

Case: Omnicare v. NCS
Wilmington, DE, October 17, 2019

Interview of: David C. McBride
Young, Conaway, Stargatt & Taylor, LLP

Interviewed by: Ellisa Opstbaum Habbart
The Delaware Counsel Group, LLP

#00:00:00# - #00:00:33#

1 MS. OPSTBAUM-HABBART: Hi, Dave. Thank you so much
2 for being here.

3 MR. McBRIDE: Oh, thank you for the invitation.

4 MS. OPSTBAUM-HABBART: We really appreciate the
5 opportunity to get your viewpoint on the Omnicare matter and,
6 obviously, I expect that you probably did not like the Supreme
7 Court's majority opinion...before we even go there-

8 MR. McBRIDE: Okay.

9 MS. OPSTBAUM-HABBART: -- I wanted to take us back
10 to the point in time when you got involved. Who called you?

11 #00:00:59#

12 MR. McBRIDE: Well, Wachtell Lipton called me. Who
13 did call me? I forget who at Wachtell called me-

14 MS. OPSTBAUM-HABBART: A litigator, you think?

15 MR. McBRIDE: Let me see who was on the case, and
16 that may refresh my memory. It was either Paul or Ted-

17 MS. OPSTBAUM-HABBART: Okay.

18 MR. McBRIDE: And-

1 MS. OPSTBAUM-HABBART: Litigators.

2 MR. McBRIDE: Yeah. And I think the deal had already
3 been signed up-

4 MS. OPSTBAUM-HABBART: Okay.

5 MR. McBRIDE: -- or maybe it was about to be because
6 I guess the litigation started pretty quickly afterwards. So,
7 maybe it was a little before the deal was finally signed up,
8 but my recollection is - I don't recollect having any input in
9 the deal terms.

10 MS. OPSTBAUM-HABBART: Could you - had you had the
11 opportunity to have some input, would you have made some
12 recommendations on changes? #00:01:58#

13 MR. McBRIDE: I really wouldn't have-

14 MS. OPSTBAUM-HABBART: Okay.

15 MR. McBRIDE: -- I think this was a... I think this
16 was - the deal terms were perfectly appropriate in the context
17 of this company; I thought they were. Let me put it this way;
18 I think the deal terms were legal. I don't think there was any
19 per se illegality about them-

20 MS. OPSTBAUM-HABBART: Right.

21 MR. McBRIDE: Notwithstanding the opinion, which now
22 says they were per se illegal. And I think that the question
23 is, were they appropriate in the circumstances of this
24 particular transaction? And I think these were some pretty

1 peculiar facts, and I think they were appropriate. So, I
2 probably was involved early enough that if I had wanted to set
3 off alarm bells, I could have, but I didn't. And I - but my
4 recollection is, I think it was either set or pretty much set
5 when I got involved.

6 And I remember Genesis, the company that we
7 represented, is located out in Kennett Square. And I remember
8 that we - somebody from Wachtell came down and we drove out 52
9 to Kennett Square and went to their really very nice offices
10 in Kennett Square. Met with them. Delightful people. It turns
11 out that two of my closest friends, their close friend was the
12 head of the company. And so, they, once I was involved, they
13 heard about it and, as luck would have it, of course, the
14 first time I am involved in a transaction where people -
15 friends of mine know who is involved-

16 MS. OPSTBAUM-HABBART: Oh, yeah. I'm sorry-

17 MR. McBRIDE: -- we lose the case.

18 MS. OPSTBAUM-HABBART: Okay. #00:03:51#

19 MR. McBRIDE: But I was really impressed with
20 Genesis. They had come out of bankruptcy, I recollected, but
21 the friend of my friends made quite a bit of money at Genesis.
22 And so, that's what I remember about the start of the case.
23 I'm trying to remember if I remember anything about the early
24 litigation part of it, but... The only deposition I remember

1 taking is I took the deposition of Omnicare's CEO, who I
2 thought was completely - I did not - I was not impressed by
3 what I - with his candor and truthfulness, let's put it that
4 way.

5 MS. OPSTBAUM-HABBART: And why was that? Was it-
6 #00:04:37#

7 MR. McBRIDE: Well...I think there were a number of
8 things in the deposition, a number of answers that I got, that
9 I remember faulting myself for not using more of it in the
10 briefing before the Supreme Court. But, I was, by the time we
11 got to the Supreme Court, I thought that the error that it
12 seemed evident that the Supreme Court was about to make was
13 more of a doctrinal error than a factual error. And I was
14 afraid that if I tried to put a bigger black hat on Omnicare
15 that it just wouldn't matter. That for doctrinal reasons, they
16 were going to invalidate certain provisions of the merger
17 agreement and the voting agreements, and that I had to try to
18 convince them that their doctrinal analysis was flawed-

19 MS. OPSTBAUM-HABBART: Sure ... well, don't be so
20 hard on yourself. I mean I read the record-

21 MR. McBRIDE: Oh, I always-

22 MS. OPSTBAUM-HABBART: -- you did a fine job.

23 MR. McBRIDE: Well, thanks. I appreciate that.

1 MS. OPSTBAUM-HABBART: I mean, I read everything,
2 and I'm not sure - you know, it's always easy to look back-

3 MR. McBRIDE: Yeah-

4 MS. OPSTBAUM-HABBART: -- and find things.

5 #00:05:43#

6 MR. McBRIDE: The one thing that I do remember from
7 rereading the facts of the case is, you remember the last
8 offer that Omnicare made that was outstanding at the time that
9 NCS signed Genesis' merger agreement and voting agreement was
10 conditioned on due diligence.

11 MS. OPSTBAUM-HABBART: Right.

12 MR. McBRIDE: Well, Omnicare had taken due diligence
13 of NCS previously. They had made several offers, none of which
14 provided anything for the stockholders, but did provide stuff
15 for the creditors-

16 MS. OPSTBAUM-HABBART: For the debt...right.

17 #00:06:20#

18 MR. McBRIDE: And then, they stopped negotiating
19 with the NCS board and just started negotiating with the
20 creditors' committee. And so, for them to come up after,
21 probably it was a year, having made several offers, and having
22 taken due diligence in connection with those to say, oh, well,
23 the offer we're making today is subject to due diligence was,
24 I thought... . I was convinced it was a sham. I was convinced -

1 not that they wouldn't do the offer, but that if we backed
2 away, they would use due diligence as an excuse to drop their
3 price or change their deal. So, I thought NCS' board's concern
4 about whether, if they didn't take our deal, Omnicare would
5 stick with what they were offering was a very legitimate
6 concern. And there were other things in the deposition of the
7 Omnicare CEO, I can't remember now, that caused me to think
8 that he was really manipulating the process.

