and management behavior better than pecuniary motivations. The selection process that brings executives to top management positions and their wide discretion to shape company strategy once in office leaves ample room for ambition, pride, envy, or animosity to filter into their decisions. It is hard to prove the existence of these drives, let alone measure them, but they are very real in the minds of market professionals. In the jargon of corporate lawyers and investment bankers, who must consider these factors in any deal negotiation, there is even a special term for them: “social issues”.

The three-way fight between Paramount, Viacom, and QVC is a textbook example of social issues at work. All of the key players in the story seemed to have had them: Sumner Redstone was willing to pay almost any price to own a film studio; Barry Diller was willing to go to great lengths to get back at Martin Davis for pushing him out of Paramount; Martin Davis was willing to leave a lot of money on the table and cede control of his empire to stop Barry Diller.¹⁰⁴ This is also consistent with claims that control is especially valuable to corporate decision-makers in the media sector, presumably because it comes with access to non-pecuniary benefits such as visibility, influence, and glamour.¹⁰⁵

“I Paid Too Much for It, but It’s Worth It”¹⁰⁶

Was the price that Viacom ended up paying too high? It is hard to tell. As the bidding continued, many in the securities industry became convinced that Diller and Redstone had become so obsessed with winning that they no longer paid attention to

¹⁰³ See *id.* at 220.

¹⁰⁴ As the bidding neared its end, the value of Davis’s stock was \$155 million under the QVC offer. See Johnnie L. Roberts, ‘The Blame Game’: Volatile Stanley Jaffe Has Scared Paramount But Hasn’t Fixed It, Wall St. J., Jan. 31, 1994, at A1. This offer was about \$2 billion, or 25 percent, higher than Viacom’s original offer. Thus, Davis personally gained about \$30 million (25 percent) from the bidding.

¹⁰⁵ In many public media firms, just like in Viacom, the controlling shareholder holds mainly shares with superior voting rights. See Harry DeAngelo & Linda DeAngelo, *Managerial Ownership of Voting Rights*, 14 J. Fin. Econ. 33 (1985); Scott Smart & Chad Zutter, *Control as a Motivation for Underpricing: A Comparison of Dual- and Single-Class IPOs*, 69 J. Fin. Econ. 85 (2003); Paul A. Gompers, Joy Ishii & Andrew Metrick, *Extreme Governance: An Analysis of Dual-Class Firms in the United States*, Rev. Fin. Stud. (forthcoming 2009).

¹⁰⁶ Words attributed to Hollywood producer Samuel Goldwyn.

price. These observers minced no words, saying the bidding was entering “the late stages of seminuttiness,” wondering whether it was “just ego-driven,” and labeling it a “tulip craze” after the famous seventeenth-century bubble in the Dutch market for rare tulip bulbs.¹⁰⁷

The bidding certainly caused the price to rise well above the starting point. According to court documents, Diller initially considered bidding \$65 a share for Paramount in April 1993, when the company was trading at around \$50 a share, its highest level in almost three years.¹⁰⁸ By the end of the race, he was ready to pay almost \$90 a share. To put these numbers in perspective, entertainment mogul John Malone, who as chairman and chief executive officer of TCI had talked to Paramount about a possible deal, said in deposition that “one would have a hard time paying more than \$75 a share for [Paramount] unless one had in mind a substantial amount of invention based on its assets.”¹⁰⁹ Or, as one money manager said during the bidding war: “Both parties are legally drunk, and they are about to have one more drink.”¹¹⁰ Viacom’s shareholders thought so too: Stock price reaction to the progression of the bidding reveals that Viacom B shareholders (the class issued to Paramount shareholders) believed the final price was \$2 billion too high.¹¹¹

On the other hand, Diller and Redstone did not bid alone. Both enlisted outside financiers to provide extra cash for their bids. These financiers were the party’s designated drivers. Diller raised \$3 billion for the bid from BellSouth, Cox Enterprises, Comcast, and Advance Publications. Redstone raised \$1.8 billion from NYNEX and acquired Blockbuster to receive a \$1.25 billion investment and access to its cash flow. The heads of these companies had no reason to bankroll bids that would not pay off. Yet their level of enthusiasm rivaled Diller’s and Redstone’s. Even at the last round of bidding, both BellSouth, which had invested \$1.5 billion in QVC’s bid, and Bruce Wasserstein, BellSouth’s investment banker, were disappointed when Diller decided not to match Viacom’s collar.¹¹² They too believed the market was too myopic to see the deal’s potential.

Within a few years of the merger, Viacom sold some Paramount assets for \$7.5 billion and kept, in addition to Paramount’s movie studio, Paramount assets valued by

¹⁰⁷ See Laura Landro, *Vision vs. Reality: More Than Paramount Is at Stake as New Bids Are Readied in Buyout*, Wall St. J., Dec. 20, 1993, at A1 (quoting investment banker and former entertainment executive Emanuel Gerard); see also Susan Antilla, *Is Paramount Really Worth That Price?*, N.Y. Times, Nov. 11, 1993, at 313.

¹⁰⁸ See Landro, *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

¹¹¹ See Pekka Hietala, Steven N. Kaplan & David T. Robinson, *What Is the Price of Hubris? Using Takeover Battles to Infer Overpayments and Synergies*, 32 Fin. Mgm’t 5 (2003).

¹¹² See Greenwald, *supra* note 86.

analysts at \$4 billion. “Effectively,” concluded Wasserstein in vindication, “Redstone got the studio for free, proving his critics wrong.”¹¹³

The Sequel

On the afternoon of Wednesday, January 17, 1996, Viacom’s chief executive officer Frank Biondi called his wife, Carol. “‘I have good news and bad news,’ he said. ‘What’s the bad news?’ Carol Biondi asked. ‘We’re not going to China,’ he answered, referring to a trip that was to have been part business and part pleasure. ‘The good news is that I’m going to be able to try some new things, because I’m going to be leaving. Sumner just walked in and said he wants to take my job.’”¹¹⁴ Biondi was, after all, serving at the pleasure of Redstone.

¹¹³ See Bruce Wasserstein, *Big Deal: 2000 and Beyond* 38 (rev. ed. 2000).

¹¹⁴ Ken Auletta, *That’s Entertainment*, New Yorker, Feb. 12, 1996, at 29.