Case: Smith V Van Gorkom
Taping Date: January 24th, 2017
Interviewer: Joel Friedlander, Friedlander & Gorris
Interviewee: A Gilchrist Sparks III, Morris Nichols Arsht & Tunnell

Friedlander: Good afternoon, Gil. I'm Joel Friedlander. We're here at the University of Pennsylvania Law School. And we're here to go back in time. We'll start off in the fall of 1980 to discuss the case of Smith v. Van Gorkom.

Sparks: Good afternoon, let's do it.

Friedlander: I just want to keep a couple dates in mind, so if you can tell me when you got started. So the merger agreement was approved initially on September 20th, 1980. The complaint was filed December 19th, 1980. And my start of the question is when did you get involved in what became Smith Van Gorkom?

Sparks: Probably sometime shortly after December 19th when the complaint was filed. We were not involved--I was not involved in any of the corporate side of this transaction.

Friedlander: And in what fashion did you get involved? Who retained you?

Sparks: [00:01:09] We were retained by the Pritzker interest. In this case the nominal purchaser was a company called GL corporation. And initially Jay and Bob Pritzker were also named as defendants, although they were dismissed before trial.

Friedlander: And I think it started off as a fast moving litigation. What was your involvement up front and just tell us about your first interaction with the case?

Sparks: Well there was a preliminary junction scheduled and ultimately heard and decided. That happened somewhere around the 30th of January, would have been the date for the decision of the preliminary injunction. And so as was the extent then and somewhat of the case now, there was some expedited discovery that took place between the filing of the complaint on the 19th of December leading up to briefing and argument on the 30th of January. I don't recall whether I actually attended any of the depositions or whether I had another partner at our firm doing it. I know at some point in time another partner in our firm was asked by me to attend a bunch of the depositions. But that's what I can remember. I do remember of course arguing at the preliminary injunction hearing.

Friedlander: Now did you ever have reason to go out to Chicago to where the offices of Trans Union were--and if so was it in that stage, that initial stage?

Sparks: [00:02:36] I did go out there. I have some very firm recollections of my visits to the Trans Union offices. And I'm pretty sure it was in the stage that preceded the January 30 preliminary injunction hearing.

Friedlander: So I sort of want to locate the practice of the state of the world was in the fall of 1980. There's a reference in one of the decisions that came out that the CFO had read about leveraged buy outs in a media article. So that was a new phenomenon. Was this case reflective of your practice at that time. Was anything about it something that had been litigated before with you?

Sparks: I started practice in 1973. The world started to change, at least from my perspective, in and around 1978. And it was sort of after Green V Santa Fe which basically laid all of this corporate stuff in Delaware's lap rather than in the federal jurisdiction, which was a question up until that time. It was a US Supreme court case. The first big case I could remember doing was a case involving Carrier and United Technology, where the Wachtell folks asked me to make the argument in that case, and from that point on I was involved in that type of case. But we're only talking two years later when we get to Smith v. Van Gorkom. [00:04:12] and there were only a very small group of Delaware lawyers who were willing or able to take on this type of practice. There were probably six or seven or eight of us in the various law firms who were doing all of these types of cases. So I had done a couple of cases similar to this prior to Smith V Van Gorkom. But this was still in an early developmental stage of what came by the end of 1988 or so to be a fairly rounded juris prudence in terms of how to conduct yourself as a director in various merger and acquisition situations.

Friedlander: So you're about seven years out of law school, and you pretty much were the lead lawyer for the Pritzkers.

Sparks: Correct

Friedlander: And you... So in the case, you weren't really working with another law firm. It was basically you at Morris Nichols defending the Pritzkers in this case?

Sparks: [00:05:10] That's right. And the Pritzkers had relied on in house counsel, by a man by the name of Hank Handelsman, who was somebody I had known from his associate days at Wachtell Lipton and had moved over to work for the Pritzkers. So he basically was the person who was on the other side of Trans Union while all this was being negotiated. And to the extent that I consulted with anybody, he was my contact.

Friedlander: Ok. And just to round out the cast of characters in this case, it was yourself, the Pritzkers, Bob Payon at Potter, Anderson and Corron for the directors of Trans Union...

Sparks: Correct

Friedlander: And Bill Prickett from the Prickett Jones firm on the plaintiffs' side.

Sparks: Right. And then there was one other case that doesn't get a lot of mention when we focus on the Delaware side of this. But there was a companion federal securities law case called Ridings v. Pritzker pending in the U.S. District Court in Illinois and Sidley and Austin was representing the Pritzker interest in that case.

Friedlander: But it was basically just the Delaware firms and you three as the principles that were really in this litigation from the beginning to the end running that show?

Sparks: Correct

Friedlander: Why don't we just talk about the Trans Union board, again, just to get a sense of how things were. I think about half the board was insider's, half were outsiders. Can you just tell me who was on the board and your perception of it?

Sparks: [00:06:42] So and some of this perception is formed with the benefit of history. But if you think about what a board of a major corporation looks like today and you think about this board, you'll pretty quickly understand that we were at the end of what we call a different age. There were five insiders and five outsiders. By the time literally a year later when the Delaware Supreme Court decided the Unocal case and made a big deal about the fact that you weren't going to get the benefit of the Unocal test, only getting the benefit of the business judgement rule if you acted reasonably in relation to the threat posed, unless you had a majority of independent directors, you were just on the verge of having it, in effect, becoming unacceptable in a corporate governing sense, to not have an independent board. And this was a split board. It was not in what we would call today an independent board.

Friedlander: Well let's keep it as a fall of 1980. Was that unusual? Or what was your perception of let's say the government of that perspective?

Sparks: [00:07:51] At that time my perception would not have been that it was unusual at the time, but I think there was enough going on by that time that you could sense that it might have been preferable to have an independent board. There was a growing role for outside directors, but we hadn't completely gotten there yet. And so we were sort of in a transition period.

Friedlander: Ok, so tell me about, you have five insiders.

Sparks: [00:08:36] Yeah, and you have five outsiders.

Friedlander: Tell us about the outsiders.

