Case: Weinberger v. UOP, Inc.
Interview of A. Gilchrist Sparks, III
Morris Nichols Arsht & Tunnell LLP
Interviewed by: A. Thompson Bayliss, Abrams & Bayliss LLP
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#00:00:00#

1 MR. BAYLISS: I'm Tom Bayliss, I am here with Gil
2 Sparks. Thank you for being here, Gil. We're going to talk
3 about Weinberger vs. UOP. Let's start with the background. The
4 Signal Companies were the buyer, and UOP was the seller.
5 Signal already owned 50.5-percent of the company. The merger
6 agreement was signed March 22, 1978, and the proposal was to
7 cash out the minority at $21.00 a share. Were you involved in
8 the structuring of the transaction or anything pre-litigation?
9 #00:00:48#
10 MR. SPARKS: I don't think so. It's possible, but I
11 don't have any recollection of having been involved prior to
12 the time the litigation began. #00:00:56#
13 MR. BAYLISS: I want to touch on a feature of the
14 merger agreement that turns out to be important later in the
15 case; that is the stockholder approval conditions. The merger
16 agreement required an approval by a majority of the minority
17 present and voting at the stockholder meeting, and also two-
18 thirds of the outstanding stock. Do you know the origins of
19 those provisions? #00:01:20#

1 MR. SPARKS: No, I really don't. My guess is, this
2 is a guess, is that Latham & Watkins, who were the general
3 counsel, in effect, or outside counsel for Signal, no doubt
4 thought that that was a good protective measure and a way to
5 be fair to the minority of UOP. Whether they consulted with
6 anyone in my office prior to doing that, I doubt because we
7 ended up representing UOP, not the acquiring company.
8 #00:01:55#
9 MR. BAYLISS: Was there any pre-closing litigation?
10 #00:01:58#
11 MR. SPARKS: Not that I recall. And that's
12 interesting because the agreement with respect to the – the
13 merger agreement, preceded by about two and a half months the
14 vote on the merger agreement. So, there clearly could have
15 been pre-closing litigation, but there wasn't. And I think
16 that may have also colored people's thinking about the case as
17 it began and as time went on. #00:02:28#
18 MR. BAYLISS: After the litigation began, did anyone
19 make an argument that the plaintiff should be kicked out of
20 court because he waited too long to bring suit? #00:02:38#
21 MR. SPARKS: Not in the way that you would make that
22 argument today. The law just hadn't developed far enough to,
23 in effect, penalize you for not suing before the deal. I don't
24 recall anyone making that argument. I do believe that on at

1 least one occasion, maybe two, Vice-Chancellor, later
2 Chancellor Brown, made some mention of the fact that by the
3 way, nobody challenged this beforehand. And it may well be
4 that it colored his thinking about the suit in sort of a
5 global way. #00:03:11#
6 MR. BAYLISS: The stockholders vote to approve the
7 deal, and it closes on May 26, 1978.
8 MR. SPARKS: Right.
9 MR. BAYLISS: The litigation begins in July 1978.
10 Tell us about the players in the litigation. #00:03:28#
11 MR. SPARKS: So, I'll start with the plaintiff
12 himself; William Weinberger. William Weinberger had been the
13 plaintiff – I know this because I Googled it up; I knew he had
14 been in a lot of cases, but I Googled it the other day to see
15 when it was he passed away, which by now he clearly has, since
16 he was in at least his mid-eighties when this suit began in
17 1978. And he, by that time, had already been involved in at
18 least 90 federal securities law cases as a plaintiff. And in a
19 number of Delaware cases, including at least one or two that
20 Vice-Chancellor Brown commented that he had decided. In fact,
21 I think, at one point, the Vice-Chancellor remarked that it
22 didn't appear that Weinberger remembered the case that Vice-
23 Chancellor Brown had decided that he had been the plaintiff
24 in, which... Nonetheless, as we will get to, William

1 Weinberger got qualified as a class representative as we went
2 forward. #00:04:36#
3 MR. BAYLISS: You mentioned some of these facts, but
4 I do want to touch on them because in a later opinion in the
5 case, the court mentions that at the time he was 81 years old,
6 he had, according to the court, virtually no accurate
7 knowledge of the status of the suit that he had filed. The
8 court went on to say that he was, at the time of his
9 deposition, unaware of the findings and opinion of any
10 financial analyst who had been retained by his counsel to
11 evaluate his contentions as to the value of the stock. He had
12 not met his Delaware counsel until two days before his
13 deposition, and five months after his suit was filed. And at
14 the time of his deposition, he had no written understanding
15 with his counsel concerning his responsibility for the payment
16 of costs in the event his suit was unsuccessful. And at his
17 deposition, he had virtually no recall whatsoever as to the
18 outcome of several other class and derivative actions in which
19 he had participated as a party plaintiff. When you found out
20 all this stuff, what was your reaction? #00:05:42#
21 MR. SPARKS: That it probably wasn't going to make
22 any difference in terms of his qualification. At that time,
23 it's hard to describe, but I think the courts had sort of
24 taken the view that these class plaintiffs who were sort of

1 wheeled into battle – one other case, I don't know whether it
2 was with respect to Mr. Weinberger or somebody else, but one
3 of our judges had characterized either Harry Lewis, who was
4 one of the other guys who did this, or William Weinberger as
5 somebody being wheeled into battle by the plaintiff. And the
6 trouble was, if you got one of them disqualified, there would
7 probably be another one that popped up. And at that particular
8 point in time, our courts just, in this particular area,
9 weren't rigorous in terms of disqualifying these people. So, I
10 can't remember if we challenged it in this case or not. I
11 think we sort of did in the context of classification
12 generally. But at least I didn't have much hope that we were
13 going to succeed. It just wasn't happening back then. At the
14 same time, a lot of us wondered what motivated people like Mr.
15 Weinberger to do this. And very frankly, we were never able to
16 punch through in discovery of the Weinberger's or the Harry
17 Lewis's exactly what the quid pro quo was. But, obviously, Mr.
18 Weinberger – maybe it's just psychic satisfaction or an 81
19 year-old wanting to stay in the game. But that was some of the
20 state of play. Just to jump forward a little bit, the reason I
21 Googled him up was you asked me, and as we thought about this
22 interview earlier, why another name popped up as a co-
23 plaintiff late in the case. And I Googled Mr. Weinberger to
24 see if he had passed away. My guess is the other plaintiff

1 popped into the case because Mr. Prickett was concerned that
2 Mr. Weinberger, by the time this case ended, if he was 81 when
3 it started, he was 88 when it ended, and there was some risk
4 that he might not have a plaintiff any more, which would have
5 been a sad way to have the case end, at least as far as Mr.
6 Prickett was concerned. But when those types of things
7 happened at this period of time, our courts were very liberal
8 in allowing class counsel to, in effect, invite other people
9 to come in and substitute and keep the case alive, at least if
10 the case had any merit. #00:08:12#
11 MR. BAYLISS: Let's talk about the lineup on the
12 defense side. UOP was represented by Sam Arsht and you from
13 Morris Nichols. #00:08:24#
14 MR. SPARKS: Well, I don't remember Sam playing any
15 role whatsoever in the litigation. He may have gotten the call
16 from someone, but Sam was not a litigator. And by this time,
17 he retired in 1980. So, by this time, Sam was certainly not
18 taking on new matters of this nature, and he never went to
19 court. I don't think I ever consulted with Sam about the
20 ongoing nature of the litigation. So, basically, in our shop,
21 it was me representing UOP. And I looked through the papers; I
22 don't see that I even had an associate working for me. In
23 fact, when the case started, I was an associate. I became a
24 partner in 1979. So, when this case began, I was a sixth-year,

