

Van Gorkom

Case: Smith V Van Gorkom

Taping Date: January 11th, 2017

Interviewer: Joel Friedlander, Fridlander and Gorris

Interviewee: Robert Payson. Potter, Anderson, and Corroon, Retired

Joel Friedlander: Good morning, Bob.

Robert Payson: Good morning, Joel.

Joel Friedlander: We're here to talk about Smith Van Gorkom. That was the case about the middle of your career, correct?

Robert Payson: Correct.

Joel Friedlander: Can you tell me how you came to be a part of the case?

Robert Payson: As I recall, I got a call from Tom Morsch at Sidley and Austin who explained a lawsuit had been filed in Delaware, and they needed Delaware council.

Joel Friedlander: Now there was also another litigation going on in another jurisdiction involving Van Gorkom?

Robert Payson: I think there was federal litigation in Chicago but we were not involved in that at all.

Joel Friedlander: Now at the time you got involved, what was the status of the transaction, like in terms of--had there been any... Was the contract fully completed or anything?

Robert Payson: [00:01:11] I'm a little shaky on the timing, but I think the directors had approved the transaction as it then existed.

Joel Friedlander: Ok. Now, this was a transaction, I guess, famously where it was solicited by the CEO of the company, to Jay Pritzker and then the board approved it on September 20th. So you're not involved at the time when the board's first approving the transaction?

Robert Payson: Correct.

Joel Friedlander: Now there was a modification of the contract on October 8th for it to allow, let me show it to you. To allow the bids to be solicited by Trans Union, right?

Robert Payson: Yes

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Joel Friedlander: Can you just tell me, were you involved in that stage, October 8th?

Robert Payson: Yes, but I'm not sure how much input we had in respect to to the change that was made. I think that was Gil Sparks or Morris Nickels counseling with Sidley and Austin

Joel Friedlander: Ok. So who did Gil Sparks represent?

Robert Payson: [00:02:25] Pritzkers [sic]

Joel Friedlander: Ok, so that was the buyer, right?

Robert Payson: Yes

Joel Friedlander: And you're representing who?

Robert Payson: The directors.

Joel Friedlander: Now were you brought in at the same time as Gil?

Robert Payson: I think Gil came in a little bit earlier. But I don't really remember that timing.

Joel Friedlander: Now did you ever work with any other--were there any other law firms representing the directors?

Robert Payson: Sidley and Austin.

Joel Friedlander: Ok. Now did they appear in the litigation?

Robert Payson: I think they were in the federal litigation. I don't recall if they appeared in the Delaware litigation or not. They were not active in the Delaware case.

Joel Friedlander: So it's basically--you and your firm, Potter Anderson--representing the directors, right?

Robert Payson: Right

Joel Friedlander: And Gil and his firm representing the Pritzker entities?

Robert Payson: Right

Joel Friedlander: And the case was brought by Bill Prickett, correct?

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Robert Payson: Correct

Joel Friedlander: Now did you--if you can sort of set the scene. Did you have a reason to go out there to--and this is a company that's based in Chicago, right?

[00:03:28] Robert Payson: Gil and I went out and met with the board, or I met with the board, and just made introductions and got comfortable with who was who and what was going on at that time.

Joel Friedlander: Did you form any impressions of how this company operated or about the directors when you went out there?

Robert Payson: It seemed to me that Mr. Van Gorkum was in charge, although he wasn't beating people over the head to get things done. I was impressed with the directors generally, especially the outside directors.

Joel Friedlander: Can you tell me something about the outside directors, like who they were or--

Robert Payson: Bill Johnson was the Chairman of IC Industries, extremely bright, knew about mergers and acquisitions. The same for, I think it was the chairman of Swift and Company... Bob--I can't remember his name. [00:04:35] but all of the outside directors seemed to have a lot of experience running corporations and valuing companies in the context of takeovers and mergers and acquisitions.

Joel Friedlander: Can you give me some kind of sense of what kind of people--their backgrounds--what kind of people were on the constituted the board?

Robert Payson: I'm not sure I knew at that time what their educational background was, but they all appeared to be bright people.

Joel Friedlander: And were they all from Chicago... In terms of social circles of them, did you have a sense of that?

[00:05:11] Robert Payson: I had the sense that there was a social circle among the directors. They knew each other socially, but more importantly, they knew each other from serving on each other's boards.

Joel Friedlander: And when you said you got the impression that Van Gorkom was in charge, can you tell me what you mean by that?

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Robert Payson: Well he was the CEO and he acted like a CEO. He was in control.

Joel Friedlander: Now you're also on the board where several of his, was lieutenants, those are officers of the company correct? So when you say he acted like the CEO in relation to his board, can you give us a sense of how boards operated then or how this board seemed to operate then?

Robert Payson: [00:06:02] He did not appear to me to be heavy handed, but you could tell when he spoke people paid attention including the members of management who were on the board.

Joel Friedlander: Now in this early stages of your interaction with the board, did you form any impression about any motivations the directors might have had in putting this deal together?

Robert Payson: The company had undertaken a major study within three years of this merger. And they had all been prepped on the financials, the fact that congress was considering passing legislation which would adversely affect transunion operations from a tax perspective. They were concerned about that. The stock of the company had been right around nineteen for three to four years. It hadn't moved. And I think all of the directors, especially Van Gorkom, wanted to get some money for the stockholders.