Sparks: Well the outsiders were all very accomplished people. They were all, I think every one of them had been a CEO somewhere. And pretty much a CEO in the Chicago area. So it was a CEO of Swift, a CEO of Railway Express, the CEO of US Gypsum and CEO of IC Industries. That IC used to stand for Illinois Central. So these were all people who knew each other, sat on each other's boards, and it was particularly in that time, something that seemed to be true of the Chicago area. There was more of this sort of, I don't know if inbreeding was the right word, but there was more of CEO sittings on other CEO's board in the same community out of the Chicago area than would have been the case in New York or Los Angeles or Houston or some of the other corporate centers at the time.

Friedlander: So among the outsiders how well would you say they knew each other or interacted?

Sparks: I think they knew each other really well. And most of them had been on this board for some period of time. Which as you read the case, was part of the defense, that they knew this company really well.

Friedlander: Ok. Now perhaps famously, an aspect of the case, there's no investment banker on the scene at the time the merger agreement is signed. Unusual, not unusual?

Sparks: [00:10:04] I don't think even that was--I don't think that was unusual at the time. Even today the Delaware law in theory is you don't have to have an investment banker. In reality you would never do one of these deals today without an investment banker. We hadn't gotten there yet. And so it's another area where you could view us sort of in transition from what I would call the pre-78 law to what we now call the modern takeover law.

Friedlander: Ok. Another aspect of what's going on at the time would include that the outside counsel is obtained the day before the merger agreement is signed.

Sparks: So the other way you need to look at this case is it's a Revlon case before Revlon. If you were going to sell a company after the Revlon decision, which was only a year or so later than the final decision in the Smith case because the case dragged on through the lower court and the Supreme Court for five years, you had to devise procedures designed to get the best price. Clearly part of that would have been hiring a banker to assist in either shopping the company, or at a minimum, to value the company. [00:11:34] But in 1980 none of that was yet appreciated. If you think about the facts in Smith V Van Gorkom, if it would have happened a year after Revlon was decided, it would have been an easy case and there would have been an injunction. Because literally none of the Revlon requirements were met.

Friedlander: Right. That's why I want to talk about, you know, as of the fall of 1980. So the idea of the outside counsel was obtained the day before the merger grant. Did that strike you at the time as a problematic thing?

Sparks: [00:12:11] Yes, I think that was problematic. It certainly, as you read the opinion, became problematic. But it was sort of worse than that as in there was no effective assistance of counsel, whether inside counsel or outside counsel on the Trans Union side up, until the day of the board meeting. So what was brought to the board didn't really have the input in any material way, of any counsel.

Friedlander: Right. Now since we are so far removed from it, I thought I might recite some days of the week here and just to get us a sense of the chronology of how the deal came together.

Sparks: Sure, go ahead.

Friedlander: Obviously there's a long before, there's a long after about different aspects. But in terms of the different aspects between Pritzker and Van Gorkom, I believe we have Van Gorkom proposes something, some kind of arrangement, some kind of a plan to Pritzker on Saturday, September 13th. On Monday, Pritzker expresses interest in this acquisition at the price point suggested by Van Gorkom on that Saturday. On Tuesday and Wednesday there are meetings with two of the insiders, Peterson and Chelberg. Along with Boston Consulting Group who's involved in some meetings with the Pritzker side. On Thursday Mr. Pritzker makes an offer and says we'd like to buy the company for $55 a share. The offer to expire on Sunday. Pritzker has his lawyer, says he's going to have my lawyer draft the agreement, outside counsel Sidley and Austin is retained by Trans Union on Friday. On Friday, Van Gorkom calls a special meeting of the board for Saturday. At that special meeting it's not only the first time the outside directors hear about the transaction, it's also the first time that the insiders on the board hear about the transaction. I think only Chelberg--I don't think Peterson was a director. But the other insiders other than Chelberg, it's the first time they hear about the transaction is on Saturday. Agreement is approved on that Saturday and signed up later that night famously, I guess, at the opera.

Sparks: [00:14:38] And Van Gorkom apparently was chairman of the Chicago opera.

Friedlander: Lyric Opera.

Sparks: Lyric opera. And I guess he had to preside at their opening. And so apparently an agreement was signed at some intermission or spare point there.

Friedlander: So just with those dates, that week in mind, when you're first hearing about the case in December 1980 and about some of these background facts, does that strike you as unusual, problematic, what's your thought about that?

Sparks: When we first heard about the case we had the allegations of the complaint. The allegations of the complaint obviously didn't have all this detail because the plaintiff didn't have all the detail in hand. In fact, the thrust of the complaint was largely different than what it turned out to be in the end. The thrust of the complaint was that the two stockholders that brought it, who were large stakeholders (one of them had 54,000 shares, the other had 30,000 or something like that) had gotten their shares in some sort of tax free exchange. And they were mostly upset about the fact that this was a cash out transaction and they were going to have to pay a substantial amount of money to the government as a result of the cash out. And that was the main thrust of the complaint: that the board didn't think about those of us that have low basis stock, which would have been acquired in connection with acquisitions that Trans Union had made over the acquisition of other companies. [00:16:16] And as time went on the sequence of events began to unfold and the lawyers, the litigating lawyers started to become aware of them. And yes, some of them were deemed troublesome. I can remember getting a call from Mr. Handelsman, when I had one of our other lawyers out defending depositions. I think it was probably before the preliminary injunction. And I got a call suggesting that maybe I ought to come out because maybe these depositions weren't going as well as they should have been going. Now not a lot the acquirer's lawyers can do because the people are being prepared by the acquired, by Bob Pason's firm. And there's not much you can do when facts are the facts. [00:17:23] But that was the first time that I got an inkling that the process here wasn't perfect.

Friedlander: Right. And I guess another key fact I left out is at that September board meeting then there's something of a management revolt saying the managers didn't like the deal once they heard about it.

Sparks: Right. So that's all reported in the opinion where a fellow named Romans who had done a buy out study of some sort, thought that 55 maybe wasn't the best price. It's interesting if you look at the Chancellor's opinion below in the trial, he makes the big point of the fact that maybe Romans didn't want to lose his job. And yet, before the Supreme Court, the Roman's thing takes on a somewhat different light. But yes, there was a management revolt. A lot of people threatened to quit. And there was an amendment fairly soon after the original deal was inked, which gave a broader, what we would today call a go shop concept. [00:18:36] That mollified in house people, at least for the time being.