1 fifth-year or sixth-year associate. And I really didn't have
2 anybody to report to. There was no general counsel of UOP. So,
3 I was, nominally, I guess, I would take my direction from Mr.
4 Crawford. But after the merger had occurred, UOP was wholly
5 owned by Signal, and the lawyers at Signal, their general
6 counsel was a guy named Brewster Arms, and then, they had a
7 senior guy from Latham & Watkins, Alan Halkett, who was really
8 the lead counsel in the case. Now, whenever there had to be a
9 UOP witness, like Crawford or a financial person from UOP, I
10 took those witnesses. Halkett took all the rest of the
11 witnesses. Bob Payson, at Potter Anderson, was the other
12 lawyer in the case. But since Halkett and Bob represented the
13 same people and Halkett was sort of doing everything on his
14 side, I don't remember Bob taking the witness. I think the
15 most he ever did was introduce Alan and then move on. I didn't
16 mean that Bob wasn't doing the same thing I was doing, and
17 that is reviewing and editing briefs. But I don't remember him
18 taking an active role either in the discovery or for that
19 matter, in any of the arguments before the court. #00:10:42#
20 MR. BAYLISS: Let's talk about the Signal Companies
21 for a moment. Were they a repeat player in the Court of
22 Chancery? #00:10:46#
23 MR. SPARKS: Well, they had been in the Court of
24 Chancery in a very high-profile case called Gimbel vs. Signal,

1 which dealt with, if I recall, it was a sale of assets case.
2 #00:10:59#
3 MR. BAYLISS: So, this wasn't their first time in
4 front of the court?
5 MR. SPARKS: Well, no; but that had been a while
6 before. I mean I think that was ’74 or something like that.
7 So, it wasn't the same team; it wasn't the same players. It
8 certainly wasn't the same issue. #00:11:16#
9 MR. BAYLISS: Let's talk for a moment about the
10 judge at the time, Vice-Chancellor Grover Brown. At the time
11 the case was assigned to him, did you believe you had gotten a
12 good draw? #00:11:27#
13 MR. SPARKS: I think all of us respected Grover
14 Brown. He was a down to earth, common sense, good judge, in my
15 opinion. I certainly was as comfortable with him as I would
16 have been with any of the other Vice-Chancellors or
17 Chancellors. Perhaps more so. #00:11:49#
18 MR. BAYLISS: Did you have a view at the beginning
19 of the case about how it would come out? #00:11:53#
20 MR. SPARKS: No. I learned very early in my practice
21 not to form views as to how cases were going to come out. I
22 just tried them. And there came a time in every case when you
23 think you know how it's going to come out. Even then,

1 sometimes, you're wrong. But when the case was filed, not
2 really. #00:12:15#
3 MR. BAYLISS: When was the moment in this case when
4 you felt like you understood how it was going to come out?
5 #00:12:20#
6 MR. SPARKS: In the very last argument before the
7 Supreme Court when Drew Moore started pounding on the Arledge
8 Chitea Report. And not before then.
9 MR. BAYLISS: Let's talk for a moment about the
10 initial complaint. Filed in July 1978, it's seven pages long.
11 Any sense of whether – at the time, of whether it was going to
12 be a ground-breaking case—
13 MR. SPARKS: No.
14 MR. BAYLISS: -- that would have a major impact on
15 Delaware law? #00:12:46#
16 MR. SPARKS: No, the original complaint had two
17 causes of action, if you will. One of them was that this was a
18 cash-out merger and under a lot of cases involving – a case
19 called Singer vs. Magnavox, the Najjar case and the Tanzer
20 case, the court had introduced into our law some concept that
21 a cash-out merger had to have a business purpose. And that was
22 just count one. No business purpose, this was just cashing out
23 the minority. And the second claim was that the price was
24 inadequate. And under Sterling vs. Mayflower and some of the

1 other cases, the burden was on the defense and, at least in
2 normal circumstances, in a cash-out controlled merger to
3 demonstrate the entire fairness of the consideration paid. So,
4 all you sort of had to do was say controlled merger, 50-
5 percent plus stockholder cashing out the minority, and I think
6 it's unfair and say a couple of words about why you think it's
7 unfair, and that would generally get you past the motion to
8 dismiss. #00:13:48#
9 MR. BAYLISS: There was also a claim against Lehman
10 Brothers. Was it usual for a financial advisor to get dragged
11 into stockholder litigation? #00:13:55#
12 MR. SPARKS: No...no. But we're early enough in this
13 – we're early enough in the whole area of litigation in this
14 area that there is nothing that's necessarily normal or
15 abnormal, but I can't recall seeing an investment banker
16 hauled into court for a fairness opinion prior to this. That
17 doesn't mean it hadn't happened, but it certainly wasn't
18 common. But there wasn't a very large sample either.
19 #00:14:23#
20 MR. BAYLISS: Rolling forward to the Court of
21 Chancery's first opinion in the case, which dismissed the
22 derivative claims for lack of standing, and then addressed the
23 discovery issue. I want to focus on the discovery issue. What
24 happened? #00:14:41#

1 MR. SPARKS: All right. So, there was relatively
2 late in the document discovery, a document popped up that I
3 can remember to this day the designation of it. It was PXLB40.
4 Plaintiff's Lehman Brothers 40. And this was a document
5 prepared in 1976 by Lehman Brothers that was addressed to
6 Forrest Shumway, who was the CEO of Signal. And it opined that
7 the value of UOP was somewhere between 17 and 21 dollars. And
8 – or, maybe it was that it would be advantageous for Signal to
9 buy UOP or the minority shareholders – and minority shares of
10 UOP for that amount. Now, that's two or three years before the
11 merger, but there had been an intervening – I don't remember
12 the details of why it was a catastrophe, but it turned out it
13 was. They had some major loss, and they had a Come by Chance,
14 was the name of the lawsuit, which they ended up paying up ten
15 years later tons of money to settle. And it had already had
16 write-offs. So, the idea was, well, it's still worth in this
17 range, notwithstanding this calamity. The deposition – I was
18 defending Crawford, the CEO of UOP – and Bill Prickett pulled
19 out this document. Now, I can't remember whether we had
20 prepared Crawford on this document or not – he had never seen
21 it and I think we may have decided that having never seen it,
22 it was not a very good idea to prepare him on it...now wait,
23 so, wait a minute, let me finish the story here. So, Bill
24 Prickett puts this document in front of Crawford, forces him

1 to read it at the deposition, and then asked the question, if
2 you had known about this document back at the time that you
3 hired Lehman Brothers, would you have hired Lehman Brothers?
4 That was his question. And Alan Halkett, he didn't jump up and
5 down, but he immediately objected and then literally kicked me
6 under the table and said instruct the witness not to answer.
7 And it was an objection—I mean, to this day, I'm not sure it
8 wasn't an objectionable question. I mean it had no foundation;
9 it was pure speculation. And the witness didn't know anything
10 about the document or what the circumstances were. And so,
11 then we had – so when we had the motion to dismiss, the first
12 one, the motion to dismiss was I mean why these were
13 derivative claims, to this day, I have no idea. Bill Prickett
14 wasn't suing, or Mr. Weinberger, if you characterize him as a
15 real person; they weren't suing on behalf of UOP so money
16 would go back to UOP. They were suing on behalf of the
17 minority stockholders whose stock had been taken away to get
18 them more money. And so, it just didn't have it. And on top of
19 that, they weren't stockholders any more. So, it didn't fit in
20 in terms of being an appropriate derivative suit in its form,
21 and they also had no standing because they weren't
22 stockholders any more. And I think Bill was arguing, well, if
23 I succeed in getting rescission, they'll be stockholders
24 again, and therefore, maybe, this should be a derivative suit.