9 MS. OPSTBAUM-HABBART: Was his demeanor such that -
10 you know, did he come with an attitude or try to be evasive,
11 you know, or? #00:07:32#

12 MR. McBRIDE: I don't remember that. It was just
13 that it was - it seemed obvious to me that he was attempting
14 to play the role of I'm the savior for the stockholders; I'm
15 the good guy here. And it was pretty obvious to me that that
16 was a sham. That he was - he had been trying to buy this
17 company out of bankruptcy-

18 MS. OPSTBAUM-HABBART: For the cheap. On the cheap.
19 #00:07:50#

20 MR. McBRIDE: -- for years, and-

21 MS. OPSTBAUM-HABBART: Right.

22 MR. McBRIDE: -- and for him to play this role of
23 I'm here - I'm the good guy was - and I just didn't think he

1 was trustworthy. I should probably go back and reread the
2 deposition. But that's the only part of the discovery-

3 MS. OPSTBAUM-HABBART: Who else did you get to
4 depose as part of the discovery process? #00:08:09#

5 MR. McBRIDE: I don't remember.

6 MS. OPSTBAUM-HABBART: Okay. That's all right.

7 MR. McBRIDE: And since we were the defendant, I
8 think we were - all of the NCS directors were deposed. And I
9 am sure somebody from Genesis was deposed-

10 MS. OPSTBAUM-HABBART: Of course.

11 MR. McBRIDE: -- maybe several people, but I - and I
12 don't remember whether I was involved in defending any of them
13 or not. But I do remember I was largely responsible for the
14 briefs. I mean, I think I basically wrote the briefs, which
15 was unusual with Wachtell because usually...when I worked with
16 Wachtell, I'd have input on the briefs, but they would - well,
17 like in QVC, which we talked about this morning, I wrote parts
18 of that brief, but I wasn't given sort of the whole brief to
19 do.

20 MS. OPSTBAUM-HABBART: Why do you think you were in
21 this instance? #00:09:00#

22 MR. McBRIDE: It was a small deal. That was my
23 thought at the time.

24 MS. OPSTBAUM-HABBART: Really?

1 MR. McBRIDE: It was not a big deal. And I guess
2 maybe I had - maybe Wachtell had enough confidence in me by
3 this point that they thought I could do the brief-

4 MS. OPSTBAUM-HABBART: I'm sure they did.

5 MR. McBRIDE: -- but I attributed to the fact that
6 it was a relatively small deal. And I'm not sure any of us
7 anticipated it would become the-

8 MS. OPSTBAUM-HABBART: Big-

9 MR. McBRIDE: -- case that it did in terms of the
10 law.

11 MS. OPSTBAUM-HABBART: So, you wrote the brief-

12 MR. McBRIDE: I think so, yeah.

13 MS. OPSTBAUM-HABBART: And then, tell me about how
14 it was in front of Vice Chancellor Lamb. #00:09:38#

15 MR. McBRIDE: Now I don't - did I - do you remember
16 if I - did I argue before Lamb? Or did somebody else argue?

17 MS. OPSTBAUM-HABBART: No, I think you did.

18 MR. McBRIDE: Okay. I don't much remember the
19 argument other than it was pretty obvious that he seemed to be
20 our way-

21 MS. OPSTBAUM-HABBART: Yes, yes.

22 MR. McBRIDE: - and I thought that was appropriate.
23 And I didn't think it was that close of a case.

24 MS. OPSTBAUM-HABBART: No.

1 MR. McBRIDE: And, of course, when it went up to the
2 Supreme Court, the initial panel that looked at it, rejected -
3 my recollection is -- they rejected the interlocutory appeal.
4 That was right before Thanksgiving because I remember
5 thinking, oh, man! This is wonderful - I got - I got
6 [overlapping]-

7 MS. OPSTBAUM-HABBART: I could enjoy my holiday.

8 MR. McBRIDE: Yeah. And then, I remember coming in,
9 I think - I forget, maybe it was Sunday. We got some kind of
10 communication that the Supreme Court was rethinking the denial
11 of the interlocutory appeal-

12 MS. OPSTBAUM-HABBART: At least it was on Sunday-

13 MR. McBRIDE: Right.

14 MS. OPSTBAUM-HABBART: So, you had your Thursday and
15 Friday, so that much was good. But, no - Steve Lamb's decision
16 - clearly, he got it-

17 MR. McBRIDE: Yeah.

18 MS. OPSTBAUM-HABBART: -- and the set of facts. He
19 understood that this was a situation-

20 MR. McBRIDE: Yeah.

21 MS. OPSTBAUM-HABBART: -- that required some quick
22 decision-making, et cetera, and plus, you know, there was a
23 history-

24 MR. McBRIDE: Yeah ... yeah.

1 MS. OPSTBAUM-HABBART: -- with Omnicare that, you
2 know, where they were not--

3 MR. McBRIDE: Yeah, NCS--

4 MS. OPSTBAUM-HABBART: -- the nice--

5 MR. McBRIDE: -- I mean, Genesis and Omnicare really
6 did not like each other.

7 MS. OPSTBAUM-HABBART: No. No, they didn't play well
8 in the sandbox together--

9 MR. McBRIDE: Yeah.

10 MS. OPSTBAUM-HABBART: -- so, there was a history
11 there, and I think Steve picked up on that, so you must have
12 liked that decision. Then, you hear the court is rethinking
13 things. So, what's the first thing that went through your
14 mind, if you can put yourself back then, the first thought you
15 had in terms of what the Supreme Court might be thinking
16 about? #00:11:37#

17 MR. McBRIDE: My first - can we use profanity in
18 these...?

19 MS. OPSTBAUM-HABBART: I think so.

20 MR. McBRIDE: My first thought was, ah, shit! And I
21 contacted everybody. I don't know whether I was the first to
22 get the notice, or what happened, but I contacted everybody,
23 and nobody could believe it. Everybody thought, what?!
24 They're--

1 MS. OPSTBAUM-HABBART: On what grounds?

2 MR. McBRIDE: -- they got to be kidding. They turned
3 down the interlocutory appeal. What are they...? And I'm not
4 sure we - I'm not sure whether they said they were going to
5 vacate the denial of the interlocutory appeal and accept it.
6 I'm sure they didn't tell us what they were going to do. I'm
7 not even sure that we knew what the issue was. We got some
8 communication that we were to be in court, I think, the next
9 day, like a Monday, because I remember going over there, into
10 the little - into the little courtroom in the state building
11 where the Supreme Court chambers are, there's a little
12 courtroom in there where we argued the Revlon TRO application.
13 Do you remember that? I'm talking to Larry. And we go into the
14 courtroom, and I think Norm Veasey, and the panel that had
15 turned down the appeal included Justice Steele, then Chief
16 Justice Veasey, and I'm not sure-

17 MS. OPSTBAUM-HABBART: Holland? #00:12:58#

18 MR. McBRIDE: I don't think it - I don't know
19 whether it was Holland or not. I don't remember now. But we go
20 into the courtroom, and my recollection is Chief Justice
21 Veasey indicated that the court was reconsidering its decision
22 to deny the interlocutory appeal and was considering accepting
23 the interlocutory appeal. And I said that we'll take a break

1 and you can sort of marshal your arguments and thoughts, and
2 then we'll come back, and you can address the issue.