Friedlander: Now so when you're first hearing about some of these facts over the course of depositions, or second hand or however it is. But pretty early on after the complaint s filed, is that chronology, did you have any basis to compare it to like to say oh that's not the way it should be done, or was it just--

Sparks: So let's step back and think about what the status of the law. What this case ultimately got decided on which was a breach of the duty of care in terms of informing yourself prior to making a decision. Prior to this case I don't believe there were any cases other than a few scattered cases involving banks where directors back in that time were thought to have some higher level of fiduciary duty other than directors of run of the mill manufacturing companies or other type of companies. And there were a few scattered cases, I'm not sure if there were any in Delaware, that talked about gross negligence and the fact that maybe you wouldn't get the business judgement rule if you were grossly negligent in considering a matter. [00:19:51] So this was new ground and while there had been a lot of writing in the 70's about the parameters of the business judgement rule, it just really hadn't ever quite made it to the court system in Delaware yet in terms of the possibility that you might be liable, personally liable for money damages, for something other than the breach of duty of loyalty or bad faith.

Friedlander: Now from a counseling side, was that a part of the practice about how to, you know, how boards should deal with mergers?

Sparks: Certainly not as robustly as it became shortly after this opinion came out.

Friedlander: So as of 1980 do you have a frame of reference to evaluate what the board...

Sparks: Not... A much more diluted frame of reference than you would have had after the opinion. I mean, this opinion actually formed what I would call the modern advice that you give to boards. [00:21:02] Not only in terms of how you ought to structure your board in the first place, so that when these types of things come along you have a majority of outside independent directors. But also the concepts that we today take for granted, that you ought to give as much notice to your board that you can, that you ought to provide them with whatever documentation is available, so that they can have it in front of them, that if necessary you take the time to meet again if there are questions raised that can't immediately be answered. All of those questions, all of those things that we now take for granted in terms of counseling boards and how they should act wasn't part of the culture necessarily. That's not to say that it wasn't followed in some quarters, but it was not as broad as it became after this case.

Friedlander: Now let's just take the concept just in terms of the timing. That someone who can make an offer, a negotiated offer, not a hostile tender offer, that someone can say here's a proposal to buy your company, I'm making an offer on Thursday, it expires on Sunday, and that's the window the board has. Obviously you defended this and said that's fine, but do you have a sense--

Sparks: Well put this in the context of, yes, I do have a sense. I mean a sense formed apart from this experience.

Friedlander: Right, but at the time did you have a sense?

Sparks: [00:22:28] But I wasn't there when that was done. So I was dealing with a set of facts that had already been made. And I can't tell you what I would advise had I been there. I just can't go through that type of exercise. But I can tell you this: if I had a buyer today or in 1987 after this case had come out, or 86 after this opinion had come out, one of the things that I have told buyers would be no, you're asking for it. You cannot push too hard. If you know what the obligations of the seller's board are, you know they need to take the time to make an informed decision. And if you push them to a point where that's literally impossible, then... And think about it. If they had hired an investment banker what kind of advice would you have gotten from an investment banker if you had hired the investment banker the day before the meeting on Saturday? So you would tell a buyer today no, you can't possible press this hard. You have to give the board an opportunity to consider this, to get advice, and you're asking for trouble if you overdo it.

Friedlander: Well back in 1980-81 while it's being litigated, is there an argument, you know, Mr. Prickett is saying you can't do this, this is too sloppy, it's too casual, it's too whatever. Did you have any sense like the strength of any of that kind of claim, you just can't do a deal this way, it's too fast, it's too hurried.

Sparks: [00:24:03] I'm not even sure Mr. Prickett understood as this was evolving exactly where it was going to go. I have a very distinct recollection, and I refreshed myself on it about an hour or two ago by taking a look at the transcript, but I remembered it. At the preliminary injunction hearing... And by this time I think Mr. Prickett, even though he lost the preliminary injunction hearing, of course he lost that and he lost the trial and we had three rearguments before we finally got a decision, and then it was three to two. But I think he had come to begin to know what his case might start to look like after these initial depositions. And he began to sort out who he was going to blame and how he was going to do this. So at the preliminary injunction argument he basically decided that he would go down the path of saying my clients, the Pritzkers, were, I think he used the term, called them Svengalis taking advantage of a tired, old man. That was his characterization of Van Gorkom who was about to retire.

Friedlander: A very foolish man.

Sparks: Very foolish and tired. I don't think he was very tired, but maybe he was foolish, who knows. He was made to look foolish by this opinion. I think that's what you could say, that's fair to say. But Prickett's approach was basically to say that my client was smarter, more sophisticated, and basically took Van Gorkom to the cleaners, which included rushing the thing. It wasn't a conspiracy argument, it was just sort of an overwhelming intellect and smartness on the part of my client that caused Van Gorkham to act the way he did.

Friedlander: Well let's talk about that. Again, just in terms of part of the dynamic of this deal, you had Van Gorkom who's exploring a sale and doing it sort of on his own, pretty much.

Sparks: Pretty much, yeah.

Friedlander: And the person he approaches is Jay Pritzker. And what's the merger and acquisition sophistication on the Pritzker side of the table?

Sparks: [00:26:25] Well the Pritzkers were about as sophisticated in terms of buying companies, putting together a corporate empire through mergers and acquisitions, as anyone at that point in time in our history. I mean, the Pritzkers put together the Hyatt chain of hotels from literally nothing. They had another entity which put together Hyatt International which put together an international chain of Hyatt hotels. They had Trans Union which had been acquiring companies... I'm sorry, they didn't have... They had Moarmon Group which had other companies that were in its umbrella that they had put together. And so this was sort of old hat to the Pritzkers something of this magnitude, and Van Gorkom really hadn't done before. Well they had acquired some smaller companies, they had not done anything like this before.