1 He lost that. And then, I had to get up and argue the PXLB40
2 thing, and I lost that. Grover Brown decided well, go ahead;
3 he can ask those questions. Well, of course, by that time, a
4 couple of things had happened. Number one—by that time, we
5 knew that PXLB40 had never been seen by anybody outside of
6 Lehman Brothers. In other words, it was addressed to Shumway
7 but had never been sent to him. It never was sent to anybody
8 at UOP. It was sort of one of these things that investment
9 bankers just sort of do internally and then somebody said, eh,
10 we're not going to send it anywhere. So, it had assumed a much
11 lesser importance. And then, I am sure, with two years to
12 prepare Shumway to answer the question, by the time he did
13 have to answer the question, he had a pretty good answer,
14 which was probably something like I don't know because I don't
15 know anything about this, and I never saw it before. I don't
16 know what the – I honestly don't remember what the answer was.
17 But the bottom line was, PXLB40 was sort of a big deal in the
18 first two years of the litigation, and by the third year of
19 the litigation, nobody cared about it any more. #00:19:34#
20 MR. BAYLISS: I do want to focus on the document for
21 a moment because it does seem as if it's the type of red-hot
22 document that any plaintiff's lawyer would want to get. It's
23 the financial advisor to the seller, and they have a memo to
24 the buyer saying you should buy this company for 21 dollars,

1 or something to that effect. And then, they represent the
2 seller, who agrees to sell, at 21. And, lo and behold, the
3 same financial advisor advises that 21 dollars is fair.
4 Meanwhile, there have been intervening events that you would
5 think would have allowed the company to recover and exceed 21
6 dollars a share. #00:20:10#
7 MR. SPARKS: Well, that wasn't completely clear, but
8 yeah, you're right. It just - but it was pretty remote. It was
9 you know, two or three years before and once it had never been
10 sent to anybody, so they had never assumed a client
11 relationship with Signal. I just think Bill let it drop. I
12 mean it just wasn't a big part of the case from that point on.
13 #00:20:33#
14 MR. BAYLISS: He couldn't prove that that document
15 had ever made it out of Lehman Brothers to Signal.
16 MR. SPARKS: He was able to prove, as I recall, that
17 Glanville, who ultimately signed the opinion, and who was a
18 director of UOP, was made aware - oh, I don't know if he had
19 known of it before, but he was made aware in the three or four
20 days that Lehman had to formulate its opinion. He was made
21 aware of its existence. But since the price was 21, and the
22 range was 17 to 21; it just didn't - it wasn't enough any more
23 for Bill to hang his hat on and he had moved on to other
24 things. #00:21:15#

1 MR. BAYLISS: Let's roll forward to the class
2 certification decision, April 5, 1979. You mentioned this
3 before, but the court determined that Mr. Weinberger was an
4 appropriate plaintiff. Would testimony of – the type of
5 testimony that you got from Mr. Weinberger at his deposition,
6 would that be sufficient today to justify a – or sustain an
7 application for appointment as a class plaintiff? #00:21:46#
8 MR. SPARKS: You know, I don't know. I'm not sure
9 how many class plaintiffs there are of the ilk of Harry Lewis
10 and William Weinberger, and there were a couple others whose
11 name I can't remember. We were just chatting about this
12 earlier today. You know, we have pension funds now who are
13 institutional plaintiffs in some of these cases. It might be
14 more of a problem today, but I'm not close enough to it now to
15 really have a great feel for that. #00:22:21#
16 MR. BAYLISS: The court also made a ruling on the
17 size of the class and cut it down from the proposed class of
18 5.7-million shares to 147,000—
19 MR. SPARKS: Correct.
20 MR. BAYLISS: Which must have been a big blow to the
21 plaintiffs at the time. Because they immediately sought an
22 interlocutory appeal and they argued in their appeal papers
23 that the practical effect of that ruling was to deny class

1 certification altogether. And then, the appeal gets refused.
2 At that point, did you think you had won the case? #00:23:01#
3 MR. SPARKS: I don't – you know, I don't have any
4 recollection of what I thought when that happened. I mean,
5 obviously, he was going to have to do – either the case was
6 over as a practical matter, or Bill was going to have to do
7 something to change that result because it wasn't economically
8 feasible to try a case with 147,000 shares. And of course, the
9 reason that it got knocked down was there was no fraud or
10 misrepresentation in the original complaint. And so, the only
11 people who really had standing as a class matter were people
12 who had voted against the merger or had not turned in their
13 shares. And that's why it was such a de minimis number because
14 everybody did turn in their shares because there was a 50-
15 percent premium to market for these, for I guess 44-percent
16 premium. So, it was hard to find, at that point, who was
17 aggrieved and why. And of course, what happened is, he amended
18 his complaint to make it a complaint basically sounding in
19 fraud and misrepresentation. #00:24:03#
20 MR. BAYLISS: I do want to touch on that because his
21 original complaint actually gets dismissed—
22 MR. SPARKS: Yes. But there's some language at the
23 end of that opinion that sort of suggests that the Vice-
24 Chancellor might be willing to entertain a motion to amend.

1 And something to the effect that as the complaint presently
2 stands, it's dismissed. Which I think somebody pretty obtuse,
3 and Bill wasn't obtuse, to figure out well, the way out of
4 this box is now to shift my theory and look around and figure
5 out what it is I can complain about that constituted a
6 misrepresentation that would vitiate the vote and open up the
7 class to everybody. #00:24:53#
8 MR. BAYLISS: So, at this point, he has gotten
9 discovery. His complaint gets dismissed, but he is able to
10 amend it with the benefit of his discovery.
11 MR. SPARKS: Correct, exactly.
12 MR. BAYLISS: Could that happen today? #00:25:05#
13 MR. SPARKS: Probably not because we have Rule 15— I
14 think it's, what, 15-triple-I or some—
15 MR. BAYLISS: Triple-A, right?
16 MR. SPARKS: Yeah. And that says that he would have
17 had to have done it after the opening brief on the motion to
18 dismiss, and if you didn't do it then, you couldn't wait
19 around until you got an opinion, you would have to amend at
20 that point. Now, there is a little bit of weasel language in
21 that rule that says you know, like for super good cause shown,
22 you might still be able to amend, but I think most
23 practitioners, if they are going to amend, look at the
24 arguments that the defense has made and amend then, so as not

1 to run afoul of that rule. But that rule was well in the
2 future beyond this point. #00:25:58#
3 MR. BAYLISS: Let's roll forward to the trial. And I
4 want to ask you about the experts, and specifically the
5 defendants' expert who presented a valuation based on the
6 Delaware block method. What is the Delaware block
7 method? #00:26:13#
8 MR. SPARKS: So, back when I started to practice,
9 and for the – as it will come clear as we move forward here –
10 for the first 10 or 12 years of my practice, when you did an
11 appraisal case, you had three factors that you considered. You
12 considered the earnings value, which generally meant that you
13 looked at five years of historical earnings and averaged them
14 out and applied some multiplier to those. You look at asset
15 value, which is what it sounds like – the fair value of a
16 company's assets. And you looked at market value. And then,
17 you weighted them. And you weighted them based on the nature
18 of what the business was. So, I'll give you an example I used
19 to use was if you had a bunch of land held for development
20 which was presently a cornfield, you'd give a higher weight to
21 asset value in the circumstance than you would to a factory
22 that was producing something because you are already getting
23 value out of the earning side of the equation from the
24 producing factory. And so, depending on what you were talking

1 about, you would weight these. And market value, the market
2 value before the deal was announced, not taking any
3 consideration of synergies from the deal, was the third
4 factor. And if it was a public company with a widely traded
5 market, you would put a higher percentage on that market value
6 than you would if it were a private company. In fact, in some
7 private companies, there was no market value or no
8 discernable, or very lightly discernable market value with a
9 few scattered trades, so that would get a low percentage in
10 that case. So, depending on the nature of the company, you
11 then totaled that up, and that would be your value. You'd
12 apply the weighting to each of them, and then you come up with
13 a number, and that would be the value. Different from the way
14 people think now largely because it assumed that the past is a
15 predictor of the future. So, you were looking backward at
16 least in terms of the earnings value and the multiple that you
17 put on it. #00:28:42#
18 MR. BAYLISS: The plaintiff's expert conducted a
19 premiums paid analysis and then rolled out a discounted cash
20 flow analysis. At the time, did you believe that the
21 discounted cash flow analysis was going to get traction before
22 Vice-Chancellor Brown? #00:29:01#
23 MR. SPARKS: Not really. I mean not only did the
24 Vice-Chancellor sort of dump on Bodenstein's discounted cash