3 MS. OPSTBAUM-HABBART: Had you ever experienced
4 anything like that before? #00:13:34#

5 MR. McBRIDE: No. I mean, no. No. I don't think it -
6 well, maybe some Delaware Supreme Court scholar will know
7 better than I do, but I had never heard of a situation where
8 the court denied an interlocutory appeal and then changed its
9 mind and accepted it. I think I know how it happened.

10 There were two cases in the Chancery Court, one that
11 Omnicare was involved in and one that the stockholder
12 plaintiffs were involved in. And I think our interlocutory
13 appeal was from the case with the stockholder plaintiffs, and
14 I don't think the panel that turned down the interlocutory
15 appeal knew about the other case. And the other case came up,
16 and I think it was-

17 MS. OPSTBAUM-HABBART: Ah... then they realized-

18 MR. McBRIDE: Carolyn Berger, who saw the other case
19 - this was Omnicare's appeal - on different issues, not the
20 fiduciary duty issues. It related to a charter provision, an
21 appeal on a charter provision issue. And she alerted, I
22 assume, the other justices and said, wait a minute, this is -
23 there is more here than [overlapping]-

24 MS. OPSTBAUM-HABBART: Only part of it ... right.

1 MR. McBRIDE: Yeah. Now, I don't-

2 MS. OPSTBAUM-HABBART: You don't know that for a
3 fact-

4 MR. McBRIDE: Yeah.

5 MS. OPSTBAUM-HABBART: -- but you think that's
6 probably-

7 MR. McBRIDE: I think that somebody refocused on the
8 situation and decided that there was-

9 MS. OPSTBAUM-HABBART: The certificate issue and
10 these issues here, right.

11 MR. McBRIDE: Yeah.

12 MS. OPSTBAUM-HABBART: They all-

13 MR. McBRIDE: Yeah.

14 MS. OPSTBAUM-HABBART: -- there was an interplay
15 between them.

16 MR. McBRIDE: Yeah. So, anyway, we go out - go out
17 of that little courtroom, having heard that they are
18 reconsidering it-

19 MS. OPSTBAUM-HABBART: How long did they tell you
20 had to marshal your thoughts? #00:15:15#

21 MR. McBRIDE: Oh, god. I don't remember. I think it
22 was probably less than an hour.

23 MS. OPSTBAUM-HABBART: Okay.

1 MR. McBRIDE: So, we're in a little conference room,
2 and the decision is made - I mean, it was pretty obvious to me
3 that they wouldn't have brought us back there and they
4 wouldn't have gone through all of this if they weren't going
5 to accept the interlocutory appeal-

6 MS. OPSTBAUM-HABBART: Correct.

7 MR. McBRIDE: They must have known they had the
8 three - whatever vote they needed to accept it. So, I went out
9 in that room, and I said, "Look, guys, you know, they're going
10 to accept the interlocutory appeal. We can make - we should
11 make whatever argument we want to make, but this is -"

12 MS. OPSTBAUM-HABBART: It's a foregone conclusion.

13 #00:15:43#

14 MR. McBRIDE: "-- this is, you know, mission
15 impossible, I think." And they go, "Oh, good - well, you argue
16 it" - to me. So... this is like let Mikey eat it.

17 MS. OPSTBAUM-HABBART: Okay.

18 MR. McBRIDE: So, I prepared-

19 MS. OPSTBAUM-HABBART: Well, thankfully you had
20 written the brief-

21 MR. McBRIDE: Yeah.

22 MS. OPSTBAUM-HABBART: -- so, you certainly knew all
23 the facts, and you knew what the strong points were. So, thank
24 goodness, you had written the brief. #00:16:03#

1 MR. McBRIDE: Well, so I get ready to go in, and we
2 go in, and I'm ready to make the argument. And, mercifully, I
3 think, Chief Justice Veasey said, well, we've decided, and
4 we're accepting the appeal. So, we-

5 MS. OPSTBAUM-HABBART: That was it.

6 MR. McBRIDE: -- Yeah. We didn't have to argue the
7 point. And so, then we were - and, at that point, I became
8 pretty pessimistic about our chances before the Supreme Court-

9 MS. OPSTBAUM-HABBART: Why?

10 MR. McBRIDE: Because I didn't think that having
11 turned down an interlocutory appeal, they would change their
12 minds and now accept it if they didn't think there was a
13 problem. It's sort of - I got a case right now where we have a
14 petition for certiorari pending before the United States
15 Supreme Court, and I think I can say this because - I've
16 talked to a number of Supreme Court practitioners and the
17 general wisdom is that they don't accept cert unless they
18 think there is a problem. And oftentimes, that means that the
19 decision is going to be reversed.

20 So, I was looking at this the same way. The Supreme
21 Court didn't have to accept this appeal. Didn't have to, sort
22 of, embarrass the panel that turned down the appeal by
23 reversing this if people were generally okay with the decision
24 of the Court of Chancery. So, I was, from that point on, was

1 operating on the assumption that there is at least a minority,
2 and maybe a majority that think there is a problem here and
3 we're going to have the uphill fight of outside of the
4 argument.

5 MS. OPSTBAUM-HABBART: You were right. #00:17:56#

6 MR. McBRIDE: Yeah, yeah. Unfortunately.

7 MS. OPSTBAUM-HABBART: And so, when you said you
8 thought something - they must have thought something was
9 wrong. Which piece of the transaction did you think they were
10 going to focus on?

11 MR. McBRIDE: Well-

12 MS. OPSTBAUM-HABBART: Or was it a combination of
13 the pieces?

14 MR. McBRIDE: I thought - I mean, to my mind, the
15 jugular of this case was the permissibility of the voting
16 agreement because, without the voting agreement, there was no
17 preclusion or coercion. The stockholders would be able to vote
18 the existing deal down and take Omnicare's option if that's
19 what they had wanted to do. The thing was only really
20 preclusive and coercive if the voting agreement operated. And
21 this-

22 MS. OPSTBAUM-HABBART: And aren't shareholders
23 allowed to-

1 MR. McBRIDE: Well, that was - that's - that was the
2 point that I thought - let me say three things about the
3 decision and then you can...