Joel Friedlander: [00:07:12] Ok. Now could you just describe generally what was your understanding of how the deal had been put together, what the negotiations had been?

Robert Payson: My early understanding was the Van Gorkom had done a study on his own and had come up with a number. He used the company's cash flow to go to Pritzker and said Jay, if you want to do this deal at 55 dollars a share, the cashflow of the company will pay for the deal in five years.

Joel Friedlander: And what happened and how quickly after that did the deal come about?

Robert Payson: It happened very quickly. I think Jay took a look at it probably with some of his own people, and said sounds like a fair deal to me and made an offer.

Joel Friedlander: So how many days later was that?

Robert Payson: I'm thinking a week.

Joel Friedlander: And then Van Gorkom brings Mr. Pritzker's offer to the board, is that right?

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Robert Payson: Right

Joel Friedlander: And on a Saturday, right? Is that right?

Robert Payson: I believe that's right.

Joel Friedlander: And the board meets to decide whether to sell the company at that time, is that right?

Robert Payson: [00:08:31] I think the meeting lasted two hours and they considered it and said this is the best we can do for our shareholders.

Joel Friedlander: Now when you come onto the scene, you know, a few weeks later, did you have a perception of that process and what that meant from a Delaware law perspective?

Robert Payson: I'm not sure we knew enough about the deal and how it was structured for me to form an opinion. I was generally impressed with the directors that we had met. And I think we had met them all--all of the outside directors. And since the deal had been done, so to speak, there wasn't much more we could do.

Joel Friedlander: Ok. Now there were a couple of amendments to the agreement. There was, I guess, at the time, the board was given the task to review the transaction, there was whether they were bound to approve it stockholders or not. And they had them at the meeting? Is that true?

Robert Payson: That's true. Do you have that document?

Joel Friedlander: I do. I have here the bound and briefs from the Supreme Court. And there's this added language to the merger agreement on that Saturday that it's presented to the board. It says the board of directors of TransUnion may have fiduciary obligations under certain circumstances. That new language was added. Have you heard about that?

Robert Payson: [00:10:23] I heard about it later. We were not involved in formulating that language. But it seems to emulate the law.

Joel Friedlander: What law was that? What was the law back then?

Robert Payson: That if a better deal comes through you better consider it.

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Joel Friedlander: Now it doesn't quite say that, right? And it certainly doesn't say that the board can turn down the previous deal and take the higher deal, right? Can you give me a sense of who was advising Pritzker and sort of their sophistication, MMA and in terms of this language an understanding?

[00:10:59] Robert Payson: I think Hank Handelsman who was a former Wachtell Lipton lawyer that Jay had hired to be inside counsel, to train, to the Pritzker entities. And I believe Hank is the one who came up with that language. I don't know how much input, if any, Tom Morsch and Sidley and Austin had.

Joel Friedlander: But this was an idea that was raised at this Saturday board meeting on the Trans Union side. Is that right?

Robert Payson: Right

Joel Friedlander: Ok. Now to just put some context--one of the key things about Pritzker's offer was it would expire within just a couple days. Is that right?

Robert Payson: That's my recollection.

Joel Friedlander: Yeah. So it was sort of take it or leave it at 55 or else I'm gone.

Robert Payson: I'm walking.

Joel Friedlander: Right. And there's also, Pritzker had a right to buy a certain amount of shares. Is that right? Can you describe that?

Robert Payson: [00:11:55] Well it was basically insurance. He had a right to buy up to a million shares at market. So that if another bidder came in and came in over his price, Jay would get the difference. He would get the benefit.

Joel Friedlander: Right. Now were you, when you came around later and found out about this language and... Well, I guess that's significance two ways it's fair to say. It's one that the board was making a change to the deal at the time they're considering it. Then also whether that language was sufficient to meet Delaware requirements, right? Both those issues came to play in the litigation, is that fair to say?

Robert Payson: It's fair to say. And when you recognize competing fiduciary duties, it's waffling. But the language is there. We had to live with it.

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Joel Friedlander: Right. And you thought... I guess you took the position later in litigation that the fact that that amendment was made, which showed that the directors were on the ball, that they were thinking about things, about how this deal would work.

Robert Payson: Correct. [00:13:07] or that the lawyers had it in mind.

Joel Friedlander: Ok, alright. And so this is on September 20th. So that change is made, those words get used. But let's just maybe keep it that time. So how sophisticated would you say the Pritzker side was? They're coming in here, they agree to this term, but it has this relatively mushy language, right?

Robert Payson: Pritzker team was very sophisticated in MMA.

Joel Friedlander: And did you have a sense of the Trans Union side? Had any of these people like ever, had they ever sold the business before? Had they been Van Gorkom ever considered selling his business, or... What was the MA sophistication on this Trans Union side?

Robert Payson: I think they were all in so many different boards that they had had some experience. I don't recall now who had done what and when. But they were sophisticated businessmen. [00:14:06] I'm talking about the outside directors.

Joel Friedlander: The... Now when did the outside directors, or even the inside directors first learn about the transaction, or about the proposed transaction?

Robert Payson: At the board meeting on...

Joel Friedlander: That first board meeting, September 20th?

Robert Payson: Right. Right.

Joel Friedlander: And what--

Robert Payson: Now I think Van Gorkom had shared what he had done as far as negotiating with Jay, with at least one other inside director.

Joel Friedlander: Ok

Robert Payson: But the whole board did not have that same knowledge.