1 flow analysis. But other judges in other cases had commented
2 on the speculative nature of discounted cash flow analyses
3 which vary tremendously based on the discount rate you apply,
4 the terminal value you selected, et cetera. So, while the
5 technique was becoming more widely used in the investment
6 community, it really hadn't gotten any traction yet in the
7 Delaware courts. And of course, that's why our witness used
8 the methodology he used, and I suspect Bill didn't like the
9 way that methodology worked for him, perhaps because in the
10 middle of this five-year historical period, this Come by
11 Chance disaster had occurred, which would have had a major
12 deflating effect on what he was doing. And so, he turned to
13 this other method. And there were other things, I mean, as you
14 get into the opinion, and we'll jump ahead to that, I am sure,
15 but the Vice-Chancellor really didn't like some of the details
16 of the Bodenstein opinion. And the one thing I remembered, it
17 was – I don't know if it got mentioned in the opinion or not,
18 but I think, I know it got mentioned in one of our briefs, but
19 we were taking Bodenstein's deposition in New York, I can—I
20 mean it's weird things that you remember on cases that you
21 tried almost 40 years ago. And we were taking this deposition,
22 and he came up with a number, and the number was 30 million
23 dollars in our favor. I mean it was – and he came back from a
24 break, and he said there was a ray of light shining through

1 the shade on my calculator and I misread the number and it's
2 really 30 million dollars more in terms of value than the
3 number I had given you at the deposition, which was – I have a
4 recollection the shades were pretty much closed, and it
5 happened after a break, and there must have been a lot of
6 scrambling about now, what do we do about this number because
7 I am sure Bill recognized immediately that this wasn't going
8 to work. And that found its way somewhere into the record. But
9 Brown was skeptical throughout the trial and throughout the
10 damage phase in terms, not so much of, well, both in terms of
11 the methodology but also in terms of Purcell's application of
12 it – not Purcell, Bodenstein's application of it. #00:31:56#
13 MR. BAYLISS: Let's roll forward to the post-trial
14 opinion. It comes out on February 8, 1981. It's 79 pages. And
15 there is only a tiny discussion in the statement of facts
16 about the Arledge and Chitea report—
17 MR. SPARKS: I think there's a line about it at page
18 67 of the opinion. I mean it wasn't part of the things that
19 Bill had selected as his disclosure points. He had a point
20 where he claimed the proxy statement said – or not the proxy
21 statements, but a couple of press releases said there was
22 negotiation and he didn't think that going from picking 21
23 versus 20 was a negotiation. And he got some ammunition on
24 that because, in the SEC proxy statement review process, early

1 drafts had said it was a negotiation, but the final proxy said
2 it was a discussion. And so, that was one of his points. And
3 then, another point was sort of one of those argumentative
4 points where we didn't disclose that Lehman Brothers' opinion
5 wasn't really an opinion because they did it really quickly
6 and I don't' know, they had a blank in the opinion letter as
7 they flew out, which I thought was actually a good thing
8 because it meant that you didn't actually know before you went
9 to the board meeting what the price was going to be. And so,
10 maybe it would have been 23, or maybe it would have been 20,
11 or maybe it would have been 21, and so they hadn't filled in
12 the blank until they knew what the price was for sure. Those
13 were the types of arguments he was making, and this wasn't one
14 of them. And it wasn't one of his arguments; it wasn't
15 anything I can recall us responding to because it wasn't in
16 his briefs. And it had no impact, no discernable impact on the
17 Vice-Chancellor – or maybe by that time he had become
18 Chancellor Brown. He's somewhere in here. He got elevated from
19 being Vice-Chancellor to the Chancellor maybe a little bit
20 later. #00:34:04#
21 MR. BAYLISS: I do want to touch on what you
22 mentioned before about the negotiations and because on
23 February 28, the Signal Companies team has an executive
24 committee meeting where they are planning to approve the offer

1 to UOP. And they invite Crawford, the CEO of the seller, to
2 attend the meeting where the buy-side executive committee is
3 going to decide to make the offer. And around that time, maybe
4 immediately before that meeting, Crawford finds out that the
5 proposed range of values is 20 to 21 dollars a share. And
6 says, his immediate reaction to Signal is that that would be a
7 generous price. In hindsight, was it a mistake to have the CEO
8 of the seller participate in the buy-side deliberations about
9 the proposed offer? #00:35:06#
10 MR. SPARKS: I didn't – it was, in hindsight, and
11 internally, certainly in the standards that have been applied
12 pretty much since Weinberger, you would not have expected the
13 CEO standing alone without financial help on his side, without
14 consulting with his board to say anything about the offer.
15 It's just I'll take it back to my board, and we'll get back to
16 you. He was called out there; they had already made their 20
17 to 21 decision. So, the fact that he was invited to sit in at
18 the executive committee meeting where they—that had nothing—
19 that was of no – to me, at least, that was of no moment. What
20 was of moment, or certainly was a moment, in hindsight, was
21 the fact that he should have done more, and he shouldn't have
22 taken it upon himself on a matter like this to, in effect,
23 lock in or theoretically lock in his own board before they had
24 a chance to even hear what was being proposed. #00:36:11#

1 MR. BAYLISS: It seems as if the discussions with
2 the SEC made this a real headache because the proxy statement
3 – the deal ends up being at 21-dollars, so just to tie in—
4 MR. SPARKS: Yeah, so he does go back to his board,
5 consults with them, and gets back to Signal and says it's
6 clear for my board that it better be 21, not 20, okay. So,
7 there is some, in that sense, there is some negotiation. There
8 really is. Now, it's not the full-throated negotiation that we
9 would expect today, but there was negotiation. And the record
10 shows that it wasn't that the SEC said you have to put in
11 discussion instead of negotiation; it's that the SEC raised,
12 as they do in their comment letter, raised the question. They
13 wanted details about the negotiation and to avoid having to
14 deal with that, the corporate lawyers apparently just said all
15 with, the heck with that; we'll just change it to discussions
16 and leave it at that. and that's how it happened. #00:37:11#
17 MR. BAYLISS: So, the plaintiff's lawyer saw the
18 change from the preliminary proxy where it described
19 negotiations to discussions in the definitive proxy statement
20 and said that's a concession that there weren't any
21 negotiations, that's another argument for an unfair deal.
22 #00:37:27#

1 MR. SPARKS: Yeah, and a little bit more than that.
2 I mean he would have wanted a fuller exposition of what these
3 discussions weren't. #00:37:40#
4 MR. BAYLISS: You mentioned Lehman Brothers and the
5 speed at which they prepared their fairness opinion, and the
6 post-trial opinion describes how the Lehman Brothers team was
7 working over a weekend because the offer is made on February
8 28, and then, by March 6, Lehman Brothers is rendering its
9 fairness opinion. So, it's four business days. They prepare
10 their financial analysis in those days and over the weekend
11 while Glanville, the lead member of the team at Lehman
12 Brothers, who is also a director of UOP, is on a holiday
13 weekend in Vermont. Then, he gets on the plane on March 6, and
14 he has this fairness opinion with the blank in it. You said
15 earlier that you thought that the fact that there was a blank
16 in there was actually a good fact. #00:38:37#
17 MR. SPARKS: Well, I didn't think – I didn't read it
18 the same way. There was no decision yet on the UOP side as to
19 whether they were going to take 21 or whether they weren't
20 going to take anything – whatever was going to happen. I don't
21 think it was unusual in this context to have a blank in an
22 opinion until you knew what the price was that you were
23 definitively being asked to opine on. That's all I'm saying.
24 But – and Glanville, of course, today, if somebody was a

1 director and you were getting a fairness opinion from an
2 investment bank, and he was a director of a company, I don't
3 think you would hire that investment banker. Back then, our
4 sensitivities on that were not as well developed. On the other
5 hand, Glanville had been a director of this company, and he
6 had been, you know...unless he was completely brain dead, and
7 there is no indication he was, he was completely familiar with
8 the company's financial situation, and Lehman Brothers had
9 been tracking the company, I am sure, because Glanville was a
10 director. So, the idea that you could get together and do a
11 valuation in four days, four business days, for an investment
12 bank is, I guess as most investment bankers, when they do
13 their opinions, they're probably done in four days. Now,
14 sometimes they are not asked to give them in four days, but
15 when you have a familiarity with a company already and stuff
16 in your files about it, and that wasn't – that wasn't crazy.
17 It's sort of in the – the sort of overall picture, not a
18 positive, it's a bit of a negative, but certainly, one that
19 Vice-Chancellor Brown was prepared to move beyond. That
20 argument didn't sway him. #00:40:37#
21 MR. BAYLISS: Right. Let's talk about that. The
22 post-trial opinion results in a complete defense verdict—
23 MR. SPARKS: Right.