4 One is, first of all, I have a lot of admiration for
5 and appreciation of the justices who are willing to protect
6 stockholders from defensive devices that are preclusive and
7 coercive. And, so, I only reluctantly come to the conclusion
8 of disagreeing with the court when the court is trying to do
9 what it thinks is protective of stockholders, because I don't
10 think that's ever an easy decision to make. And, so, I respect
11 that. And, if the discussion of the Unocal doctrine in this
12 decision had been directed to board-adopted defenses that had
13 the effect of preventing the stockholders from making their
14 own decision about whether to go forward with the transaction
15 or not, I would say, right on. I agree with almost everything
16 you say.

17 The problem was that what the court was addressing
18 were board provisions designed to facilitate, implement, and
19 effectuate a stockholder decision as to whether to go forward
20 with the transaction or not. And I just didn't think Unocal
21 had any application to board conduct that facilitates a
22 decision that the stockholders have made.

23 MS. OPSTBAUM-HABBART: Did you - were you surprised
24 that that was the focus of the argument? #00:20:46#

1 MR. McBRIDE: No, I think we pretty much knew. I
2 think it was pretty much the focus of the argument in the
3 Chancery Court when we - we knew that this was a lock-up. The
4 deal was locked up. It absolutely was going to cause - the
5 operation of these provisions would cause the merger with
6 Genesis to happen, and it would prevent a higher offer from
7 Omnicare. And by the time we argued that matter before the
8 Supreme Court, it was-

9 MS. OPSTBAUM-HABBART: The price.

10 MR. McBRIDE: Yeah. Omnicare was - I said, this case
11 stands for the proposition that three and a half is more than
12 two. I mean it - a lot of it seemed to be motivated on the
13 idea, we're just going to let the stockholders have the better
14 deal. I mean, I don't think that was really the motivation,
15 but we knew that was a problem, whenever you're before the
16 court, and you're arguing to the court, we want you to allow a
17 transaction to go forward that's the lower of two
18 possibilities, you're not in the most advantageous posture.

19 MS. OPSTBAUM-HABBART: No. But unfortunately, you
20 were arguing after the fact-

21 MR. McBRIDE: Yes.

22 MS. OPSTBAUM-HABBART: And the decision to go with
23 the deal to - was perfectly - was made - was perfectly fine-

24 MR. McBRIDE: Yeah.

1 MS. OPSTBAUM-HABBART: -- at that time.

2 MR. McBRIDE: Yeah.

3 MS. OPSTBAUM-HABBART: So, to go back and Monday
4 morning quarterback - is that correct expression?

5 MR. McBRIDE: Yeah.

6 MS. OPSTBAUM-HABBART: Monday morning quarterback,
7 that's hard, and plus it was stockholder action-

8 MR. McBRIDE: Yeah ... yeah.

9 MS. OPSTBAUM-HABBART: -- that was the last piece
10 that tied. #00:22:26#

11 MR. McBRIDE: I mean, that - and that goes back to
12 my perception of Unocal, which never really was articulated by
13 either the Court of Chancery or any of the opinions, not as
14 clearly as I tried to make it in the briefs. And I have said
15 this before, that, to me, the takeover cases in the eighties
16 were a collision of two paradigms. Because tender offers were
17 a new phenomenon... . We didn't have tender offers until, what?
18 The late sixties and they didn't really even become a serious
19 business - a form of business transaction -- until the late
20 seventies and then the early eighties. And the two paradigms
21 that collide are, if you treat a tender offer like what it
22 technically is -- an offer to buy the stock of a stockholder -
23 - then you would say, well, stockholders get to make their own
24 decision whether to sell their stock or not. The board doesn't

1 have any role in that. That's a stockholder decision. So, if
2 you believe that's the paradigm that would apply to a tender
3 offer, you would say, board of directors, you don't have
4 anything to do with this. And there were people arguing in the
5 early eighties that that's what the law should be.

6 On the other hand, the tender offer had an effect
7 that was comparable to a merger, and it was typically the
8 precursor to a merger. And, in the merger paradigm, the board
9 gets to make the decision first whether there is going to be a
10 merger or not. And, unless and until the board decides to
11 recommend it to the stockholders, the stockholders don't have
12 any vote or any decision to make. If you treat a tender offer
13 like that—

14 MS. OPSTBAUM-HABBART: Well, then...

15 MR. McBRIDE: -- then the board should be the first
16 decision-maker. What Unocal did, in my way of thinking is,
17 created a compromise of those two points of view. And, on the
18 one hand, it said it rejected the view that board - you don't
19 have anything to do with this; this isn't your business. It
20 said the board does have an important role to play in
21 addressing tender offers—

22 MS. OPSTBAUM-HABBART: But a reasonable ... you have
23 to act reasonably. #00:24:32#

1 MR. McBRIDE: Yeah. But, in order to protect the
2 shareholder interest, which is the - I have the right to sell
3 my shares when I want to paradigm -- you can't take action
4 that's you, the board, can't take action that is preclusive
5 or coercive, but preclusive of shareholder choice or coercive
6 of shareholder choice, or that's not reasonable in relation.

7 So, for me, the whole point of Unocal was to protect
8 the ability of the shareholders to make their own choice. And
9 it had - the doctrine had - should have had no application to
10 a situation where the shareholders had made the choice. And
11 now, all you are doing is effectuating it. But, not only did I
12 think it was doctrinally wrong, but it seemed to me sort of
13 impractical, because in some situations you could sign the
14 merger agreement, and then get written consents from the
15 stockholders-

16 MS. OPSTBAUM-HABBART: Form over substance.

17 #00:25:34#

18 MR. McBRIDE: Yeah. Four hours later, deliver the
19 written consents-

20 MS. OPSTBAUM-HABBART: And you're done.

21 MR. McBRIDE: And the deal is locked up. So, if you
22 could do it four hours after the merger agreement is signed,
23 why can't you do it four hours before the merger agreement is
24 signed?

1 Then the other thing to add insult to injury, I
2 thought the court's - but I will say that the majority's
3 analysis of Unocal and saying it's an absolute prohibition on
4 preclusive and coercive defenses, I think I'm fine with that
5 as applied to board action to prevent stockholder choice - or
6 to coerce stockholder choice.