Friedlander: And did you have a sense that there was a disparity of sophistication and they just corporate talent and advice, you know, on the Pritzker side versus the Trans Union side?

Sparks: Well, I knew Hank Handelsman. Hank was an extremely smart corporate lawyer, trained at Wachtell. So he had a great sense of how to do this. And on the... There was nobody but Van Gorkom on the other side.

Friedlander: So you have this, maybe now you call it exploding offer Thursday to Sunday. And the right for Pritzker side to buy, I think, a million shares of Trans Union, at the then market price.

Sparks: Well they actually bought it for fifty cents more than the market price. The market price was 37.50 and they bought a million shares for 38.

Friedlander: So yeah, they buy at 38, the offer then becomes 55. So if anybody else comes along, they lock in a seventeen million dollar profit.

Sparks: If somebody beats them they lock in a seventeen million dollar profit. Although in today's world I mean, there was no, there really wasn't the type of developed law that we have in terms of lock ups and leg ups as developed as time went on. But this would have been a leg up not a lock up. I mean this was a seventeen million dollar advantage in a six hundred million dollar transaction. [00:29:00] It would not have deterred anybody on its own for coming forward and making another offer.

Friedlander: Ok. I want to talk a couple minutes about some of the things that happened in the corporate world on the corporate practice side while the deal is pending. So--

Sparks: While the deal is pending or while the litigation is pending?

Friedlander: Well a piece of it is while the litigation is pending.

Sparks: Ok. But you're talking now about the relatively narrow period of time between--

Friedlander: September... I'll take it up through January, though. So you enter the scene as a player.

Sparks: The deal closes in February, so yeah, you go ahead.

Friedlander: Ok. So in September there's a merger agreement that's presented to the board on Saturday, and there's an amendment to it that's made--

Sparks: On October 8th.

Friedlander: Well there's an amendment to it that's made that day on Saturday the 20th, which is... and this became the subject of a lot of litigation, that the board didn't like an aspect of the deal, that there was some sort of understanding, that Gorkom had that this deal would be shopped or that it would operate as a floor.

Sparks: So there are a couple of things going on here. The fact finding and the opinion, and I can't quarrel with it, I haven't gone back to see what Van Gorkom's testimony was, but I don't doubt it. Van Gorkom apparently was operating from a false legal premise in one sense. In in my view, it's always been the law that you can't trump a contractual duty with a fiduciary duty. So you can have what we would call today a fiduciary out, but you better write it in your merger agreement. You can't simply say I have fiduciary duties and therefore I can ignore this provision in the merger agreement that says that I can't shop a company--

Friedlander: Or that they have to recommend it to the stockholders?

Sparks: Or have to recommend it to the stockholders or something like that. [00:30:49] So those things, and of course, under common practice today, all those things are part of the contract. And there are, many of them, are heavily negotiated as these deals are done. But back then the law wasn't, it hadn't made it to Van Gorkom. And I know had written an article about this, but maybe I wrote it afterwards, I can't remember. I know I had always had the view, but I don't know if it was shared by everyone, that you cannot trump a contractual duty with a fiduciary one. So Van Gorkom goes into this apparently thinking I can. And the board wants the ability to shop the company. And so there's testimony about the fact that that was something that was agreed upon at the meeting on September 20th. There are two things that then happened. Number one, and I'm not sure that I ever got to the bottom of this. If we had we would have produced it. The actual document that was in the boardroom at the time of the board meeting was lost to the world. I mean, you could draw whatever inferences you could about that. I would certainly have preferred that it had existed and somebody had had it. But whether between Brennan who had only been called in the day before and Handelsman who drafted the agreement, either they just moved onto another draft or just lost it, I have no idea. But that was not helpful. What did happen was that the language, there's language in the--

Friedlander: Let me help you out.

Sparks: I can tell you what it says [laugh]

Friedlander: [laugh]

Friedlander: I can read it.

Sparks: No, let me speak to it. I know what it says. So it starts out, so we can include some context, that within 30 days after execution of this agreement TU--that means Trans Union, will call a meeting with stockholders for the purpose of approving and adopting the merger. And the board of directors shall recommend to the stockholders of Trans Union that they adopt the merger agreement and shall use it to best efforts to obtain the requisite vote therefore. And then there's a semicolon and there's this language: provided however that GL and NTC acknowledge that the board of directors of TU may have a competing fiduciary obligation to the stockholders under certain circumstances. And so one of the issues in the litigation was what in the world did that mean? [00:33:31] Did that mean that you could change your recommendation? Did that mean that you could shop at company? Did that mean if a better offer came along could you take it and under what circumstances? So that language artfully drafted probably by Mr. Handelsman, carried, you know, was meant to carry all sorts of weight. And when that language got into the agreement, whether it was penned in after the director said we want the opportunity to do some of these things, whether it was in the agreement when it was first brought before the board, I don't know the answer to that. Nobody knows the answer to that.

Friedlander: Right. So, and you as a litigator you were trying to make as much out of this as you could, say how could the directors possibly be negligent, they insisted on and got this provision.

Sparks: That language was--

Friedlander: Not as helpful as you would have liked.

Sparks: Not as helpful as you would have liked it to be. I mean, you look at it this today and if you were to deal with these type of concepts, changing your recommendation, being able to terminate if a better offer comes along, being able to shop, under what conditions can you shop? Is it a passive shop? Is it an active go shop? All those things today would take up two pages of a merger agreement. In this case you were trying to cram all of those thoughts or some of those thoughts into four lines that could be read to mean almost anything.

Friedlander: Now you don't even have to move forward to today, because there was a management revolt about this deal, people threatening to quit. And in response to that Van Gorkom goes to Pritzker and says we got to change this, we got to do something to make the deal more open to others. And there's an amendment made to the contract. And a lot of this is in the opinion about the facts of how it got there. Apparently, it didn't get documented until later and it was apparently originally oral. But there was a special meeting on October 8th, Van Gorkom gives an oral discussion before you're involved, and it then becomes some resolutions to amend the agreement to allow the deal to be actively shopped and for Salomon Brothers to be hired to assist.

