Delaware State Bar Association Oral History Project
Excerpt of an interview with The Honorable Jack Jacobs
Interviewed by Lawrence A. Hamermesh
Recorded on October 26, 2018

[00:43:59]

1 **MR. HAMERMESH:** Let me return to your judicial work.
2 Delaware corporate law has witnessed the evolution of doctrine
3 governing freezeouts, transactions in which a controlling
4 stockholder acquires the shares of the minority, and how the
5 courts are supposed to evaluate those transactions. And
6 relatively early in your career as a Vice Chancellor, you
7 found yourself in the middle of that development in a case
8 called Citron v. E.I. Du Pont de Nemours & Company. And I want
9 to talk about that and get your recollections about your
10 decision and how that came about and what you contributed to
11 the development of that doctrine. I can ask more leading
12 questions, but I prefer to let you take it from there.
13 [00:44:51]
14 **MR. JACOBS:** Well, this was another case where, you know,
15 the Supreme Court, actually in the same case, Weinberger, you
16 know, had now — had pronounced new doctrine, new changes in
17 the law governing not just appraisals, as we talked about
18 before, but also how a court should evaluate, from a liability

1 standpoint, as well as a damages standpoint, freezeout
2 mergers, mergers with a controlling shareholder.
3 You know, I mean, there was case law all the way
4 back to the fifties that dealt with that we called the "the
5 entire fairness doctrine," but it was a doctrine that never
6 had any real definition. That is, there weren't too – there
7 were not any guidelines, you know, that established, that, you
8 know, that gave more precise instructions as to what the court
9 should do. And so, one of the concerns, we now know, of the
10 Supreme Court, and I am sure it was fueled by the law review
11 articles, was that entire fairness is like the Chancellor's
12 foot; it all depends on, you know, who the, you know, the
13 judge is and what time he got up in the morning and, you know,
14 what he had for breakfast and all that.
15 [00:46:21]
16 So, one of the contributions that was made by
17 Weinberger was to try to put more content into the application
18 of the entire fairness standard of review, which is what it
19 is. So, that was the background.
20 The case that you're talking about actually involved
21 one the cleanest deals that had ever come before the Delaware
22 Courts; it was Du Pont deciding, for purely business reasons,
23 that it wanted to acquire the remaining thirty percent of
24 Remington Arms, a gun company that it had owned since time

1 immemorial, maybe since the Civil War for all I... . And at
2 that time, because it was a gunpowder company, it made sense
3 to have a gun company. But, you know, over the – during most
4 of the twenty – at least during the last fifty years of the
5 twentieth century, it didn't – it did not play a major role—
6 [00:47:24]
7 **MR. HAMERMESH:** Better living through armaments just
8 doesn't roll off the tongue as a corporate slogan.
9 **MR. JACOBS:** No, because it was a specialty chemicals
10 company, not a gunpowder company. So, they decided that you
11 know, that owning seventy percent, they had the votes to do a
12 cash – cash-out merger. They decided not to do a cash-out
13 merger, that they were going to do a stock for stock merger so
14 that all the shareholders of – the thirty percent public
15 shareholders of the gun company would become shareholders of
16 Du Pont.
17 So, what's remarkable about the case anyway, is that
18 you know, Weinberger was not decided until after this
19 transaction took place. And yet, you would believe that the
20 lawyers for the company, which happened to be Covington &
21 Burling, were clairvoyant because everything they advised the
22 company, Du Pont, to do, is precisely what the Supreme Court
23 said should be done to, basically, to pass the entire fairness
24 standard, even as elaborated in that case.

1 [00:48:39]

2 **MR. HAMERMESH:** That's the footnote in UOP that talks

3 about achieving benefits of more deferential review through

4 use of a special committee—

5 **MR. JACOBS:** Yeah.

6 **MR. HAMERMESH:** -- of directors.

7 **MR. JACOBS:** So, number one, Covington advised Du Pont to

8 set up a special committee of non-Du Pont directors, so all

9 the Du Pont directors recused themselves from any involvement

10 at all in negotiating or approving the transaction – well, in

11 negotiating the transaction. They, I believe, also recommended

12 that the shareholder – that there be a majority of the

13 minority shareholder vote of, so that Du Pont, you know,

14 unless a majority of the, you know, well, unless a majority of

15 the seventy percent agreed.

16 [00:49:36]

17 **MR. HAMERMESH:** The thirty percent—

18 **MR. JACOBS:** The thirty percent—

19 **MR. HAMERMESH:** Right.