7 But the other thing it did - I'm unloading here-

8 MS. OPSTBAUM-HABBART: That's okay. That's okay.

9 #00:26:24#

10 MR. McBRIDE: -- was say that you had to have a
11 fiduciary out-

12 MS. OPSTBAUM-HABBART: Which is?

13 MR. McBRIDE: And I used to debate this issue with
14 Bruce Stargatt because, if you frame the issue of can the
15 board breach its fiduciary duty after the merger agreement is
16 signed? well, that question sort of answers itself. But that
17 really begs the question is, what is the board's fiduciary
18 duty after the merger agreement is signed? Does it have a
19 fiduciary duty to walk away from a deal because a higher offer
20 comes in after the fact that you had no reason to anticipate?
21 Well, I think it's, to my way of thinking, the board doesn't
22 have a fiduciary duty-

23 MS. OPSTBAUM-HABBART: Well, a contract is a
24 contract, or should be. #00:27:10#

1 MR. McBRIDE: Yeah. I mean, I had a case -- I was
2 discussing this with Larry yesterday. I had a case that really
3 was, to me, a perfect example. We had a client who
4 participated in an auction for the purchase of a media
5 company. And the auction was exemplary. I mean, they did it by
6 the book just about perfectly. It went on for quite a while.
7 The bids were accepted. They put a deadline in. Our client won
8 the bidding. The merger agreement a la Omnicare--

9 MS. OPSTBAUM-HABBART: A fiduciary out--

10 MR. McBRIDE: -- had a fiduciary out provision in
11 it. And one of the other bidders, it was actually NBC, called
12 us after we had won the auction, after we had signed the
13 merger agreement, and said, "Hey! Congratulations on winning
14 the auction. Congratulations on your deal. We want to talk to
15 you about what portion of the company you're going to sell to
16 us." And we said, "Well, we're not planning to sell any
17 portion of the company to you." And they said, "Well, that's
18 too bad because if you won't agree to sell the part of the
19 company that we want to us, then we're going to make a bid and
20 outbid your merger deal price.

21 MS. OPSTBAUM-HABBART: That is so not fair. That's
22 so not fair. #00:28:32#

23 MR. McBRIDE: So, we -- that was our reaction was
24 this is so not fair, and--

1 MS. OPSTBAUM-HABBART: Right. #00:28:35#

2 MR. McBRIDE: -- we filed an action to seek, on
3 behalf of our merger party, asking the court to enjoin the
4 target board from terminating our merger agreement--

5 MS. OPSTBAUM-HABBART: You made your client a
6 stalking horse.

7 MR. McBRIDE: Yeah. And we went before Chancellor
8 Allen.

9 MS. OPSTBAUM-HABBART: And? #00:28:50#

10 MR. McBRIDE: And he was sympathetic to the argument
11 that my - the argument we made was that if the merger
12 agreement itself is not a product of a breach of fiduciary
13 duty, and this one wasn't, and no one was arguing it was. If
14 the merger agreement itself is not a product of a breach of
15 fiduciary duty--

16 MS. OPSTBAUM-HABBART: How can this be--

17 MR. McBRIDE: -- the board does not have a fiduciary
18 duty to walk away from the deal just because a higher offer
19 comes in. And so, they can't terminate because they don't have
20 a fiduciary duty to terminate. And the Chancellor was pretty
21 sympathetic to that argument. They got up and said, well, Mr.
22 McBride misstated the fiduciary out provision. It's not
23 whether we have a fiduciary duty. It's whether in our

1 discretion and judgment we think we do. And we'll tell you,
2 Your Honor, we think we do.

3 And so, he did something - I can't remember what it
4 was. He delayed them for a while. In the period of that delay,
5 we negotiated an increased termination fee for our client. We-

6 MS. OPSTBAUM-HABBART: See, that's just not right.
7 That's not the way deals are supposed to get done.

8 MR. McBRIDE: Yeah.

9 MS. OPSTBAUM-HABBART: As a transaction lawyer, I
10 just find that offensive.

11 MR. McBRIDE: Yeah.

12 MS. OPSTBAUM-HABBART: And, if you can't put the
13 proper collars around the fiduciary out, you have to be crazy
14 to have your client sign the deal and not get it done, if you
15 can, you know, with written consents, right away.

16 MR. McBRIDE: Yeah. Well, I was going to say that to
17 me, it's also a question of, and the argument I used to use
18 with Bruce Stargatt is, well, if I enter into a contract, if I
19 am a corporation and I enter into a contract to buy your
20 house, if I decide that I don't want to buy your house anymore
21 because a house that I like better, at a better price-

22 MS. OPSTBAUM-HABBART: I can walk away. #00:30:45#

23 MR. McBRIDE: -- do I have a fiduciary duty to walk
24 away from the deal? He goes, of course not. I said, well, if

1 the seller doesn't have a fiduciary duty to walk away from the
2 deal, then why should the buyer have a fiduciary duty, if the
3 contract is not a product of a breach of fiduciary duty in the
4 first place?

5 MS. OPSTBAUM-HABBART: And he said? #00:31:04#

6 MR. McBRIDE: Hmmm, interesting point. That's what
7 Bruce said, yeah.

8 MS. OPSTBAUM-HABBART: Interesting ... that was all
9 you're ever going to get.

10 MR. McBRIDE: I don't think I ever got Bruce to
11 concede anything.

12 MS. OPSTBAUM-HABBART: So, that was as far as it
13 went. So, what do you - as a result of that experience and the
14 one you are describing now, with the media company, how -
15 hopefully deal lawyers bring you in, and look to get some
16 input from you on how to manage that fiduciary out phenomenon?

17 MR. McBRIDE: Yeah. I think - well, if you've got a
18 public company and it's not practical to get stockholders
19 locked up, then it's sort of a - it's a moot point, because I
20 don't think you should be able to put deal protection devices
21 into your merger agreement that coerce or preclude the
22 shareholders from making an uncoerced choice on whether to
23 approve the merger or not. But the real thing is, I think-

1 MS. OPSTBAUM-HABBART: How do you negotiate, though,
2 when somebody else can always step in up to the last moment?

3 #00:32:08#

4 MR. McBRIDE: Well, but that goes to a question that
5 Justice Berger put to me in the oral argument. I remember, she
6 said -- I was making the point of - I think I started with the
7 proposition that they wanted a commitment from us that we
8 would do the deal, and we wanted a commitment from them it
9 would do the deal. And Vice Chancellor Berger said to me, oh,
10 but Mr. McBride, what you're forgetting is that there are two
11 constituencies that need to make - that you need to get
12 approval from, the board and the stockholders. And I said,
13 exactly, Your Honor. And we went to both constituencies, and
14 we got approval from both constituencies. And I thought that
15 exchange, to me, was like that's it. That's the jugular right
16 there.

17 MS. OPSTBAUM-HABBART: Right. #00:32:57#

18 MR. McBRIDE: And I don't remember there being
19 anything after that, that she said, and I thought - I thought
20 I made a good point, but it didn't win the case.