1 MR. BAYLISS: -- or defense result. Judgment in
2 favor of Lehman Brothers, judgment in favor of the Signal
3 Companies and the defendants. No material misrepresentations
4 to the stockholders, no breach of fiduciary duty by the target
5 board. There was a reasonable basis for finding that the
6 merger price was fair. What was your reaction at the time?
7 #00:41:10#
8 MR. SPARKS: Well, I was glad we won instead of we
9 lost.
10 MR. BAYLISS: How did you celebrate?
11 MR. SPARKS: We didn't—I don't remember, in these
12 cases, I don't know about other people, but I had lots of
13 cases at this point in time. I didn't have time to celebrate.
14 I just was happy to put this one off to the side until I knew
15 what happened next and move on to the next one. I mean we were
16 already – I was doing two and three takeovers at a time. This
17 was just one case...I didn't celebrate. #00:41:42#
18 MR. BAYLISS: You just left the empty champagne
19 bottles in your office and kept going.
20 MR. SPARKS: There were no champagne bottles in my
21 office.
22 MR. BAYLISS: Did you expect that the case was over,
23 or did you think that there would be an appeal? #00:41:56#

1 MR. SPARKS: Oh, I thought there'd be an appeal. He
2 had already appealed – had an interlocutory appeal on one
3 matter. By the time I got to Van Gorkom, I knew there would be
4 an appeal because I knew Bill would never quit. He would play
5 it out till the end. I think I sort of knew that by this time.
6 #00:42:16#
7 MR. BAYLISS: Let's talk about the first Delaware
8 Supreme Court opinion. It's February 9, 1982, and I want to
9 focus on the decision-makers; Justice Duffy, Justice McNeilly,
10 and Justice Quillen. What was oral argument like before this
11 court? #00:42:31#
12 MR. SPARKS: You know, I don't remember much about
13 oral argument before the court. I don't think it was – I mean
14 we ended up with a dissent by Justice Duffy, which was
15 unusual. So, my guess is there were some questions. I don't
16 have any recollection of that, and I don't think we have the
17 transcript of that. #00:42:55#
18 MR. BAYLISS: Was there a dominant personality among
19 those justices? #00:43:00#
20 MR. SPARKS: Not like there was on the next opinion,
21 let me put it that way. I mean Justice Quillen was – Justice
22 Quillen was a good judge and had been a Chancellor. And Duffy
23 had been a Chancellor. And I think that all had something to
24 do with it. I mean we're talking about a standard of review

1 that is pretty favorable in terms of a fact determination by a
2 sitting judge on the Court of Chancery. I think those two, and
3 to maybe a lesser extent, McNeilly, but McNeilly wasn't a very
4 dynamic judge – they trusted Grover Brown; he had been a
5 consistent judge in terms of his performance, and I think they
6 were prepared to defer to him unless there was something
7 really out of sorts. Now, Duffy, obviously, found some things
8 out of sorts. He had an objection to the Lehman performance,
9 and I don't remember; he had another objection also, and he
10 expressed that in his dissent. #00:44:14#

11 MR. BAYLISS: So, there's a majority opinion; it's
12 five pages long.

13 MR. SPARKS: Right. Which is really sort of a – we
14 defer as a practical matter to the factual findings and
15 conclusions of the judge in the court below. #00:44:26#

16 MR. BAYLISS: And you mentioned the dissent – six
17 pages, raises the Lehman Brothers issue and also raises an
18 issue about who as a practical matter was given the burden of
19 proof. And there is a suggestion that Justice Duffy believed
20 that the Vice-Chancellor might have required too much from the
21 plaintiff. #00:44:47#

22 MR. SPARKS: Plaintiffs, yeah.

23 MR. BAYLISS: No mention of the Arledge and—

24 MR. SPARKS: No.

1 MR. BAYLISS: -- Chitea report in either the
2 majority opinion or the dissent.
3 MR. SPARKS: No.
4 MR. BAYLISS: So, at this point, you've gotten a
5 full defense judgment at the trial court level. The Delaware
6 Supreme Court has just affirmed – did you think the case was
7 dead? #00:45:16#
8 MR. SPARKS: Well, I figured there would be a re-
9 argument of it – because of the dissent. Now, at some point in
10 time – at some point in time, the court, as a matter of
11 policy, came up with a policy that if there were a dissent,
12 then there would be a re-hearing en banc. I can't remember
13 whether that policy was in place in 1983 when this opinion
14 came down. But you at least figured there's probably be a
15 motion for re-argument because of the dissent. #00:45:49#
16 MR. BAYLISS: I do want to address an asterisk that
17 appears in the opinion, and it says, "The justices named are
18 the only members of the court qualified to sit in this
19 appeal." #00:46:03#
20 MR. SPARKS: Okay, then it's this – I'll just talk
21 about this because it's an important part of what happened.
22 Whether it would have changed the result or not, who knows?
23 But one of the justices that wasn't on the panel was the Chief
24 Justice, Daniel Herrmann. And he wasn't on the panel because

1 his son is a partner at Richards Layton and Finger. And Frank
2 Balotti, of Richards Layton and Finger, was representing
3 Lehman Brothers. So, he couldn't sit. The other person who
4 wasn't on the panel was Justice Horsey. And there is a comment
5 in some of the later papers about some time limit that had to
6 expire, and it hadn't expired— before Justice Horsey could sit
7 on this case. And it hadn't expired at the time of the first
8 argument, but it had expired at the time of the second
9 argument. Now, I just don't remember what that particular time
10 limit was or what the policy of the court was that said you
11 couldn't sit until some period of time went by. But I do know,
12 I am convinced to this day, that Bill Prickett was smart
13 enough to say, and what he did was he dismissed Lehman
14 Brothers. Okay. That requalified Chief Justice Herrmann. He
15 wanted a different panel than had decided this. And then,
16 Justice Duffy must have retired, and Drew Moore came in, and
17 then Horsey's time went up, and he came on. So, when the
18 matter was re-heard en banc, of the three judges that were
19 originally there, only - well, McNeilly was still there. I
20 guess Quillen was still there. #00:48:06#
21 MR. BAYLISS: Two left.
22 MR. SPARKS: Two left, and three completely new
23 ones. And had it had to be, it had to be that the dismissal of

1 Lehman Brothers was to requalify Chief Justice Herrmann.
2 #00:48:20#
3 MR. BAYLISS: It seems brilliant because the dissent
4 focuses on Lehman Brothers, and one would expect that if you
5 were to seek re-argument, you'd want to capitalize on Lehman
6 Brothers—
7 MR. SPARKS: And yet, he just threw really,
8 really...it was so much more important to get a new panel than
9 it was to try to exploit the dissent, is the way I read it at
10 the time, and do to this day. #00:48:41#
11 MR. BAYLISS: So, the plaintiffs decided to throw
12 away their claims against Lehman Brothers to reconstitute the
13 court. It seems brilliant or dastardly—
14 MR. SPARKS: Or something.
15 MR. BAYLISS: Depending on your perspective.
16 MR. SPARKS: That's correct. That's a fair way to
17 put it.
18 MR. BAYLISS: so, let's talk about the court on re-
19 hearing. Two of the justices are the same. There are three new
20 personalities. Is this court a totally different animal?
21 #00:49:08#
22 MR. SPARKS: Pretty different.
23 MR. BAYLISS: How so?