20 **MR. JACOBS:** Yeah, they would have a veto power, and Du

21 Pont would not do the transaction. That was accepted.

22 The Supreme Court recommended that – or held that it

23 would be, you know, they would look favorably if the special

24 committee had its own independent counsel and own investment

1 bank. That's what happened in that case. So, it was all done,
2 you know, at arm's length. They had, I think, Morgan Stanley
3 advised the committee, and they came up with the stock for
4 stock exchange ratio. You know, there was no concern about –
5 the only concern was just to get it done and to get it done
6 right, you know, not to save – not to start pinching pennies
7 or anything.

8 Anyway, so that was done, and then, a lawsuit is
9 filed, a derivative action against the directors of Du Pont
10 claiming that the price – the buyout price was unfair. And
11 then, the case sat there for several years. I mean, it may
12 have gone on at a glacial pace, but it wasn't until I got on
13 the court that the defense side decided that they either
14 wanted – that they were going to, you know, either get this
15 case dismissed for lack of interest or force it to trial. And
16 so, it got forced to trial, and we had a full trial, you know,
17 where I heard testimony from every one of those independent
18 directors, from the Chairman of Du Pont, from all the
19 investment bankers, and it was clear, as I have told you,
20 that, you know, but for trying to apply whatever the law was
21 to the facts, the facts were not problematic. I don't think
22 there were even any disputes about what the facts were.

23 But the problem was that, you know, what was the
24 standard of review to be?

1 [00:51:51]

2 **MR. HAMERMESH:** Right. Which Weinberger v. UOP really
3 didn't quite answer.

4 **MR. JACOBS:** Not in – not quite. And it's turned out to
5 be a subject that involved litigation over the next ten years.
6 Or at least, I shouldn't say that -- four years, five years.
7 The plaintiffs' case rose or fell on the proposition that this
8 – that entire fairness would be the standard of review, not
9 business judgment. But, you know, the footnote in Weinberger
10 and, really, you know, the what I considered to be the
11 animating force behind Weinberger, which is that if you can
12 replicate a real market transaction involving a third party's
13 negotiating at arm's length, then it should fall under
14 business judgment review because that's what happens when you
15 have two completely disconnected companies that are
16 negotiating a merger consolidation.

17 [00:52:50]

18 But Weinberger didn't really say that.It was – it
19 suggested it, but it didn't say it. And that was an unanswered
20 question. So, one of the major issues that I had to decide
21 was, you know, is this a business judgment case? In which
22 case, you know, it would be an easy opinion to write. Or would
23 it be an entire fairness case, in which circumstance, there
24 would be a much more textured kind of analysis and having to

1 grapple, you know, with Weinberger because there had never
2 been a fully developed post-trial case where the Weinberger
3 apparatus had to be applied.

4 My inclination was to apply business judgment, to
5 hold that it was business judgment. There was a decision by my
6 then colleague, Bill Allen, Chancellor Allen, in the TWA case,
7 in which he had done exactly that. But, unfortunately, one of
8 my hotshot law clerks discovered a 1985 Delaware Supreme Court
9 case called Rosenblatt v. Getty Oil, which involved, you know,
10 although different, you know, a different kind of transaction,
11 the same paradigm facts, the same master facts. And, in that
12 case, the Supreme Court said, no, the – well, it didn't really
13 – it just said, and I don't even know to what extent it was
14 litigated, that the standard of review, even though this was
15 the cleanest deal that they had had, would still be entire
16 fairness, but the burden of proving unfairness would shift to
17 the plaintiff. In classic entire fairness, the directors, the
18 controller always had the burden of proof. So, this – that was
19 a change.

20 [00:54:43]

21 So, I, you know, there was nothing in the TWA
22 opinion that addressed that precedent. It wasn't cited. And
23 nothing in the Rosenblatt opinion that explained why business
24 judgment wouldn't be the standard. So, what did I do? I went