21 MS. OPSTBAUM-HABBART: But again, how would you
22 advise someone today knowing that, at any point in time, your
23 client could be nothing more than the stalking horse if
24 someone else comes in. #00:33:16#

1 MR. McBRIDE: Yeah. I - well, I still would advise
2 to try to get the stockholder vote committed to-

3 MS. OPSTBAUM-HABBART: But again, it's a public
4 company, you can't do it in advance and but I think that in -
5 and -

6 MR. McBRIDE: Well, if you want to do a public
7 company merger, and you want to do a merger as opposed to a
8 tender offer, then I think you just have to live with the
9 contingency that the stockholders may not approve the
10 transaction. Anymore, it happens so rarely. I mean, there
11 seems to me to be very few hostile deals that are going on-

12 MS. OPSTBAUM-HABBART: That is correct.

13 MR. McBRIDE: Yeah. And part of it is because - and
14 I think this largely happened after QVC, but surely by the
15 time of Omnicare, boards are not very often obstacles to
16 getting deals done, I don't think, anymore. I mean, people
17 seem to be quite open to selling companies. And, so, a lot of
18 the issues we dealt with in these takeover cases, both the
19 contractual issues and the fiduciary issues, have sort of
20 been, in a way, mooted out. The market for corporate control
21 now is quite vigorous, and...

22 In fact, I have had people argue to me that boards
23 are too enthusiastic about doing deals. That bad deals are
24 being just because people want to do deals-

1 MS. OPSTBAUM-HABBART: As opposed to the long-term
2 staying the course. #00:34:57#

3 MR. McBRIDE: Yeah. Yeah. So, in a way, a lot of the
4 takeover law - the market has sort of moved to where maybe the
5 hostile bidders in the eighties would have liked it to move
6 where it's pretty free and open.

7 MS. OPSTBAUM-HABBART: But still, if you have a
8 transaction with a fiduciary out, somebody else, their plan of
9 action might be to just sit it out and see what the final
10 price is and then decide they're interested. #00:35:26#

11 MR. McBRIDE: Yeah.

12 MS. OPSTBAUM-HABBART: And you can't preclude that,
13 and that's-

14 MR. McBRIDE: Well... I don't - if you conducted a
15 perfect auction... Well, you can't take away the shareholder
16 vote, but you could certainly - and I don't think you can
17 coerce the shareholder vote, but you can give yourself enough
18 of a termination fee or a breakup benefit that you're rewarded
19 for winning.

20 MS. OPSTBAUM-HABBART: But you know what ...
21 termination fee does not cover the - in my opinion - the time,
22 the money, the distraction from other endeavors-

23 MR. McBRIDE: Yeah.

1 MS. OPSTBAUM-HABBART: -- that is needed to get a
2 merger negotiated.

3 MR. McBRIDE: Yeah.

4 MS. OPSTBAUM-HABBART: So, I just don't think, you
5 know, percentage of this or that, I - it doesn't cover the
6 loss or the planning that goes into how you are going to
7 utilize that acquisition. What it's going to do for the good
8 of the company. You've involved a lot of people. You've done a
9 lot of analysis. You're not getting that back. #00:36:30#

10 MR. McBRIDE: Right. I agree with you.

11 MS. OPSTBAUM-HABBART: So, it still doesn't seem
12 fair.

13 MR. McBRIDE: Well, on the other hand, I think this
14 goes back to - frankly, what I think was animating the
15 majority opinion, in this case, is you've got to live with the
16 fact that stockholders have to approve the deal. And that's
17 just an aspect of public company deals. If you want to do a
18 public company deal, you've got to live with that.

19 MS. OPSTBAUM-HABBART: Understood.

20 MR. McBRIDE: What they were, I think, wrong about
21 in the Omnicare case was that we had gotten the stockholder
22 approval. Now, if they had wanted to say - if they wanted to
23 have a narrow rule - and this occurred to us - if they had
24 wanted to say that here, the stockholder vote shouldn't lock

1 up the deal - shouldn't be permitted to lock up the deal
2 because it was a supermajority vote. And the 50-plus - the 60-
3 percent that voted was actually, only, I think, 20 or 30-
4 percent of the equity of the deal. So, because there was a
5 supermajority class of super-voting stock class, what was
6 really a minority part of the equity of the company could
7 dictate to the majority of the equity of the company, we're
8 going to do this deal.

9 Now, you can say, well, that's exactly what people
10 bargained for when they invest in a company that's got-

11 MS. OPSTBAUM-HABBART: Class-

12 MR. McBRIDE: -- class votes.

13 MS. OPSTBAUM-HABBART: Right. You're giving veto
14 rights.

15 MR. McBRIDE: Yeah. But it's - it's an equity that
16 would have resulted in a narrower decision than the one that
17 was entered here because this one didn't turn on the fact that
18 it was supermajority voting stock and it wasn't a majority of
19 the equity. It just turned on the fact that what was really,
20 to me, another doctrinal proposition. Not only did they do the
21 Unocal, but they said, what you can't do is coerce the
22 minority. And the coercion was that the majority voters had
23 decided we're going to do the deal. If that's coercion, then
24 our corporate statute is coercion, because that's what the

1 statute says. The majority gets to make this decision and the
2 minority's got to go along with it. If that's coercion, then
3 our whole statutory structure is coercive.

4 So, I don't understand the rationale for the
5 majority.

6 MS. OPSTBAUM-HABBART: What did you think of the
7 whole certificate argument that there was - that - what they
8 were, in fact, doing was an impermissible transfer?

9 #00:39:11#

10 MR. McBRIDE: I - to tell you the truth, I don't
11 remember that argument. I didn't go back and reread that
12 opinion. I thought - I remember thinking it was not a slam
13 dunk from our side. I thought there was an argument, but I
14 thought we had the better side of the charter argument.

15 MS. OPSTBAUM-HABBART: Yeah ... I thought that was a
16 waste of time, unfortunately, from the real issues - the ones
17 - the hard issues that you're talking about.

18 MR. McBRIDE: Yeah.

19 MS. OPSTBAUM-HABBART: And, well, I'm sorry that
20 your friends - the first time your friends understood what you
21 were doing-

22 MR. McBRIDE: Yeah...

23 MS. OPSTBAUM-HABBART: -- and the impact you had on
24 it. But, it was a bit of a rollercoaster.

1 MR. McBRIDE: It was.

2 MS. OPSTBAUM-HABBART: At first, it turned your way-

3 MR. McBRIDE: Yeah.

4 MS. OPSTBAUM-HABBART: -- and they said, Dave did a
5 great job and won the case, blah-blah-blah. And then-

6 MR. McBRIDE: Dave [thumbs down]-

7 MS. OPSTBAUM-HABBART: Who knew, right? Right?

8 MR. McBRIDE: Yeah. Who knew? Fame is fleeting.

9 MS. OPSTBAUM-HABBART: But, you know, I want to step
10 back one more second when it was... . You were talking about
11 when you met with, I think you said, the president, when you
12 deposed the president-

13 MR. McBRIDE: Yeah.

14 MS. OPSTBAUM-HABBART: -- and you didn't like his
15 feelings. Did you have any other opinions about the other
16 players when you saw them throughout this? Any of the players.