Joel Friedlander: And what was to come out about what the board, what some of the managers, what some of the board members thought of the deal at the time?

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Robert Payson: Yeah, I think there was a board member named Romans who thought that the price was low, and thought that a better price could be obtained. [00:15:05] But he didn't prevail.

Joel Friedlander: Right. So... And this is on one of the reports to Van Gorkom. And when did he first find out about the transaction as it came out in litigation?

Robert Payson: It could have been at the September 20th board meeting. Might have been slightly before, I don't remember.

Joel Friedlander: Ok. So the insiders and outsiders are both finding out about the deal at the time they're asked to approve it, right?

Robert Payson: Right. Except for Van Gorkom and Chelberg [sic]

Joel Friedlander: Ok. And did you have... Was there any development of the law... You know, from a Delaware law perspective, did you have a view about whether this made this a hard case or an easy case? Or what was your view coming in?

Robert Payson: We thought it was a classic business judgement rule case. None of the directors was interested in the transaction. So we thought the business judgement rule applied. And we also thought that the directors--because of the study done within three years, or two years of the merger [00:16:16] that they had--they were informed, they knew what they were doing.

Joel Friedlander: Ok. Now a couple weeks later. So September 20th. Then there's this amendment to the... It was a special meeting of the board. And some board resolutions were adopted about amending the agreement to say that until January 31, 1981, the company will be permitted to actively solicit for other offers, and hire an investment banker to assist in that effort.

Robert Payson: Correct

Joel Friedlander: Can you tell me how that came about?

Robert Payson: [00:16:57] I think it was a response of the lawyers to what had been alleged in a complaint, and they wanted to cure any possible problem that there might have been.

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Joel Friedlander:Ok. Now, the... I'm just wondering about... Because the Delaware complaint isn't filed until I think December. So when... Was your perception had been other litigation filed earlier, or...

Robert Payson: That's my recollection but I'm not sure.

Joel Friedlander:Ok. The.... So Bill Prickett files his complaint and this is December 19th, 1980. This is the original complaint. Among the things he alleges, count one breach of fiduciary duty, officers and directors have not made an adequate effort to determine the availability of other potential merger partners who could offer a better deal. Among other counts and things he's complaining about. Did you have a view of the merit of this complaint or the merit of that theory?

Robert Payson: I think we believed that once the deal was announced anybody could shoot at it and come in with a higher price. There was nothing to stop, for example, General Electric, from making a competing bid. [00:18:29] We thought that that was a market test in an of itself.

Joel Friedlander:Just the fact that the deal was out there?

Robert Payson: Correct

Joel Friedlander:So did you have a view about whether this stated a claim or this was even... what the law should make of an allegation that boards you know, didn't go and look for other bids?

Robert Payson: Ummm... Because we believed that the announcement of the deal provided a target for anybody who was interested, we didn't think there was any violation of Delaware law as the deal then stood.

Joel Friedlander:And when you're thinking Delaware law, what kind of cases are you thinking of, what kind of doctrines?

Robert Payson: The business judgement rule and common sense.

Joel Friedlander:Ok. Not other like takeover cases or people putting themselves up for sale cases, right?

Robert Payson: [00:19:33] Correct.

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Joel Friedlander:Ok. Now did... So given that this theory's being made that you have to look for other merger partners, did it strike you as a strong complaint, a novel complaint, and interesting complaint, frivolous complaint? What was your basic approach?

Robert Payson: We didn't think there was much to it. But we took it seriously. I mean, people were being sued for a lot of money.

Joel Friedlander:Did you ever hear any comments about the complaint around town or anything come to mind about that?

Robert Payson: No

Joel Friedlander:Did you... I think I heard a story... Were you at the Potter offices with somebody, and one of Prickett's former partners showed up or something? Can you...

Robert Payson: Yeah, Rod Ward was in Charlie Crompton's office, and I went in and there was a copy of Mr. Prickett's complaint on Charlie's desk. I had probably given it to him. [00:20:25] And Rod said that's why I left to go to Skadden. And pointed to the complaint.

Joel Friedlander:And what did you understand that to mean?

Robert Payson: That he thought it was frivolous.

Joel Friedlander:I see. And was that your view as well?

Robert Payson: Well I'm not sure I thought it was frivolous but we thought we would prevail.

Joel Friedlander:Now... So Bill Prickett files this complaint, and in pretty short order takes a bunch of depositions. Is that right?

Robert Payson: In anticipation of his motion for preliminary junction.

Joel Friedlander:Ok. And it comes out in the depositions facts about how the directors had just learned about the transaction, and Roman's was either opposed to it or thought there was more money available. And as a litigator, there are a couple of things that were done on the defense side. Can you describe them in terms of at the board level and in terms of informing the stockholders?

Robert Payson: [00:21:34] Well at some point the proxy statement went out with respect to the deal as originally cast. We then thought it would be important in defending the litigation, to cure any of the allegations of the complaint so we issued a supplemental

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proxy statement, and threw everything in, including all the allegations of the complaint. So we thought the shareholders had full information upon which to make a decision.

Joel Friedlander:Ok. Now there was also something done at the board level that the board was asked to look at the complaint, look at the... adopt a new set of resolutions about the transactions. Is that right?

Robert Payson: That's my recollection.

Joel Friedlander:Ok. The... And those so the... There's an affidavit of William Moore was submitted in litigation. Who was William Moore?

Robert Payson: [00:22:42] I think he was an inside lawyer.