1 MR. SPARKS: Well, largely because of the
2 personality of Justice Moore. And it was Justice Moore who
3 jumped all over the Arledge Chitea report from the very
4 beginning of the oral argument. He didn't even wait for
5 Halkett to get up; he started making up his points with Bill
6 Prickett. And at this point in time and history in our court,
7 the court – even at this early point, it became even clearer
8 as time went on and we went to cases like Van Gorkom and some
9 of the takeover cases – the Unocal's, the Revlon's. The court
10 had sort of ceded the lead position in these corporate
11 transaction type cases that it reviewed to Justice Moore. He
12 was, by far, the most influential Justice on the court. And
13 particularly, the relationship between he and the Chief
14 Justice meant that every time Justice Moore said something,
15 the Chief Justice sort of echoed it. And you can sort of see
16 that in the transcript if you go back and look at it. So,
17 people came in to argue about one thing, and oh, by the way,
18 the court decided in re-arguing and what it did was it vacated
19 the earlier decision – I mean got rid of it. It had to get rid
20 of it because it said it was en banc and there is no procedure
21 for having a re-argument of an en banc, en banc. So, there
22 they said this was never really an en banc thing in the first
23 place. So, we get rid of that. We have re-argument, and we're
24 going to decide it based on the briefs that were submitted two

1 or three years ago on the first argument. There were no new
2 briefs. So – which is a sort of strange thing. I can't
3 remember seeing that that much. And like sometimes the court
4 is very helpful in these circumstances and actually tells the
5 parties what's bothering it and says you know, please address
6 question A, question B, question C, in some of the very
7 biggest cases they did that. They did that in Unocal, for
8 example. But here, they didn't. And it all happened at oral
9 argument. And after sitting there and listening to umpteen
10 questions about how could you possibly not think that this
11 Arledge Chitea report, prepared by two UOP directors who are
12 also Signal directors, who – using Signal information – how
13 could you possibly believe that that wasn't a breach of
14 fiduciary duty? And you hear that about five times. You say
15 when is it that you realize you're in trouble in a case? Well,
16 on that one I had to have realized that we were in trouble. It
17 was pretty clear where they were headed. Now, it's not all of
18 the things that they decided in the opinion, and there are a
19 ton of them, where they really re-made the law in terms of
20 controlled mergers. All of those things weren't raised in oral
21 argument; many of them weren't even discussed by either side
22 in the briefs. But on this point, which was the real point,
23 and if you look at it closely, I think the result would have
24 been different if there hadn't been an Arledge Chitea report.

1 On this point, it was pretty clear where they were headed. So,
2 I am sure that the drive back from Dover to Wilmington was not
3 a gleeful one. #00:52:52#
4 MR. BAYLISS: Did you have to report to anybody
5 about the oral argument and start to manage expectations, or?
6 MR. SPARKS: Not really by this point. Because by
7 this point, UOP had been – I didn't. I personally didn't.
8 Because UOP had been a wholly owned subsidiary now of Signal
9 for the better part of five years. Now, Alan Halkett, who made
10 the argument, I am sure had to report to Brewster Arms, who
11 was the general counsel of Signal, as to what happened. But I
12 don't remember being on that call. I wouldn't have normally
13 thought I would have been on the call, though it's possible I
14 may have sat in on a call and thrown in my two cents worth.
15 But it was pretty clear where we were headed. And there was a
16 letter that we sent after, which is very unusual. There was a
17 letter we sent after the argument based on some testimony by
18 Walkup, who was the Chairman of the Board of Signal but had
19 been at the UOP meeting where he had a recollection that he
20 had shared the Arledge Chitea report with the UOP board. But
21 there was no corroboration of that; there was some sense that
22 maybe a couple of pages had been shared. And in the end, the
23 Supreme Court actually said we did fact-finding; we went back
24 into the record, and we looked at the record, and we can't

1 leave on the balance of facts, which is a trial court
2 function, that that didn't happen, and therefore, then build
3 its decision around that finding of fact. #00:54:30#
4 MR. BAYLISS: And that finding of fact relates to an
5 issue that wasn't even the focus either at the appellate
6 argument before, or at the trial level. #00:54:37#
7 MR. SPARKS: Or in the briefs before the Supreme
8 Court, which had been written two years before, for the first
9 appeal.
10 MR. BAYLISS: So, the opinion comes out on February
11 1, 1983. It is, I think, what an observer at the time must
12 have thought was a stunning reversal. Can you remember the
13 atmosphere in the legal community – or at least in the defense
14 bar – to the opinion? #00:55:11#
15 MR. SPARKS: Well, I don't know if this case had
16 gotten to a point in terms of people looking at it like they
17 were looking at you know, some of the big takeover cases, that
18 it was viewed as such a stunning reversal. I think, but I
19 think people looked at almost like the Supreme Court writing a
20 law review article or a statute, for all the things that were
21 in the opinion. Doing away with the Singer, Tanzer, Najjar
22 business purpose test. Saying that this could have been
23 completely different if there had been a special litigation
24 committee formed of the independent directors to negotiate.

1 Abandoning the decades-long block method of deciding appraisal
2 cases and saying we're going to apply an expanded, more
3 liberal method, including things like discounted cash flow,
4 both through this type of case and to appraisal cases. They
5 actually go on and say we're sort of relegating – this was
6 sort of hopeful thinking that never really happened, but we're
7 sort of relegating people back to the traditional remedy of
8 appraisal. I think they hoped to sort of end these cases and
9 just have appraisal cases. That really didn't happen. But
10 there were just all of these findings, many of which had never
11 been discussed by the parties. I mean on the business purpose
12 thing; our position had been twofold. Number one, that the
13 majority of the minority vote really did away with the
14 business purpose concept because that had not been present in
15 any of these business purpose cases. But number two, the
16 latest case in the business purpose area had been a case
17 called Tanzer, and it had said that a business purpose of the
18 parent was sufficient. And we had a ton of business purposes
19 of our parent. We had a lot of excess cash, and we didn't know
20 how to invest it. And so, we had said, but even, even if we're
21 wrong about the majority of minority vote thing, we've
22 satisfied the most recent of these cases. So, in a way, when
23 you look back on it, the business purpose was sort of on its
24 way out in Tanzer. By the time the court said it can be the

1 business purpose of the parent, it didn't have much meaning.
2 It would have only been in the case where the parent had a
3 personality conflict with the minority stockholders and had no
4 business reason for doing it that I suppose it would have
5 still had life. So, getting rid of it was – it was a bad idea
6 to start with, and getting rid of it was – but nobody argued
7 that – I just told you what we argued. Prickett argued it was
8 still vibrant. And so, the court just said, eh, we're
9 reforming this whole picture, and we're going to get rid of
10 that. #00:58:02#
11 MR. BAYLISS: I do want to mention something that
12 you had said a moment ago about the Delaware block method. The
13 opinion describes the Delaware block method as clearly
14 outmoded. And then goes on to say that a more liberal approach
15 must include proof of value by any techniques or methods which
16 are generally considered acceptable in the financial
17 community. And otherwise admissible in court, subject only to
18 our interpretation of 8 Del. C. Section 262. Why did the
19 Supreme Court do that? #00:58:46#
20 MR. SPARKS: Well, I think by the time we got to the
21 mid-eighties, it was pretty clear that the block method wasn't
22 – no investment bankers were doing the block method in terms
23 of actually making decisions on how to advise their clients in
24 these types of transactions. It just wasn't – it wasn't

1 modern, and frankly, Justice Moore knew that. And so, he came
2 in and said, this block method is – you know, and we're being
3 laughed at. We're being laughed at in the business community
4 because of the application of this block method. It meant that
5 the values you were putting on companies for purposes of
6 buying them, didn't mesh with the appraisal values that
7 somebody who dissented might get. And that could end up with a
8 higher value or a lower value, but it was pretty clearly not
9 calculated any more to give people what they had – a
10 substitute for what they had before in any rational way. And
11 of course, the worst thing about it is it was backward-
12 looking. So, you look at – I mean we all have been conditioned
13 now for 40 years to look forward. And we look at projections,
14 and we base our valuations and making decisions as to whether
15 to buy stock or not buy stock based on the projections that
16 you see and capitalizing those with some discount rate and
17 looking forward. I mean, five years is a long time. It's
18 gotten to be shorter and shorter and shorter in terms of
19 modern businesses. I mean, you know, it might have been great
20 to have Blockbuster's five years' historical earnings, and you
21 would have paid a zillion bucks, but by the time you got to
22 that point, it was already pretty clear that Blockbuster was
23 on the way out, Netflix was on the way in. So, it just didn't
24 – that's just an example, I mean there wasn't any litigation