1 into my colleague's office and said, you know, Bill, I got a
2 problem, and told him about Rosenblatt, and he said, and I
3 said, look, I find that I am in the position where I may have
4 to go in a direction completely opposite from where you went,
5 and it would be very public. And he said, well, if you have
6 to, you have to, because nobody cited Rosenblatt to me, and
7 when I decided TWA. I said, okay. I'm relieved to hear that.
8 And now, here's my other problem. Rosenblatt doesn't really
9 give any rationale for why, you know, it would be – why there
10 would continue to be entire fairness review rather than just
11 shifting standards to business judgment. And they didn't. And
12 so, you know, because I was now going to have to apply this,
13 and I didn't want to do it just by saying well, the Supreme
14 Court said—
15 [00:56:02]
16 **MR. HAMERMESH:** They said so.
17 **MR. JACOBS:** Said so, and so that's – that's it. To try
18 to come up with some rationale that would make sense. And so,
19 literally, Bill Allen and I, in his office, forged a
20 rationale, which was that even if you have, you know, all of
21 the safeguards in place, that is the procedural safeguards,
22 that the shareholders would, you know, there is a risk that
23 the shareholders would approve the deal out of concern that if
24 they didn't, then the controller, frustrated over having its

1 deal voted down, would take some kind of retaliatory step
2 later on, such as cutting dividends, trying to delist, or
3 whatever. And that became the rationale. That was not a
4 rationale that was warmly accepted on Wall Street, or by the
5 corporate community, I recall, after writing the opinion in
6 Citron, where, you know, I upheld the deal. But based on the
7 modified entire fairness paradigm that, you know, one major
8 Wall Street firm said this is the stupidest thing that they
9 had ever heard of and that the rule should be that what
10 happened at TWA – and they had a point. I thought they were
11 right, but I, you know, I was bound by Supreme Court
12 precedent.
13 [00:57:40]
14 And so, the issue – there were two issues that ended
15 up getting litigated for a number of years. One was, all
16 right, when, under what circumstances, you know, does the –
17 you get modified or entire fairness light, you know, where the
18 burden shifts to the plaintiff? And can there ever be a
19 circumstance, under Weinberger, where you don't apply that
20 mode of analysis but, actually, go back to entire fairness?
21 The bottom line was that, in 1994, the Delaware
22 Supreme Court clarified, you know, that they – I mean, we
23 still had TWA and Citron as polar opposite cases, and they

1 resolved that opposition in favor of Citron, to my dismay. I
2 was hoping they wouldn't. But then in—
3 [00:58:40]
4 **MR. HAMERMESH:** Quoting you at great length.
5 **MR. JACOBS:** Yeah, unfortunately, yeah. And well, what
6 Bill and I had come up with at great length—
7 **MR. HAMERMESH:** Right.
8 **MR. JACOBS:** And, then, several years later, I forget
9 what year it was, in the MFW case, basically went back to the
10 roots of Weinberger and said, yes, there are circumstances
11 where you can have business judgment review, even if a case
12 that has – a merger that has been controlled or, you know,
13 where there has been a controlling stockholder. So, it took
14 five or six years to resolve, you know, what I called the
15 lower-order issue, but probably twenty to resolve the higher
16 order; it was 1983 to what? Two thousand and?
17 [00:59:26]
18 **MR. HAMERMESH:** Well, the Delaware Supreme Court M&F
19 Worldwide opinion was 2014, which was, ironically, or sweetly—
20 **MR. JACOBS:** Yes.
21 **MR. HAMERMESH:** -- your last year on the bench.
22 **MR. JACOBS:** That's right. That's right.
23 **MR. HAMERMESH:** So, you sort of presided over the entire
24 evolution of this body of doctrine from—

1 **MR. JACOBS:** If I can just inject one—

2 **MR. HAMERMESH:** Please...

3 **MR. JACOBS:** -- one editorial comment. The Chancery – the
4 Chancery judges and, you know, I think, should be commended.
5 They did their best to try to faithfully implement and apply,
6 you know, whatever higher court doctrine they are bound by,
7 but to do it in a way that makes sense from a business law
8 standpoint. And sometimes they get it right, and sometimes
9 they don't. But it's also true of the Delaware Supreme Court,
10 I think, you know, when the, you know, some of their prior
11 case law is called to their attention as not making sense, or
12 not making sense, you know, in the particular circumstances,
13 and you know, should merit a reassessment from a higher-level
14 point of view, they have done that, and I think that's what an
15 appellate court ought to do, and I think Delaware has –it may
16 take time to get it done, but it generally ends up doing it.
17 [01:00:47]

18 **MR. HAMERMESH:** Right. And M&F Worldwide in 2014 was one
19 of those opinions that—

20 **MR. JACOBS:** I think so.

21 **MR. HAMERMESH:** -- recast the doctrine effectively.

22 **MR. JACOBS:** Right.

23

24 [01:00:59]

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