Joel Friedlander:You general counseled him, right?

Robert Payson: I think that's right. There's another general counsel with senior Bill, but Bill Moore was general counsel.

Joel Friedlander:So there's a January 26th board meeting and the board is asked to adopt or review a whole series of resolutions about facts of the case to consider the transaction again. Is that right?

Robert Payson: Correct

Joel Friedlander:Now what was the rationale behind that?

Robert Payson: Once again, it was to put everything in front of shareholders. And if they voted in favor of the deal, that would be it.

Joel Friedlander:They being the shareholder?

Robert Payson: The shareholders, right.

Joel Friedlander:Ok. But the board... Now what was your... Did you have a sense of what the significance of that was from a legal perspective, that the stockholders voted in favor of the deal?

Robert Payson: It certainly was my view, and I think shared by Gil, that if the stockholders had all available information and voted in favor of the transaction, that that would [00:24:01] moot the complaint.

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Joel Friedlander: When you say moot, that would be a complete defense basically?

Robert Payson: Right

Joel Friedlander: And now this board... the board resolutions that were adopted, the way the board discussed and recites the history of the transaction from the last, I guess the last three months prior to that, four months... the fact that the board members hadn't been told about it, other than Chelberg, the president, or Van Gorkom himself. The fact that Van Gorkom had suggested the merger price, the deadline that it would be withdrawn by on or before September 21... The board hadn't--said the board hadn't had the opportunity to go see an investment banker to get a view about the fairness of the deal. And it says the fact that when the board accepted the offer, the board expected other parties would become interested and therefore the Pritzker offer would become a floor. I take those as... Is it fair to say this is an effort to paper the transaction in a way that hadn't been done at the time?

Robert Payson: [00:25:13] Correct. We wanted the shareholders to have all the information in light of the complaint.

Joel Friedlander: Right. But also this is... you thought the board could re-review the transaction and that that would have certain legal significance, or what did you think about that?

Robert Payson: It's what we thought.

Joel Friedlander: And did... How... Was this more of an effort to shore up the record or create a new defense or how would you describe... these new board resolutions?

Robert Payson: I think it was to shore up the record.

Joel Friedlander: Because does it strike you as problematic that a lot of the stuff hadn't been written down at the time of the deal?

Robert Payson: No, but in light of the complaint, we thought it was in the best interest of everybody to give everything to the shareholders and let them decide.

Joel Friedlander: Ok. But you're talking about the shareholders. But this is actually the board adopting a new set of resolutions or approving the deal?

Robert Payson: Right

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Joel Friedlander: Is that something you'd ever done before or seen before? Did you have a view about the merit of that?

Robert Payson: I don't recall seeing it before.

Joel Friedlander: Ok. So a bunch of it... A bunch of the facts that had to come out in the litigation or that were more details about the transaction are then approved, are then brought before the board and written down and then submitted to the court, right?

Robert Payson: Correct

Joel Friedlander: Among the other things were the fact that some members of management were, had extensive discussion with KKR about a leverage buyout. Do you remember anything about that?

Robert Payson: [00:27:03] Vaguely. But nothing ever came of it.

Joel Friedlander: And GE had, there were some talks with General Electric about them potentially buying Transunion?

Robert Payson: I believe so. But the chairman of GE decided he didn't want to get into a fight with the Pritzker's. So that's what we heard.

Joel Friedlander: So there ended up not being any other bids for the company, other than the original bid by the--

Robert Payson: Correct

Joel Friedlander: Now the case started out with a preliminary injunction hearing, right?

Robert Payson: Right

Joel Friedlander: How did you feel about the case at that stage of the litigation?

Robert Payson: We thought we were in a very solid position, based on dollar alone, the business judgement rule. And the fact that we met all the directors and they all appeared to be honest and not involved in the deal at all.

Joel Friedlander: There's a statement by at the oral argument by one of the lawyers on the defense side by Gil Sparks, saying "Your honor, this is an arm's length merger. We've looked at the cases. We haven't found a case in which this court has enjoined an arm's

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length merger. And of course in this type of case, plaintiff must show constructive fraud to fail." Was that...

Robert Payson: That was our view of the law, yeah.

Joel Friedlander: And so that injunction was, you think it was about that, it was going to happen. Was that fair to say?

Robert Payson: We thought we had a very solid case.

Joel Friedlander: Right. Now... and Vice Chancellor Marvel, he issued a short decision denying the preliminary injunction, right?

Robert Payson: Correct

[00:28:59] Joel Friedlander: And he said there was no indication of fraud or ultra vires conduct, that the court will not interfere with questions of policy and business management in the absence of fraud to test his business judgement. He said that... What'd you think--

Robert Payson: That's the case. That's what we thought about the case. There was, I mean, there was no self dealing, there was no inkling of fraud. And the directors had done their job.

Joel Friedlander: Now, what do you think would happen to the case at that point?

Robert Payson: Well knowing Bill Prickett it probably didn't matter if we won because he would be coming back. I had experience with him in the Weinberger case, and Bill does not give up. So we were hopeful that the denial of the preliminary junction would put an end to the case, but it didn't.

Joel Friedlander: And indeed the case marched forward to trial in just the next few months after that, right?

Robert Payson: Prickett pushed very hard for an expedited trial.

Joel Friedlander: Was there any availability to sort of end the case by motions or...

Robert Payson: We thought that the opinion on the preliminary injunction really put an end on the case, but it wasn't dispositive. There was still a case out there.