17 #00:40:28#

18 MR. McBRIDE: No... I mean I remember just liking -
19 maybe it was a bit of hometown bias-

20 MS. OPSTBAUM-HABBART: Right ... Genesis-

21 MR. McBRIDE: -- but I liked the people from
22 Genesis. I thought they were nice, good people. I mean, I will
23 say this, and this is not - I thought the hardest question to
24 answer from our side of this case is you're a bidder. I'm

1 bidding for Company A, and I say I'm going to make this bid,
2 but if you don't lock it up, I'm out of here - I'm gone-

3 MS. OPSTBAUM-HABBART: I'm out of here; you have no
4 other options.

5 MR. McBRIDE: Yeah. And - and Company A says no to
6 you. Says I'm not locking up the deal; I'm going to go talk to
7 this other bidder. And then, after talking to the other
8 bidder, Company A comes back and says, hey, you know what? We
9 talked to that other bidder; we're satisfied you're the best
10 deal, we want to do a deal.

11 MS. OPSTBAUM-HABBART: And lock it up.

12 MR. McBRIDE: If you were willing to do the deal at
13 whatever price on Monday, and they come back to you two weeks
14 later and say, we'll do the deal you wanted to do on Monday;
15 we're ready to sign it up. Are you really going to say no? Why
16 would you say no? That - I think, there is a certain - that
17 threat has a bit of - there is a question about would you
18 really follow through on that threat?

19 Now, here, I think Genesis would have really
20 followed through because of their prior experience-

21 MS. OPSTBAUM-HABBART: Yes.

22 MR. McBRIDE: -- with Omnicare, and because of the
23 hostility. And I just - I think I had the sense that they were
24 - they had been dealing with the creditor committee. They had

1 been dealing with the independent committee of the NCS board.
2 They had been - they had made several offers. I think it was
3 four or five offers before we finally got to the final offer.
4 And I think they were just sort of fed up, like, look, this is
5 it. And we're not going to - it's either now or never, and if
6 you bring Omnicare into this thing, we're gone. Because, in
7 part, I think they just figured that it would be an endless
8 quagmire if Omnicare got involved, and they had to deal with
9 Omnicare.

10 MS. OPSTBAUM-HABBART: Were you part of the decision
11 to allow the-

12 MR. McBRIDE: To allow them to waive-

13 MS. OPSTBAUM-HABBART: -- whereby Genesis ... yeah,

14 MR. McBRIDE: Yeah.

15 MS. OPSTBAUM-HABBART: -- to waive the restriction
16 against the discussions.

17 MR. McBRIDE: Yes.

18 MS. OPSTBAUM-HABBART: You were part of that?

19 MR. McBRIDE: Yeah.

20 MS. OPSTBAUM-HABBART: And what was your thinking?

21 #00:43:16#

22 MR. McBRIDE: I'm trying - it came to me as the
23 decision had been made we're going to waive - I guess this is
24 okay, I mean, we obviously did it, so-

1 MS. OPSTBAUM-HABBART: Right.

2 MR. McBRIDE: -- that that's not confidential. My
3 own thinking at the time was I've often had a theory in these
4 situations where give your opponents enough rope to hang
5 themselves.

6 MS. OPSTBAUM-HABBART: All right.

7 MR. McBRIDE: I was, and I think this is true, that
8 if we allowed Omnicare to actually - if we allowed them to
9 actually negotiate with Omnicare, and allowed Omnicare to
10 actually make an offer, it would not be-

11 MS. OPSTBAUM-HABBART: Better.

12 MR. McBRIDE: -- a better offer. And it wasn't
13 because it had this due diligence condition-

14 MS. OPSTBAUM-HABBART: Of course.

15 MR. McBRIDE: -- to it that made no sense, where
16 somebody who had already had due diligence and already made
17 three or four offers was now saying oh, I need more due
18 diligence.

19 MS. OPSTBAUM-HABBART: Why do you think the court
20 didn't focus on that and see them as a bad player?

21 #00:44:21#

22 MR. McBRIDE: Well, maybe I fault myself for it. I
23 think we tried - I didn't go back and reread the briefs. I
24 think Chancellor - the Vice Chancellor-

1 MS. OPSTBAUM-HABBART: He got it ... he got it.

2 MR. McBRIDE: -- got it ... yeah. Why the Supreme
3 Court didn't? I just think they were - I just think they had
4 in their minds that they were right about Unocal, and they
5 were half right about Unocal. If we were dealing with a board-
6 adopted device to prevent stockholder choice, then I would
7 have said right on majority opinion. So, I just think they got
8 in their minds that Unocal means this, and we want to give it
9 force, and didn't really understand why it didn't apply in
10 this circumstance. That's the only thing I can think of
11 because I don't - I'm not sure I understand why they would
12 have done it unless it was our joking reference to the fact
13 that the case stood for the proposition that three and a half
14 is more than two and a half, or whatever the offer was for-

15 MS. OPSTBAUM-HABBART: Well, maybe that was, at the
16 end, the final nail. #00:45:39#

17 MR. McBRIDE: It might have been, but I - I think
18 the majority was genuinely motivated by a feeling that Unocal
19 was good law, that the preclusive - coercive test was a good
20 test, and I think it is, in the context of things that
21 preclude or coerce shareholder choice, and just lost sight of
22 the fact that this wasn't precluding or coercing shareholder
23 choice. It was facilitating shareholder choice. I don't have
24 any other explanation for it. So...

1 MS. OPSTBAUM-HABBART: Any last thoughts?

2 #00:46:20#

3 MR. McBRIDE: No.

4 MS. OPSTBAUM-HABBART: Any issues - no last
5 thoughts?

6 MR. McBRIDE: Not really.

7 MS. OPSTBAUM-HABBART: No issues or feelings that
8 you wanted to share before you-

9 MR. McBRIDE: I remember how - I remember how upset
10 Vice Chancellor Lamb was when the-

11 MS. OPSTBAUM-HABBART: Tell us.

12 MR. McBRIDE: -- Supreme Court decision came down.
13 After that, it just so happened that he and Joyce were having
14 lunch at my house - not lunch, dinner. And he was - we didn't
15 discuss it, but he was obviously upset by the decision-

16 MS. OPSTBAUM-HABBART: Not happy.

17 MR. McBRIDE: Yeah, yeah. And I thought rightfully.
18 I mean, I tell people that in the Omnicare case, we had three
19 jurists look at the facts and law. Three ruled our way. Three
20 ruled Omnicare's way. And it just so happened that one of our
21 three was a Vice Chancellor instead of a justice; otherwise,
22 it would have been a tie.