Sparks: [00:35:51] Right

Friedlander: So even as of then what was, that's part of what you have to work with at the time you're on the scene. What did you think of the October 8th amendment?

Sparks: Well I thought more of it than the Supreme Court ultimately did. I mean, if you're looking at that on its face it certainly seems, you now have an investment banker. The investment banker is going out to validate, try to get a better offer, see if this 55 dollar offer is really what the market demands. My recollection is that the amendment provided that if you could get a better offer and it was a concrete offer that you then had the right in theory to terminate the Pritzker offer. And now we're edging closer to what you might have seen in a 1985 merger agreement with a go shop. I mean it's a go shop provision.

Friedlander: Right. Now, and then, the effect of this... So Solomon Brothers goes out, knocks on doors metaphorically, and there's two parties that express some sort of interest in weird ways and then they go away. KKR has discussions with the management other than Van Gorkom, right? They--

Sparks: They were talking about a leverage buyout, correct.

Friedlander: And Van Gorkam is not going to be a part of it. There's language that he seems to be discouraging it. And that his key president of--the president of the key subsidiary was going to go along with it, was going to be the new top manager. And then the key managed backs out and KKR backs out all within the space of a couple of hours after that manager talks to Van Gorkom.

Sparks: [00:37:50] That's what the opinion says. I frankly don't remember the detail with respect to any of that, but I obviously read the opinion.

Friedlander: Alright. And then there's another party, General Electric Credit Company--

Sparks: Yes

Friedlander: And they're out there and they're talking about making a bid. And this is all in the air, I guess, now you're on board before...

Sparks: So now what I understand from the opinion... and again, there are hundreds of these cases that I did, so I haven't gone back and read depositions or even trial testimony, but the opinion recites what GECC did not want to compete against the Pritzker's. That's... and so only if the Pritzkers agree to an effect withdraw would they come in and make their offer. And the Pritzkers...

Friedlander: They kept their contract.

Sparks: They didn't withdraw. They kept their contract. As they were privileged to do as a contractual matter. And if you step back into 1980 there was still a general sense in the, what I would call the white shoe business community, that we don't do hostile deals, we don't do... We don't do deal jumping and you can't think of a more white shoe company at that time than General Electric and General Electric Credit. [00:39:20] So it's entirely credible that General Electric backs off and says no, we'll pursue a deal but we're not going to compete with the Pritzkers. And I don't think it had anything to do with the Pritzkers, I think it's more of a sense of we're just not going to get into this, something that would be viewed in the business community that we live in as deal jumping or something as time went on and we got to the 90's and the 2000's, all of those inhibitions about hostile deals by major companies, and all of that sort of faded away. But this was a different age. And that was still part of the culture.

Friedlander: Right. Some of that early real time experience, a couple things on the litigation front or on the corporate front. So Prickett's taking a bunch of these dispositions, he's learning a bunch of these facts, he amends his complaint, Trans Union puts out a proxy statement. I think Pricket amends his complaint to say that doesn't tell enough of the story. So there's an amended proxy statement which talks about KKR and General Electric and other things.

Sparks: [00:40:27] Well the proxy statement did more than that. I mean, the proxy statement was an attempt to sort of take all the bad facts that had been developed in the depositions, all the questionable facts... all the things we had been talking about: Van Gorkom and the fact that gave the 55 dollar price to the Pritzkers, that there was only a day or two notice at the board meeting, that they didn't have the merger agreement, all of those things, there was an attempt to put all of that into the proxy statement as well as the failure of the GE deal and the failure of the KKR deal. And the reason for that was, alright, somebody's challenging us. Two reasons for it, number one, we had disclosure claims, both in the Prickett complaint and the Ridings complaint in Illinois. And so how do you beat a disclosure claim? Well you just disclose everything you can think of. And number two, here was a chance for the board to look at it all again with all of these facts that had all been developed on the litigation before them. So the idea was you get all this, you beat the disclosure claim and you also allow the board to exercise its business judgement and take advantage of the case law that allows you to ratify things.

Friedlander: Ok, so you have... just to be clear, there's two separate things. There's a new proxy statement saying there's a lot of new facts, saying the stockholders are fully informed, that's the idea. But the other thing is which maybe, tell me if this is unusual, you have a new board meeting where the board's going to recite all the facts going back from September, or a bunch of the facts, and reapprove the transaction.

Sparks: [00:43:35] Correct, that's what I was just saying, yes.

Friedlander: Yeah. Was this seen as a corrective thing, or what did it... tell me...

Sparks: Well I just did. There were two levels to it. One of them was to give the board... if there was a problem with not having all the facts reasonably available to you before you made a decision, here the board was being given all of those facts. We can talk about why that didn't work in a bit. And secondly, there were disclosure claims that basically were reciting the same facts as being things that the stockholders should have known. For example, the stockholders should have known that the 55 dollar price didn't come from Pritzkers, that it came from Van Gorkom, and that there was no real negotiation about it. So today that would be a material fact. So those, and finally, there was... you want to defeat that claim, and finally, you wanted to be also able to evoke ratification concepts in case you needed to argue that all this related back to October 8th, 10 or to September 20th.

Friedlander: Let's put the stockholder ratification aside. How'd you feel about the board ratification? Was this a bit of a novelty, or did you think this was a well established doctrine going back a long time that you could just have the board--

Sparks: Oh I thought that was a well established concept, that you could present a board under Delaware law, and you still can, with a set of facts and ratify some past action. And if it wasn't a void act, voidable acts are ratifiable under law.

Friedlander: So how good did you feel about the case say at the preliminary injunction phase? You've gone through this exercise of the supplemental proxy statement and this board ratification.

Sparks: [00:44:28] I think they felt very good at the preliminary injunction stage, but primarily because the plaintiff really couldn't show irreparable injury or a balance of hardships that would justify a preliminary injunction. In other words, the choice then, because there were no other deals around, either there's no deal and nobody gets 55 and the market price had been 37.50. Presumably if the deal gets canceled the market price goes back to 37.50 lots of people would hurt. And so you didn't-- you still had the prospect of what actually occurred later on, of a money damage trial down the road. But, and I think the court, that... It's almost like the plaintiff didn't try to show irreparable injury. I mean they had a very bad irreparable injury, balance of hardships case. So I wasn't surprised that we prevailed at the primary injunction case.