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Joel Friedlander: So it was a case that could be tried if Mr. Prickett wanted to do it, right? Now, Bill Prickett, his theory of the case... Now he's no longer with us, so we can't ask him. But he took straight on the view about whether the business judgement rule applied. And it's fair to say his theory was, and he was sitting Sam Arshat about the business judgement rule. And say in order to have the business judgement rule you, it's "one thing to make a decision, another thing to make an informed decision. It's only the later type of decision that the court, that the business judgement rule protects." [00:31:00] So that was a statement of Sam Arshat and the law review article in 1980 cited by Mr. Prickett in his briefs, saying this was not an informed business decision. Did... You refer to this as being superficially presented and hastily adopted transaction, not investigated thoroughly. What did you think of that theory?

Robert Payson: Because of the directors' backgrounds, including the huge study done just a short time before the merger, we didn't think there was any basis to Prickett's allegations that the directors are not informed, and that they had all the available information.

Joel Friedlander: Now Mr. Prickett was trying, in his attack on the motivations or the, like his theory of the case, when he argued to the court, after trial... So the Spring of 1982... Maybe we should--was that to put it bluntly, says Mr. Van Gorkom was a fool, he was negligent, that he just, that he was a babe in the woods that got fleeced by Jay Pritzker. That... What'd you think about that?

Robert Payson: [00:32:17] There was nothing to that kind of language. Van Gorkom was a very bright, very honest person, who had the shareholder's interest in mind. I think we all believed that.

Joel Friedlander: So tell me about that. How did the witnesses go in? Give me a view about how did... how did it feel from your perspective, like putting on Van Gorkom as a witness?

Robert Payson: I called Van Gorkom and Bill Johnson. And I thought they came across very very well. In fact, the judge's law clerk after Van Gorkom testified came up to me and said where did you get him, Central Casting? Which was interesting. She thought he was a really good witness, as did I.

Joel Friedlander: Sort of funny to hear that from the law clerk right in the middle of the trial, or after the trial.

Robert Payson: In the middle of the trial. It's a small town. In fact, she was the wife of one of my partner's... Former wife of one of my partners.

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Joel Friedlander: There was an issue at the trial, I guess these are facts that people might know about the case, was that... There was a question about whether the original merger agreement a part of the record, right? So we have... We have the marked one with the change, and the question was well was there you know, like what was the story about the original merger agreement?

Robert Payson: It was confusing. [00:33:57] We couldn't find the original documents.

Joel Friedlander: And I guess they said the draft agreement without that change, so that-

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Robert Payson: Correct. Prickett kept demanding production of the document. We searched everywhere, couldn't find it. When we were working on, as I recall, working on a motion for reargument, Hank Handelsman found somewhere in his papers what Prickett had been asking to be produced forever. And we then sent that on to the Supreme Court.

Joel Friedlander: Ok, so it's a few years later, you're talking about motion for reargument after the 3-2 loss in the Supreme Court. Ok. In terms of the lawyer for Trans Union, the outside council for Trans Union, was on the scene at the board meeting on September 20th, he was not called to testify.

Robert Payson: No

Joel Friedlander: Can you give us any sense why on the defensive side?

Robert Payson: Just didn't think it was necessary. We thought we had enough witnesses that went to the merits of the complaint, that we didn't need the corporate lawyer to come in and add anything.

Joel Friedlander: Did you think there was any important legal advice to be given at that stage about whether this kind of deal, if it was problematic or an issue, about whether to approve a merger agreement and say without a banker's fairness opinion, or...

Robert Payson: [00:35:26] The way things developed, we didn't think it was necessary.

Joel Friedlander: So the trial happens, the post trial oral argument, and then the decision comes out. And again, the defendants prevail, right?

Robert Payson: Correct

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Joel Friedlander: The... And you see defense attaching some marvels of old law about if you're attacking a corporate action, unless the directors are so far with that information, they can be said to have reached an unintelligent and unadvised judgement, it will stand. And that text wasn't satisfied by the plaintiff.

Robert Payson: Right. And that was well developed law.

Joel Friedlander: And that was still the governing rule?

Robert Payson: It's, one of the interesting passages in the opinion, on law opinion. But it says there's a question about Prickett's theories was there was a lot of the cash flow from the company, this company generated a lot of cash flow and you couldn't tell that from the proxy statement. And nobody tried to analyze the value of the cash flows. [00:36:50] Is that the case?

Joel Friedlander: Well that's what Prickett said.

Robert Payson: But there was no--back in the time--there was no like DCF analysis. There was no banker saying this is--

Joel Friedlander: Right.

Robert Payson: And we didn't call any experts to so testify.

Joel Friedlander: The judge rules "I'm satisfied that the effort to reach a fair value of the stock here and issue on the basis of discounted projected cash flows, is not an appropriate method of determining the fair present value of the securities here in issue." The present which would have been arrived at by such method evaluation fluctuating substantially depending on the discount rate employed. And that no one needs to provide, there's no case... In citing Weinberger V UOP, the chancery decision, saying no Delaware case says they need DCF analysis. And that was the law at the time, right?

Robert Payson: It was the law at the time.

Joel Friedlander: So you prevail as expected in the court chancery. And did you have a view of about how the case looked then for purposes of appeal?

Robert Payson: We thought it should go away, but once again, Bill Prickett in his dogged way, kept coming and went to the Supreme Court.