1 about that, but that's the difference. And that's become even
2 more important as business cycles, and innovation get –
3 accelerate and have accelerated. #01:00:58#
4 MR. BAYLISS: There is a discussion about
5 modernizing the appraisal statute. But the case isn't an
6 appraisal case.
7 MR. SPARKS: That's right. But they were saying
8 we're going use it as – and we're going to view it as an
9 appraisal case, a quasi-appraisal case. And they had some
10 gibberish in there about preserving this quasi-appraisal
11 remedy for cases that were in the court or about to be in the
12 court or in the court below and dada-dada-da, I don't know if
13 that ever had any effect on anybody or anything. And then,
14 everybody else was going to get relegated to appraisal. Well,
15 that didn't happen. And so, in effect, the valuation
16 methodologies that had formulated continued to be used in
17 various valuation efforts in takeover cases from this point
18 forward. There is another thing, by the way, this case did,
19 which I can't remember all of them, there were so many
20 innovations and changes. There had been a case called Lynch
21 II. And Lynch II had said that the only remedy for a cash-out
22 merger, and I'm going to get back to that in a minute – but
23 the only remedy was rescissory damages, which was also a
24 bizarre concept. And the Supreme Court also said, by the way,

1 we overrule that; that's out of the picture. It's anything –
2 it's any form of money damage that seems appropriate in the
3 case. And then, we had a damage trial, which we will get to in
4 a minute, I assume, ended up being a textbook demonstration of
5 how rescissory damages can't work in the circumstance where
6 the case is being tried seven years after a merger in which
7 the company basically had disappeared four years earlier, and
8 all sorts of decisions had been made that scrambled the eggs.
9 So... #01:02:56#
10 MR. BAYLISS: You mentioned the damages trial. There
11 is an opinion before that, April 24, 1984, where the court
12 rejects the argument that the rescissory damages are out of
13 the picture because the—
14 MR. SPARKS: Well, what happened there is, if you're
15 going to try a rescissory damage case, you have to open up
16 discovery and discovery, in this case, had been based on what
17 happened in 1978. If you're going to try rescission, because
18 rescissory damages, in theory, is the highest value that you
19 might have received in the period between the time of the
20 merger and the time of the decision on the damages. That's a
21 seven-year period, or a six-year period, I can't remember if
22 it was eighty-four or eighty-five that we did the damage
23 trial. So, we had tried to convince the court, look, the eggs
24 are so scrambled, you can tell now you don't need a trial to

1 tell that they are so scrambled that rescissory damages won't
2 work. Let's just try the damage case – a regular damage case.
3 And the reason we did that was because we didn't want to bear
4 the expense of document production for seven more years, and
5 more depositions on that. But we lost, so we did have to bear
6 that expense. #01:04:15#
7 MR. BAYLISS: So, let's roll forward to the damages
8 trial. The court decides that it can't award rescissory
9 damages, and it goes on to say that the minority, and I am
10 quoting here, should be compensated for the wrong done to them
11 even though a damage figure cannot be ascertained from a
12 comparison of selected stock values and hypotheticals with any
13 degree of precision. It suggests that the court is very
14 uncomfortable with any damages analysis. #01:04:47#
15 MR. SPARKS: Chancellor Brown hated this case. I
16 mean it was clear from the beginning; he didn't like this
17 case. There was a 50-percent premium being paid to the market.
18 Almost everybody – almost nobody—147,000 shares out of five-
19 million didn't like it. Or at least demonstrated they didn't
20 like it by not turning in their shares or voting against it.
21 And I just think he thought – and the nature of Bill
22 Prickett's complaint was like – at first, it's filed a couple
23 of months after the merger rather than anybody trying to
24 enjoin the merger when it could have been straightened out in

1 a timely way. And then, it clearly takes on the look of a
2 complaint searching for a cause of action. Yeah, you file one,
3 if that doesn't work, so you then come up with another one.
4 Yes, you had the benefit of discovery, but the stuff that you
5 came up with wasn't very persuasive. Nobody raises in the
6 court below, Arledge Chitea and all of a sudden, the case
7 comes back to him, and I just think he said I've had enough of
8 this case. And the rescissory damage proof I put on – I would
9 think, in fact, I actually went back and read the transcript
10 because I didn't remember I'd even put on a witness. But we
11 had like three witnesses. We had a guy from UOP, who was the
12 chief financial officer of UOP. And I put him on, and just
13 took him through all of the things that had changed at UOP,
14 and frankly, blew out of the water a lot of the supposition
15 that their banker had made about timberland, saying oh, yeah,
16 we got this great, valuable timberland. So, yeah, but except
17 we had these – except they have been in a conservation-type
18 thing with the State of Michigan and the State of Wisconsin
19 for 40 years. And if we ever did anything other than just
20 harvest timber, for which we got almost no money, we would
21 have to pay them all the back – all the taxes that we had
22 saved because had put them in a conservation thing and it
23 would have been a negative number. I mean it was – he got rid
24 of that. The company had stopped keeping its own money and

1 Signal had taken over the treasury function and was paying its
2 bills. This Come by Chance thing had resulted in something
3 like an 80-million-dollar judgment against the company. I mean
4 the whole idea that there was going to be any way that you
5 could pick a time and say I've got a time where rescissory
6 damages were here and it would have been appropriate, and
7 somebody would have done better than 21; there was no way he
8 could have decided that. There's no way. There's no way with
9 any intellectual integrity. So, then he's left with Purcell's
10 testimony where, I guess, in this trial, we must have had
11 Purcell do a discounted cash flow; I think maybe we did. And
12 then he's got Bodenstein, and he didn't like Bodenstein's
13 testimony any more than he liked it the first time. And so,
14 what's he left with? And he doesn't call it nominal damages,
15 but that's probably sort of what it was. He says, well,
16 Purcell said he could have given a fairness opinion at 20, or
17 up to 22. I mean, well, yeah, that's not really very exciting.
18 He could have given a fairness opinion at a hundred to the
19 minority stockholders of UOP. And he has a few other words
20 about you know, and I know I have to give him something
21 because the Supreme Court has said that they have been
22 deprived of the right to intelligently make a decision. But on
23 the other hand, you know, he says but don't forget that we are
24 only in this box because Signal created it by trying to be

1 generous to the minority by making it a majority of the
2 minority vote in the first place. So, I'm giving him a dollar
3 a share. So, think about that. The class has been expanded,
4 obviously, because it's now a disclosure case from 147,000
5 back to five-million. So, we got a five-million-dollar
6 judgment. By the way, by this time, Signal had merged with
7 Wheelabrator. And I believe it also merged with Allied and had
8 become Allied Signal. None of the people at Signal were even
9 there any more. And Signal was like five times larger than it
10 had been before – five-million-dollars to Signal was nothing.
11 I mean it was chump change by this point. And so, poor Bill,
12 having put in thousands of hours over the course of seven
13 years, ends up with a five-million-dollar judgment, of which,
14 I don't remember what the fee is, but assume he got the
15 largest fee that our court would theoretically give, which
16 would be for all the effort he put in, which he would have
17 clearly deserved a fee of a third. I don't know if that's what
18 he got. But we're talking about, you know, less than two
19 million dollars for his thousands and thousands of hours. And
20 to add insult to injury, so we get this opinion from – we get
21 the opinion from Grover Brown, who was by then Chancellor,
22 about a dollar a share. And I think I'd – I pretty well recall
23 that I had a part in this. I think I was the instigator and
24 said why don't we do a motion to affirm? Because I said I

don't think the Supreme Court – first, they had all this language about discretion, we're giving it to the discretion of the court below. I said I don't think the Supreme Court has any stomach to hear anything more about this case. So, why don't we try a motion to affirm? So, in Delaware practice, if the plaintiff appeals, which Bill Prickett did; he appealed the dollar. I mean, he said this was like nothing. It was – this was a horrible result. And we originally cross-appealed, and then we decided not to cross-appeal. So, we withdrew our cross-appeal. Instead, we filed a motion to affirm. And a motion to affirm basically says the defense is saying that you're not allowed to say any argument. You just say we move to affirm and the standard on a motion to affirm is just looking at the appellant's brief, that there is no way they can win. That's what basically, how a motion to affirm works in the Delaware court. And the court summarily granted a motion to affirm. Bill moved to re-argue. They summarily got rid of the motion to re-argue, and that was the end of the case. So, it finally ended, and it ended in a very truncated, unusual way. It was sort of like nobody wanted to have anything to do with this case any more. But – what it left behind was an entirely new regime in terms of parent – subsidiary mergers and cash out mergers, which survives to this day. I mean it is – nobody after this opinion would