Friedlander: But put aside the inequitable injunction law, you made the argument that to enjoin an arms length merger you need to show constructive fraud. You're citing cases going way back. How'd you feel as a matter of substantive law?

Sparks: I think that was a fair argument to make at the time because there really weren't any cases that had found what we would now call gross negligence in terms of finding liability or blocking a deal.

Friedlander: Now, Mr. Prickett he makes the argument.

Sparks: Well then there's one exception. There is the Gimbel Signal case, but even that case didn't really end up being a case that resulted in an injunction—it held that plaintiff was entitled to an injunction, but it also required that the plaintiff put up a bond for the entire amount of the transaction, so that the injunction was in effect a nullity.

Friedlander: Bill Prickett now makes the argument, you're hearing him now make the argument for the first time that Van Gorkom is this very foolish man who went out and whether it was a matter of hubris, thought he could just go out and negotiate a deal with Jay Pritzker. And instead he just got fleeced, you know, in terms of the value the stockholders were receiving.

Sparks: That was his argument.

Friedlander: Yeah. What did you think of that argument as a matter of law or as motivation? What was your conception of motive of what someone should have needed to prove to upset a merger transaction?

Sparks: That question is so abstract. You're asking me to step back at a time when I was trying to make sure we won the injunction. I'm not sure that's what I was thinking.

Friedlander: Well let me put it differently. Did you have a perception of Van Gorkom's motives? Why he did what he did and selling the case, either the preliminary injunction case or say a trial?

Sparks: [00:47:16] Over time... I'm not... I would not completely reject, even though it wasn't part of the case, that it wasn't a duty of loyalty case. I would not completely reject the concept that as Van Gorkom, near retirement age, given his personality, he preferred to cash out and sell the company rather than turn it over to any of the people who were his subordinates. You can never prove that and that's not the way Prickett, even though he made noises about that, sought to prove it. But it's... It's not a completely implausible motivation, if you will.

Friedlander: Can you tell me any impressions you formed about Van Gorkom, just seeing him at the offices or how he ran the company? As far as you can tell?

Sparks: So Van Gorkom was... and again, this is sort of a reflection of the times, but Van Gorkom is what you would have, in my view, thought of as the 1970's imperial CEO. He looked the part... In the offices they had red carpets in the executive suite, and only people who were executive officers of the company and their admins were supposed to walk on those carpets without permission. I can remember one time when I was at the office, and I was summoned by Mr. Van Gorkom with a sort of "Sparks!" My own client wouldn't have done that, but as far as he was concerned I was somehow on the subordinate side of the picture. And I felt like he dealt with his own executives pretty much the same way. [00:49:18] He had been CEO for seventeen years, which was a long time. And successful. But his... the other personality trait that I sort of sensed in him was a very puritanical one. And I don't mean that to be a necessarily negative, it was in some sense a positive one. The opinion suggest that he wasn't enthusiastic about a leveraged buyout. I think he truly believed that leveraged buy outs were inappropriate, as did many other people in the seventies. And it wasn't until the Wells Rich case at the SEC and some other cases that the tide began to turn. But at this point in time leveraged buy outs were not only new but some thought that they were immoral and just not appropriate to have, especially management leveraged buy outs--MBO's. So all of that sort of played into all of this, and it also think I played into the way he treated his board.

Friedlander: What do you mean by that?

Sparks: I think even in this period of time you would have taken your board into confidence and, at minimum, you would have taken other of your senior executives into your confidence. It was somewhat of a one man show.

Friedlander: Now the case doesn't end at the preliminary injunction phase. It goes on a track to trial within a period of months. How'd you feel about... it's one thing to defeat an injunction, cause you said there's no competing bid, all those sort of equitable arguments. What'd you think going to trial phase and now having, not your clients, but their folks and maybe your clients ultimately, responsible in a way.

Sparks: But that's the problem. When it's all said and done, the merger having been done, if there's a problem the person who's going to write the check is going to be my problem. [00:51:23] On the other hand, the defense is being mounted by counsel for the individual defendants.

Friedlander: Now by the way you stayed in [inaudible] cause you end up with substituting into representing the company after the transaction closed, right?

Sparks: Well I stayed involved also because GL wasn't dismissed, I don't believe. And so... But yes, after the... transaction was completed I would have turned in, represented Transunion, but Transunion, and for that matter GL, are really sort of passive entities in this, in the way it developed by the time we got to trial.

Friedlander: Ok. And what did you think on the merits phase going into trial and having to deal with this on the substance and not being able to make the procedural arguments that you could make or the people arguments?

Sparks: Well I mean... and you'll see them in the opinion... And they were good enough to persuade Chancellor Marvel and good enough to persuade two of the five judges in the Supreme Court. So I guess you could say of the six judges, three of them thought we did a pretty good job before they got together with just the wrong three. I thought that we had built a pretty reasonable case in terms of the knowledge and sophistication of the directors who sat at that Saturday board meeting. And [00:52:47] who had recently, very recently before this been subjected to a complete study of the company by the Boston Consulting Group, they understood the business dynamic that would cause this merger to be advisable in the sense that they had a lot of tax law carry forwards. They didn't have enough operating income to take full advantage of them, and that in a sort of perverse way was causing a burden on their stock. So they couldn't buy companies fast enough and manage them to take care of that problem, so that the idea of selling the company was something that had at least surfaced by the time they had reached that Saturday meeting. And they certainly had a very in depth sense of what this company was like. They were also highly qualified people. Some of them were insiders and highly qualified but the outsiders were very sophisticated people. It wasn't a politically correct board. It wasn't an academic here and...

Friedlander: Well there was one academic, I believe.