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Joel Friedlander:Mhmm. [00:38:16] Now did you have any sense that this was a momentous case, an important case, at any point during the Chancery stage?

Robert Payson: We thought it was classic business judgement rule case, and we had no problems. The directors had no problems.

Joel Friedlander: And now when you get on appeal, the... How'd you feel about the case like during the pendency of the appeal?

Robert Payson: Once again, we thought we had a solid case. We thought our briefs were better than our opponent's. We were very confident. Not cocky, but confident.

Joel Friedlander: Ok. Was there ever any point during the course of the appeal that your views changed?

Robert Payson: At the end.

Joel Friedlander: [laugh] [00:39:16] Well the reason I say is this case was on appeal for a long time. Like we have this whole volume of the briefing on appeal.

Robert Payson: Right

Joel Friedlander: At first there was a panel, so it was an argument before the panel of a court. And there's a separate argument then before the full court. Which would probably not be deemed unusual, right?

Robert Payson: Right.

Joel Friedlander:And then if we look at the dates on that, the argument before the panel is on February 24th, 1983. It goes back to the, goes to the full court, argued on May 6th, 1983. And then on March 30, 1984, ten months later, you don't have a decision, right?

Robert Payson: Right

Joel Friedlander:And you get an order from the court requesting supplemental briefing.

Robert Payson: That's correct.

Joel Friedlander:On certain issues about... Is there evidence of an absence of good faith? Is there evidence to support reasonable alliance and good faith under 141E? Is there evidence to support that the stockholder vote was sufficient defense? Or and the effect

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of stockholder ratification of the merger, whether that was defense? [00:40:34] And asking for supplemental briefs for the next couple months?

Robert Payson: Right

Joel Friedlander: Did that give you pause?

Robert Payson: I'm sure it did, but we still thought we had a very solid case. And we didn't know what was at the core, why they were going this way. We suspected that Justice Moore was trying to revisit some settled Delaware law, but of course we didn't know that.

Joel Friedlander: Now, he gave you kind of a hard time at oral argument, in going back to the Spring of '83. In terms of the fact that Van Gorkom didn't tell his fellow directors before the board meeting that I have solicited and obtained an offer to buy the company for 55 dollars a share.

Robert Payson: Right

Joel Friedlander: And he says now it doesn't speak well on my opinion for a former Chief Executive Officer, for a Chief Executive Officer and chairman of the board to say he doesn't trust his board and that he wouldn't tell them [00:41:41] because he was fearful that something was going to get out on the street. Now that is the record isn't it? And you said Mr. Van Gorkom was concerned about leaks before he got a firm offer. What was the testimony? What was Mr. Van Gorkom view on that?

Robert Payson: As I recall [cough] Excuse me. As I recall he simply said that the more people that know, the more chance there is for a leak, and the leak could blow a great deal. I've never understood quite how that would happen, but that's certainly Van Gorkom's view.

Joel Friedlander: And what was the view of the directors about how good a deal this was? Did it seem--

Robert Payson: Oh they were ecstatic. They never... I mean, remember, the price had been around 19 for ever. And here was a 55 dollar offer, all cash.

Joel Friedlander: Well I think it was 38 at the time the deal was in--

Robert Payson: Right. So it was a fifty percent premium.

Joel Friedlander: And just looking at that, they didn't want to let the deal go?

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Robert Payson: Exactly

Joel Friedlander: So you have the supplemental briefing. And then there's a new oral argument. And that's in June of 1984.

Robert Payson: [00:43:08] Correct

Joel Friedlander: Months pass. [laugh]

Robert Payson: [laugh]

Joel Friedlander: Do you have any view about, you know, the world, that there's been more mergers and acquisitions activity, you know, over the course of this case, from the time it was first presented to Vice Chancellor Marvel in early 1981, to supplemental briefing in 1984. A lot more merger activity. Do you ever feel like the outside world of M&A activity, was, you know, that atmosphere had an impact on this case? Or that this case was out there for a long time?

Robert Payson: I don't think we believed so because this wasn't a hostile takeover and there was no green mail [sic] and we thought it was cut and dry.

Joel Friedlander: Well, there was one thing interesting. The supplemental briefing there's, for the first time in the case, in Mr. Prickett's supplemental brief in May 1984, he quotes at length from Marty Lipton takeover bids in the target's boardroom. Which is an article from the business lawyer from 1979. And so this is a response to one of those questions about whether there's enough evidence for good faith or lack of good faith or reasonable reliance. And the subsection of this article takeover bids that target's boardroom, what the director should do. And block quotes it from page 16 to page 18 of his brief. Basically says that's what the board should do. [00:45:04] Did... You know, I look at the defense briefs, they're not citing any contemporary materials about mergers acquisitions activity or the like. But it's relying on this old school Delaware law. Did you see that the Martin Lipton article or that sort of view about what directors should be doing had an impact on the case?

Robert Payson: Yeah. We thought--my recollection is that a block quote without an analysis of what was said in that quote couldn't overcome what we thought was settled Delaware law.

Joel Friedlander: So it's basically that the seller in Delaware needs this set of facts--

Robert Payson: Exactly

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Joel Friedlander: Pretty closely. Now in terms of the standard, what kind of a standard was Bill Prickett [fighting?] for? It ended up being settled... At some points he's saying the director's taking--acting with reasonable care, that a prudent man would exercise.

Robert Payson: I guess that's what he was saying, but you never knew. It changed from brief to brief and argument to argument.