23 MS. OPSTBAUM-HABBART: And yet, the Supreme Court
24 adopted all of the Vice Chancellor's findings of fact-

1 MR. McBRIDE: Yeah.

2 MS. OPSTBAUM-HABBART: And the Vice Chancellor
3 thought that it was a stellar-

4 MR. McBRIDE: Yeah.

5 MS. OPSTBAUM-HABBART: -- it was a record of stellar
6 board performance.

7 MR. McBRIDE: Yeah. I just - I think - I did a lot
8 of these takeover battles in those years, and - Revlon, Time
9 Warner, QVC, this one, and probably half a dozen others. And
10 whenever I was on the plaintiff side, my theory was, you want
11 to present facts that would convince the court there is a
12 breach of fiduciary duty under the good old due care loyalty
13 context. And then, give them a rationale where they could rule
14 in your favor without necessarily having to find the bad faith
15 or the gross negligence or whatever. But as I look back on
16 these cases - we just talked about QVC this morning, and we
17 spent - I spent in QVC, I wrote the statement of facts in QVC
18 in our reply brief - I spent a huge amount of time trying to
19 convince the court that there was just a plain old breach of
20 fiduciary duty.

21 In the final analysis, the case turned on whether
22 Revlon applied or not. The Paramount board thought it didn't
23 apply, and, therefore, apparently thought they could sell the
24 company to Viacom regardless of who was making a better offer.

1 And that wasn't right and, consequently, their effort to do
2 that got struck down. And you could argue that if they had
3 been perfect in their performance from a fiduciary standpoint—

4 MS. OPSTBAUM-HABBART: Still.

5 MR. McBRIDE: -- it still would have—

6 MS. OPSTBAUM-HABBART: Same outcome.

7 MR. McBRIDE: -- the same outcome. And I think
8 that's clearly - that's obviously the case in Omnicare where
9 everybody said this board was—

10 MS. OPSTBAUM-HABBART: Terrific.

11 MR. McBRIDE: Yeah.

12 MS. OPSTBAUM-HABBART: And it still didn't carry the
13 day.

14 MR. McBRIDE: Yeah. Because of a doctrine that got
15 misapplied, in my estimation, because the court lost sight of
16 why Unocal was created in the first place.

17 MS. OPSTBAUM-HABBART: Well, the minority,
18 obviously—

19 MR. McBRIDE: Didn't.

20 MS. OPSTBAUM-HABBART: -- didn't lose sight and
21 supported your position— #00:49:42#

22 MR. McBRIDE: Yeah.

23 MS. OPSTBAUM-HABBART: There must have been some
24 feeling of vindication when you read the dissent.

1 MR. McBRIDE: Yeah, well-

2 MS. OPSTBAUM-HABBART: Even though it doesn't change
3 the outcome, but it still-

4 MR. McBRIDE: I'd rather lose three-three, I mean, I
5 take a lot of comfort from the fact that, in terms of our -
6 the job we did as advocates, that, like I say six jurists
7 looked at these facts and law and three decided it one way,
8 and three decided it another. So, I don't feel like we - I
9 don't feel like there was anything we could have done that
10 would have changed the-

11 MS. OPSTBAUM-HABBART: Changed the outcome.

12 MR. McBRIDE: I mean, after the decision came down,
13 I asked myself, like, for example, Ed Welch called me before
14 the argument before the Supreme Court, and, of course, he is
15 representing NCS, who now has a better offer. And his board
16 are a bunch of NCS stockholders who would make a lot of money
17 if that better offer happened.

18 MS. OPSTBAUM-HABBART: Of course.

19 MR. McBRIDE: So, Ed was, I think, concerned that -
20 that we wanted to make sure that we felt like we put up the
21 best defense that could be put up for our merger agreement.
22 And he asked me, basically, how should we divide up the
23 argument time? And I was thinking, well, it's really their
24 board whose fiduciary duties are at issue. I thought they

1 should take most of the argument time, and I would have only
2 like four minutes. And after the argument was over, not that
3 Ed didn't do a great job, but I began to realize that it was
4 really our contract rights that were at issue. And the
5 fiduciary duty issues were only a - were a subsidiary question
6 to do we have contract rights that we could enforce? And maybe
7 we should have put more emphasis on that. Maybe we should have
8 put more emphasis on that-

9 MS. OPSTBAUM-HABBART: I have a feeling that train
10 had left the station-

11 MR. McBRIDE: Yeah.

12 MS. OPSTBAUM-HABBART: -- that you couldn't, by that
13 point, once they mooted the denial - the interlocutory appeal,
14 you said you knew the track you were heading, and I don't
15 think anything could have changed that focus at that point.

16 MR. McBRIDE: Yeah. I don't think so either. And
17 like I say, if I'm ever in a plaintiffs' case where I've got
18 to rely on Unocal, after rereading the majority opinion, I'm
19 going to go back to that majority opinion and quote it because
20 I think it's a great exposition of Unocal if it had been
21 applied to defensive techniques that precluded shareholder
22 choice.

23 MS. OPSTBAUM-HABBART: So, you will - you would
24 still quote it?

1 MR. McBRIDE: Yeah.

2 MS. OPSTBAUM-HABBART: Well, you have to.

3 MR. McBRIDE: Yeah.

4 MS. OPSTBAUM-HABBART: It's-

5 MR. McBRIDE: The law.

6 MS. OPSTBAUM-HABBART: -- the law, right? But how
7 about the commentary where the former Chief Justice Steele
8 said it was, you know, like a fly in the ointment that's going
9 to-

10 MR. McBRIDE: Yeah ... yeah. Well, I think maybe the
11 only reason that precedent has survived is because it just
12 really comes up so rarely. You almost, in - like the way we've
13 talked about it - in any public deal, you can't get a
14 shareholder voting agreement. It's just not practical. And in
15 any situation where you can get a shareholder voting
16 agreement-

17 MS. OPSTBAUM-HABBART: You will.

18 MR. McBRIDE: -- you can get the consents and
19 execute them right after you sign the merger agreement, and
20 you've got the same result.

21 MS. OPSTBAUM-HABBART: Yeah, but again, form over
22 substance-

23 MR. McBRIDE: Yeah.

1 MS. OPSTBAUM-HABBART: -- and it doesn't negate the
2 unfairness. Well, thank you, Dave, so much--

3 MR. McBRIDE: Thank you, Ellisa.

4 MS. OPSTBAUM-HABBART: It was really a pleasure
5 talking with you.

6 MR. McBRIDE: It was a pleasure - it was a pleasure
7 to be questioned.

8 MS. OPSTBAUM-HABBART: Thank you.

9 #00:53:23#

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