Sparks: Well yeah, but he'd also been a CEO of something. So it was in that sense a highly qualified board. And so that plus the fact that they did get the Pritzkers to agree to what we call the October 10 Amendment which was the go shop, which cured a lot of the problems that were around on the 20th, and caused me to believe this was a decent case. And that of course was reinforced by the fact that we got a very favorable opinion from Chancellor Marvel at trial after putting on our witnesses. So I don't think I was, I certainly wasn't surprised that we won at trial. I went into most of my cases thinking I have a pretty good chance of winning, and we won this one. [00:54:48] And so I don't think anybody was alarmed at this--

Friedlander: At the trial stage.

Sparks: At the trial stage.

Friedlander: And Vice Chancellor Marvel had already rules at the preliminary injunction phase in terms of the standard. He said the plaintiffs had failed in his opinion to establish fraud or bad faith in advancing the merger by any of the directors and referred to where there's no indication of fraud or ultra vires conduct the court will not interfere with questions of policy. So this absence of fraud, long before Chancellor Marvel, I'm reading from the preliminary injunction opinion... It's... he's putting a pretty high standard on the plaintiffs, right? Now the plaintiffs brief, when they're presenting the case at the trial phase, they take on directly the question about the business judgement rule. And they cite a couple of law review articles by your partner, Sam Arsht, about when the business rule applies and when it doesn't, and that you need a prerequisite for the business judgement rule is that directors be informed. Any impression of that argument or taking on the business judgement rule and that sort of due care, head on way, in terms of...

Sparks: [00:56:09] It was the only way he could win.

Friedlander: Because there's no loyalty argument, really.

Sparks: There was no loyalty argument. I mean, and as the case went on, I mean it was absolutely clear.

Friedlander: And that argument he maintains all the way through the Supreme Court. So the idea was that the business judgement rule required some level, some greater level of board attention than this got, what... at any point along the way, what'd you think of that, just that basic proposition?

Sparks: Well I think you can see from the strategy that was employed, including the effort in January to in effect bring the board's attention to all of these facts, that certainly the defense lawyers were uncomfortable on standing on what happened on September 20th as being the record. And did want to bring this matter back to the board on multiple occasions to make sure the board was kept apprised of developments as they went forward. And I, you know... I think... And we were concerned about the disclosure claims. And that's why all that was laid out in the proxy statement. And I also think the October 10 sort of opening this thing up to a go shop was significant. And I suppose if there was an area of greatest disappointment in terms of the way the Supreme Court handled it, it was sort of the way the Supreme Court blew that off, I guess is the way I would put it, and said it didn't count.

Friedlander: Now I think there's a line in the briefs in the transitionary phase that says well, maybe speaking to that about the effect of shopping the company, says as we just seen with Conoco, with Dupont, Seagrams, Mobil, all bidding for Conoco, that you know, there's an active market for companies and therefore if you open up the process that should be good enough. Did you think that was sort of basically a winning argument at the time?

Sparks: [00:58:30] I think that was a positive argument, the basic idea, which I think till this day is true, that if you put it out there and somebody's really interested, they're going to find a way to make an offer and push forward.

Friedlander: Right. So some of it is as we saw with the fact that no one showed up--

Sparks: Sort of once you saw the press release, everybody went out there with their pencil calculating what they thought they could pay for it and whether what they thought they could pay for it was less than what the company was really worth and could return.

Friedlander: Right. And this would be their press release as of October, right? Because--

Sparks: Frankly, it might have been the press release as of September, but it certainly was the press release as of October.

Friedlander: Ok. But I'm saying, cause as of September, I believe, the Supreme Court had gone back to check the facts. But that it didn't say anything about we're here to take, to be open to other bids or things of that sort.

Sparks: No, it didn't. But the idea that once a deal was announced that people would look at the deal, investment bankers all over the place would be looking at the deal and sophisticated inhouse corporate, and corporate people would be looking at the deal and asking whether this fit our company and whether there was some way we could top this bid, even if on its face it looked like it was locked up, was something that I think by this time, people understood would happen. And lots of lock ups have turned to be unlocked up when the pressure's put on and the market price for the company, given the next person's indication of interest, exceeds the merger price.

Friedlander: Right. So let's talk about price for a second. I mean, we saw that the two people who expressed the most interest had discussions and ended up not bidding for various reasons. KKR and GE. The other argument you made about price at trial by the plaintiff was well if you look at a discounted cash flow, this company's just worth a lot more, and the cash flow numbers were never disclosed and then this takes us back in time, but you made the argument with a supporting case at the time, the chancery opinion of Weinberger v. UOP. And the Chancery opinion is saying don't look at this discounted cash flow stuff, it's all very highly theoretical and you know, this beta thing, you can't really believe in it. And Vice Chancellor Marvel essentially agreed that.

Sparks: [01:01:05] Well help me a little bit when was Weinberger decided?

Friedlander: Well I believe if we look at the opinion, I believe Chancellor Marvel cites. So the chancery...

Sparks: Well he does cite it in the last page, right. So we have Weinberger v. UOP. So the supreme court in I think 1981, and we're talking 1982 in the trial court opinion. The supreme court comes out in Weinberger. And it basically says that what we had called the block method of evaluation where you would look at historical market values and asset values and liquidation value and you'd give them each a percentage and you'd add it up and you'd come out with some evaluation. The Court basically said that was out of date and that Delaware courts in valuation matters ought to use whatever it is modern investment bankers are using. [01:02:04] In reality, the only thing that modern investment bankers were really using were discounted cash flow methodologies.

Friedlander: And even as of 1980 this argument being made--

Sparks: Certainly as of 1983, when Weinberger was decided, yes that was the... Delaware law changed and all these appraisal cases that used to have this historical look back type of evaluation, that was all gone. And basically people understood that the main method was a discounted cash flow methodology. And what's notable in the opinion, in the trial court, is that apparently Chancellor Marvel didn't buy it. And this was because at trial the parties put on experts dealing, trying to make a point in the Trans Union case, that the discounted cash flow methodology showed that 55 was more than fair and plaintiff put on somebody that showed the discounted cash flow approach was much less than fair. And Marvel says that's not an appropriate method of determining the fair present value of securities here in issue, the present value which would have been arrived at by such method of evaluation fluctuating substantially depending on the discount rate employed. [01:03:35] So by the time TransUnion was decided on appeal, the Supreme Court has just said hey, from now on we ought to be thinking about using the discounted cash flow method, which the Chancellor is looking at the ones, presented to him and saying there are so dependent on the discount rate employed that I don't trust it.