Joel Friedlander: [00:46:23] And your side was taking that gross negligence was the standard, right?

Robert Payson: Correct

Joel Friedlander: And did you have doubts at all that the kind of facts you had would or would not meet the test of gross negligence?

Robert Payson: We were confident that there was no evidence of gross negligence.

Joel Friedlander: Now famously the decision comes out and it's a 3-2 decision in January 1985.

Robert Payson: It was not a happy day.

Joel Friedlander: [laugh] Do you remember anything about that?

Robert Payson: Not really, just being very disappointed and shocked.

Joel Friedlander: Yeah. And what was the litigation step you took then?

Robert Payson: I don't understand your question.

Joel Friedlander: Well you filed the motion for reargument, right?

Robert Payson: Right

Joel Friedlander: Can you give me your sense of what, like what your thoughts were about the case as reflected in your motion for reargument?

Robert Payson: Well we thought that the majority opinion was just clearly wrong. And I tried to spell that out in the motion for reargument. And it was kind of a no holes barred piece of paper. Respectful but judges you didn't quite get this right and here's why.

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Joel Friedlander: Alright. So like the second sentence of the motion--which is rather... It's a long motion, by the way, isn't it?

Robert Payson: It is.

[00:47:56] Joel Friedlander: Can you tell me anything about how that came about, in terms of the length of the motion?

Robert Payson: I think we filed a motion for extending the page limitations, and that was granted.

Joel Friedlander: And the motion says: the majority opinion has shocked the corporate world, and it's unprecedented holding that knowledgeable directors of a Delaware corporation, performing their statutory managerial function, may be exposed to catastrophic personal liability in respect to an arms length business decision, where there were no charges or proof of fraud, bad faith, or self-dealing. Is that basically the case?

Robert Payson: That was the case.

Joel Friedlander: And first this case being of national importance and having already creating confusion in the bar...

Robert Payson: There was an article written shortly after the opinion came out in the New York Law Journal, which expressed that kind of shock and surprise. And we thought because of the impact on the business judgement rule that it was of national importance in the corporate world.

Joel Friedlander: Now with a 3-2 decision, and that kind of reaction you'd seen, did you follow this with optimism that someone would recognize that it was gotten wrong, or what?

Robert Payson: [00:49:21] In my own naive mind at the time, I thought we wrote a very powerful motion for reargument. If I had been a little older I would have realized it had little chance for success.

Joel Friedlander: [laugh] The... Could you tell me did anything happen, anything you heard about the case after it came out or any reaction, any interaction yet with the court afterwards?

Robert Payson: It's quite surprising that very shortly after the opinion came down denying the motion for reargument, the lawyers were summoned to Supreme Court chambers, I think by the clerk of the court, but I'm not sure. So Bill Prickett, Bill Sparks and I traipsed

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over to court. Walked into chambers and Chief Justice Herman said: gentlemen, there's a rumor going around that this court was once 5-0 for affirmance and that one judge turned the court around. He said the first part of that rumor is true, the second part is not. You may use this information as you see fit. And we kind of looked at each other dumbfounded and walked out. [00:50:36] It was an interesting end to quite a case.

Joel Friedlander: Now of course the case doesn't end at that point, right? Cause that was a case about liability, but damages still had not been litigated, right?

Robert Payson: Correct

Joel Friedlander: And then eventually the case--

Robert Payson: --pretty much out of the case.

Joel Friedlander: Now why is that?

Robert Payson: Because the remaining defendants are Pritzker, or Pritzker entities.

Joel Friedlander: Yeah at some point, I think, Pritzker actually, they got the... I think the Pritzker parties got dismissed from the case. So your clients are the parties, but they're not the ones with the money to settle the case, right?

Robert Payson: Right

Joel Friedlander: [00:51:20] So there was a settlement for, I guess, I think it was about 25 million dollars.

Robert Payson: That's my recollection. I was not involved.

Joel Friedlander: Yeah. But it was your clients that were facing that personal liability, right?

Robert Payson: That's true.

Joel Friedlander: So who paid--who funded the settlement?

Robert Payson: I believe the Pritzker's.

Joel Friedlander: And back at the time was there any D&O insurance?

Robert Payson: No

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Joel Friedlander: That just wasn't part... Is that unusual or is that just not part of the landscape?

Robert Payson: I think that was Van Gorkom. But he didn't believe in himit

Joel Friedlander: So the Pritzker's paid. Jay Pritzker funded the settlement?

Robert Payson: And some of the individual defendant directors may have contributed, but I don't know.

Joel Friedlander: Ok. Did you ever hear anything about any arrangement that Pritzker had with any of the outside directors about them contributing money in some fashion?

Robert Payson: No. I mean, I think Jay wanted them to contribute something so that somebody besides his family money was involved.

Joel Friedlander: Now did you hear anything about any contributions to charity, along those lines?

Robert Payson: [00:52:36] Vaguely. That he had demanded the, at least some of the individual defendants make contributions to some Jewish organizations.

Joel Friedlander: And what was that animated by as you refer to it?

Robert Payson: Jay Pritzker... simply wanting the directors to own up personally.

Joel Friedlander: The.. And you say that's something you weren't involved in?

Robert Payson: No

Joel Friedlander: Bob, I just want to capture a couple of things about corporate life circa 1980's with the board, with the management of the company. You were at the offices of Trans Union, right?