1 really do a cash-out merger without having a special committee
2 with outside directors negotiate. I don't think anybody would
3 ever – I think by this time; you would think three times
4 before you had picked an investment banker that had a – or you
5 had a director from that investment banker on the board. All
6 of these things were basically dictated by this case, which
7 really revolutionized and brought into the modern era how we
8 deal with this type of conflict transaction. #01:13:01#
9 MR. BAYLISS: Thank you very much, Gil, it's been a
10 pleasure and thank you for sharing your thoughts with us.
11 MR. SPARKS: My pleasure.
12 *Applause*
13 CHIEF JUSTICE STRINE: While the cameras are still
14 rolling, does anybody have any questions you want to ask Mr.
15 Sparks? #01:13:25#
16 CHIEF JUSTICE STRINE: Gil, is this the only opinion
17 where you thought the learned reasoning and prose in the
18 Delaware Supreme Court was gibberish?
19 MR. SPARKS: When did I say that?
20 CHIEF JUSTICE STRINE: That was my favorite part of
21 the interview.
22 MR. SPARKS: No, there were some others.
23 CHIEF JUSTICE STRINE: Why did the case never
24 settle? #01:13:48#

1 MR. SPARKS: I don't know the answer to that. I
2 would not have been in the loop in terms of settlement. I mean
3 any settlement would have had to have been Signal's decision.
4 So, it's possible that the general counsel of Signal, Brewster
5 Arms and Alan Halkett had discussions with the senior
6 executives of Signal about possibly settling at some point.
7 But I'm pretty sure I wasn't a party to those, if they
8 happened at all. I just don't know. And, if you look at how
9 this developed, I mean, the Arledge Chitea thing came sort out
10 of left field at the argument. I suspect Bill didn't have a
11 lot of leverage before that argument. Whatever leverage he had
12 after that argument, he probably thought he had more than
13 Signal would have thought that he had, and he just played it
14 out to the end. Just like he did in Smith vs. Van Gorkom. I
15 mean Bill Prickett certainly – he was a bulldog in terms of
16 taking these matters and taking them to the end, and he was
17 very successful in doing that. Now, this one, I don't know
18 whether Bill considered – I'm sure Bill considered it a
19 victory, but I am not so sure he considered it an economic
20 victory. When Smith vs. Van Gorkom was another example where
21 we won, and we won, and we won and finally, on re-argument, en
22 banc, we lost, and that was just because of Bill's
23 perseverance. #01:15:34#

1 CHIEF JUSTICE STRINE: Gil, could you – that's
2 interesting, the juxtaposition, actually, of Van Gorkom and
3 Weinberger. How do you balance the overall utility of those
4 decisions? Because I sense from both of you that there is a
5 sort of profound concern about due process to the folks who
6 were operating in real time and then being assessed by
7 evolving standards six years after the fact in both cases.
8 But, as you said, there were profound evolutions in Delaware
9 law and – is the law better for these two things? Or...
10 #01:16:17#
11 MR. SPARKS: Oh, yeah; I think it is. I mean if you
12 think about – and I like to think about basically Van Gorkom,
13 which basically emphasized the duty of care and did some other
14 things. Unocal, which put a huge premium on having boards
15 dominated by outside directors. And this case, which basically
16 said if you're coming before – if you think you're going to
17 come before our court again, things will probably be
18 completely different if you have an outside negotiating
19 committee made up of outside directors. So, you have both of
20 those cases put a premium on outside directors. Modernized how
21 you look at the economics. Emphasized the fact that there
22 better be a process, as Van Gorkom did. And put together those
23 three cases, I think, have established the model which we –
24 with a little tweaking here and there – rely on today to

1 maximize the chance that these conflict transactions are as
2 close to being arms-length as they can be. And I think those
3 are the three opinions that probably were the most influential
4 in shaping that total picture. #01:17:38#
5 CHIEF JUSTICE STRINE: As a historical matter, and I
6 think it's interesting to think about Weinberger because I
7 think we often think about the other cases. You know, I think
8 we've grown in thinking that Van Gorkom has to be looked along
9 with Unocal and Revlon. Because what you're saying – there
10 were some real societal pressures on Delaware and whether this
11 tradition of the business judgment rule approach could be
12 maintained. And that Weinberger was one of the critical
13 decisions in saying if we're going to maintain it, we have to
14 do it with credibility so that we can face the mirror test.
15 And I take it what you're saying is, across the board, the
16 court was trying to take the traditional Delaware way, apply
17 it to evolving markets, but in a way where it had genuine
18 integrity. #01:18:24#
19 MR. SPARKS: Right. And these cases – you know, it's
20 funny. Some of them started earlier. But they all got decided
21 within a period of maybe two to three years. So, this was –
22 what's the date on the Supreme Court's opinion here?
23 MR. BAYLISS: ’83 for the reversal.

1 MR. SPARKS: ’83 ...and then, Van Gorkom is ‘85, and
2 Unocal is ‘86. And all of these things are happening pretty
3 much – there are some other cases coming out, sort of filling
4 in little blanks all during that period. And it was Delaware's
5 response to a system that when you entered the eighties, and
6 you entered this takeover era, which we had never had before.
7 I mean, the first real takeover that I remember was one that
8 at least I did, it was one of the very early ones, it was
9 1978, which was Carrier and United Technologies. And as you
10 entered into this period, there was no law. I mean our law
11 just hadn't caught up with it. And the big question was would
12 you test these under this entire fairness concept, which we
13 used for conflict transactions? The Singer – Magnavox case,
14 which I mentioned here as being one of the ones that you look
15 to. Or would you measure it by the business judgment rule,
16 which was very deferential? And the takeovers were a little
17 bit different because the directors didn't face a pure
18 conflict of a monetary nature, but they faced a challenge to
19 their directorships because if they got taken over, their
20 directorships were going to be gone. It was more of a – the
21 concern was more of losing face. At that time, we weren't
22 paying our directors of major corporations $400,000 a year or
23 $300,000 a year, which we seem to pay them now. They would
24 probably get paid 20. And so, it wasn't – and they were all

1 people of means, so it wasn't like they would miss the money.
2 But they didn't want to – but theirs was sort of a fighting
3 instinct; you don't want to lose. And so, the Supreme Court,
4 in the end, and it ended up in Unocal, fashioned a standard
5 that was in between with somewhat of a preliminary
6 determination that what you did was reasonable in relation to
7 the threat posed. Made sure that everybody understood that
8 directors' duties under our statutes included not just running
9 the internal affairs of the corporation, but also protecting
10 the stockholders. And all of that plus these cases focusing on
11 process and procedure allowed us to sort of move forward and
12 really vitiate the criticisms that had begun to grow as people
13 didn't understand how this was going to work. And almost none
14 of that was by legislation. It's a great example of the common
15 law reacting to establish things that frankly, are - almost
16 read like statures when you look at Weinberger and the things
17 that they repealed, if you will, and the things that they
18 adopted. It's an important case and maybe with this
19 background, when you all look at it, you can take a look at it
20 and count up the things, including the footnote seven, that
21 talks about special committees, and all the other things that
22 they sort of said well, we're going to – this – we're
23 overruling Lynch II. We're overruling purpose. We're adopting

1 this new appraisal evaluation concept. All of these things

2 that they did. It's fairly remarkable.

3

4 End Interview #01:22:10#

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