Robert Payson: Yes

Joel Friedlander: And I think you're talking about how Van Gorkom ruled... You know, he was clearly the guy in charge. Was there something about the carpeting at the offices that reflected that?

Robert Payson: I had a very vague recollection of a carpet with lines on it and only senior people could walk on some lines, and others had to walk on other lines. And I also

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remember a bottle in the refrigerator in the kitchen where it said "Van Gorkom's. Do not touch." That's my recollection. But I will tell you, I became very fond of him when I was preparing him for trial. He impressed me as being very very honest and cared for the shareholders. [00:54:15] And wanted to do his best for them.

Joel Friedlander:The... If I can just probe you a little bit more. Did you have any sense about... I know this is a lot of hearsay, but you know, say Jay Pritzker wanting some of the directors to give to Jewish charities, what the motivation of that was?

Robert Payson: I think he sensed there might have been some anti semitism on the part of some members of the board and that made him angry.

Joel Friedlander:And the board, these are all--it's all Chicago people, is that right, on the board?

Robert Payson: Correct.

Joel Friedlander:So in a sense, and they serve on each other's boards. And Pritzker himself is from Chicago?

Robert Payson: Yes

Joel Friedlander:So it's a bit of a Chicago story, right?

Robert Payson: Exactly

Joel Friedlander:Now the law firms. You know, look at all the signature blocks and all that... All the speaking roles, it's all Bill Prickett for the plaintiff, you for the directors, Gil Sparks for the... For Pritzker.

Robert Payson: That's right.

Joel Friedlander:Was that unusual, to have the Delaware lawyers, not just having a primary role, but really virtually the sole role in presenting the case?

Robert Payson: [00:55:23] At that time, that was fairly unusual was my recollection.

Joel Friedlander:So there had already been a migration to acting as co-counsel with national firms, and...

Robert Payson: Right

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Joel Friedlander: Do you have any reflections on the case or what came out of the case, or either how you viewed it or people viewed you, or what people said about the case and your role in it?

Robert Payson: Well obviously Gil and I were disappointed. I more than anybody else, because my clients were the direct targets of the opinion. We to this day think the court was wrong. Not surprisingly.

Joel Friedlander: Right. So the judges, you could say were 3-3, right? Because you had Marvel on your side and it was 3-2 on the Supreme Court.

Robert Payson: Correct

Joel Friedlander: And I guess, you know, law professors or practitioners, if anyone polled them today, who knows how the polling would go, right? Whether it was rightly or wrongly decided?

Robert Payson: I suspect that's correct.

Joel Friedlander: So nobody held it against you, I take it, that case came out as a did.

Robert Payson: My practice continued to thrive until I retired, so...

Joel Friedlander: Right, but twenty some odd years later, right?

Robert Payson: Right

Joel Friedlander: [00:56:39] Bob, you mention that there's, there was a tax component to the deal. A structure that in the sense that the company had certain tax benefits that it was taking advantage of. Is that right?

Robert Payson: In connection with their real car leasing activities, there were certain tax benefits from that business. And the board had become concerned as far back as a study that was done a couple of years before. That congress was going to pass legislation that would make--that would create tax problems, and that the benefits that they then had would go away. And that's why Van Gorkom seemed to be in a rush. Although I don't think he was--to sell the company immediately to get the highest price possible before congress did something that would harm the value of the stock.

Joel Friedlander: Right. Do you have a sense of the timeframe involved until any potential legislation happened or this tax effect would be manifested?

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Robert Payson: My recollection is that at least some of the directors thought it was imminent. [00:57:55] And that's why they pushed forward.

Joel Friedlander: Right. But the idea was the company could be sold to somebody else who could better take advantage of the tax benefits?

Robert Payson: Correct, yes.

Joel Friedlander: Whether or not the legislation happened, is that the case?

Robert Payson: I don't now recall, but I believe that the way Transunion... Trans Union was a public company. And that had something to do with the tax benefits and the pending legislation. And I can't remember what it was.

Joel Friedlander: So you understand Pritzker had no reason to be concerned about this legislation?

Robert Payson: Exactly

Joel Friedlander: Ok. But there was no effort. I guess what makes this case, is there was no effort to canvas, you know, other folks who might also have, be able to take advantage of this tax, these tax benefits.

Robert Payson: Well, as I said, GE appeared interested for a while and then withdrew their interest. Never even closed on it. But I don't know the answer to your question other than that.

Joel Friedlander: Well, you know... there was no solicitation of bidders to say well you know, who can take advantage of... We have this tax benefit, who can take advantage of it?

Robert Payson: No, there was not. All we knew was there was a deal out there and it could be shot at.

Joel Friedlander: Right. And Pritzker saw the deal and jumped on it, right?

Robert Payson: Certainly did. At a very high premium.

Joel Friedlander: Smith Van Gorkom became a celebrated case pretty quickly. Was celebrated maybe that's not even the right word. How would you describe the importance of Smith Van Gorkom just from your practice?

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Robert Payson: I don't think it was important because we still relied on the business judgement rule. And I think our view was that Van Gorkom had not really changed that, although it had upset it for the purposes of that case.

Joel Friedlander: Did you see an effect on your practice in terms of just what other boards were doing and lessons learned?

Robert Payson: No. I mean, I think people proceeded with more caution and more papering of transactions, but there was no real impact.

Joel Friedlander: Ok, well, thank you very much, Bob.

Robert Payson: Thank you, Joel.

[01:00:13 end of audio]