Friedlander: Right. But you're making the argument. I think if we keep it as of that time, you made the post trial argument, Vice Chancellor Marvel went along with it, saying don't pay attention to discounted cash flow.

Sparks: Well I think... Honestly, I can't remember whether it was just the plaintiff or whether both sides put on experts dealing with...

Friedlander: I know the plaintiff did. That's a good question whether the defendants did as well.

Sparks: Yeah, I can't remember if the defendant did as well. My guess is we did. And he is basically saying look, I'm not just going to deal with this and basically saying I don't trust it. Which may be using hindsight of, may have caused some judges on the Supreme--justices on the Supreme Court--to think ill of him in that regard.

Friedlander: One thing Chancellor Marvel says the end of the post trial argument, he says this is the most important case. And was your--did you... Did it feel like an important case at the time when it was being tried and argued in the Court of Chancery?

Sparks: I think by this time, I mean, there had been enough. It's not every case when you go back and you ratify everything that a board did. The actions in January, to make these supplemental disclosures to ratify all of this stuff, that was unusual. And certainly by that time, I don't know if I understood it as an important case, but I understood the seriousness of the case, and I understood the argument that was being made.

Friedlander: [01:05:38] So it goes up to the Delaware Supreme Court, the opinion in the Court of Chancery is early 1980.

Sparks: April 6th, 1982.

Friedlander: Right, ok.

Sparks: I'm sorry, it was submitted April 6th. Decided July 6th, 1982. And then we saw right after that the Chancellor retired, ok?

Friedlander: Now was there ever something about the case you perhaps learned later about Vice Chancellor Marvel?

Sparks: It was Chancellor Marvel.

Friedlander: Ok, he became Chancellor Marvel. Whether he'd read the depositions of the case.

Sparks: Well without ascribing it to any particular Justice, I was told at some point by one of the Justices that one of the important reasons why the case ended up as it did is that the sealed deposition transcripts which were sealed for confidentiality were in sealed envelopes in the court's file and that those sealed envelopes had never been opened. And the inference that was apparently drawn from that is an unhelpful one when you're trying to rely on the very favorable Levitt v. Bouvier standard of review in Delaware, which basically says that if it's a fact finding question as distinguished from a legal question, the Supreme Court won't interfere with it unless it's not the product of a rational decision making, logical decision making process. If the Supreme Court is of the belief that portions of the record that the Supreme Court deemed important were not read by the judge below, then you are obviously at greater risk under that standard of review. And if you read the Supreme Court opinion, then you will see that on a couple of times, without getting into detail, they make it clear that because of the record below, they feel free to do fact finding on their own as distinguished from reviewing the fact finding of the court belowunder the Levitt v. Bouvier standard. [01:08:02]

Friedlander: Alright. And Chancellor Marvel I think, on his basic conclusions as the facts were if you look at the market value of the stock, the business acumen of the board members, the substantial premium.

Sparks: And the shopping, and the unsuccessful shopping.

Friedlander: I don't know if he emphasized that so much, but he said there was no recklessness by the board.

Sparks: That's right. And don't forget what we're looking at here. We're... even today and you're looking at this case, the stock that was trading at the time of the announcement of the merger, 37.50. In the previous six years it had never traded above 41. And the stockholders were getting 55. And it's against that backdrop that all of this happens. And so you've got a premium which the Supreme Court completely ignores because they're into intrinsic value and discounted cash flows, and no discounted cash flow or other intrinsic value analysis was done at the time of the merger, and that's true. They're basically saying well you gotta have that, you gotta at least try, and premium over market plus your knowledge of the way the stock has performed, your knowledge of this tax problem that the company had, the go shop... that doesn't, that's not good enough. You had to know what the intrinsic value was.

Friedlander: Well just, ok, so back again, in the 1980 or even defending it during the litigation, that basic question of stocks trading at 38, someone's making an offer to buy it at 55, not in an era where you're getting offers every other day from anybody else. The offer expires on Sunday, directors are sitting there on Saturday, and the advice from outside counsel to the board, at least reflected by the opinion, well, if you don't take this offer, you'll get sued. [01:10:19] Do you have a feeling about that? Like it should have been an easy decision for the board, just oh you have to say yes?

Sparks: [inaudible] That's not legal advice. That's sort of fact of life advice, you're probably going to get sued no matter what you do. It wasn't as true then as it has been in recent years, but I'm sympathetic with the court being skeptical of that advice. That really isn't legal advice, that just... nor is it directed to what a director ought to be thinking about, which is what's in the best interest of the company, and its stockholders are making a decision, not whether I'm going to get sued or not.

Friedlander: Well maybe just press that a little bit more. Cause we're talking about Chicago. We got the Chicago School and people saying that directors should just be passive. Was there any credence, do you think, to someone to make an offer to buy my company at 55 and it's trading at 38. I should just say yes.

Sparks: Well more so than there was after Unocal and Revlon and all these things transpired over this really compact period of time. Part of the lesson there is that you can't be passive. So one of the things that gets into the record here is well, your decision is really to let the stockholders decide. And that's just one of the principles that Smith v. Van Gorkom shot down. It's no, directors are not passive, directors have an obligation to pass on this. And you can't pass on it without a recommendation, so you have to declare its advisability using the language of 251(b). [01:12:06] And all of those things are imbedded in this opinion. So there were some fundamental legal misapprehensions that appeared to be around in the thinking of some of those who were part of the September 20 meeting, perhaps innocently. But one of them is you can approve a merger agreement without necessarily recommending it and just let the shareholders decide. And I think we discussed a couple of the other ones. The idea that a fiduciary duty can trump a contractual obligation with a third party, you can invoke your fiduciary duty and somehow avoid a commitment that you had made in the contract that was wrong. And then you can ask yourself, well, if there had been... if counsel had been retained even a week earlier to help out with this, maybe people would have been told that that was wrong. But neither in house counsel nor outside council were consulted before the day of the board meeting. Or before the day of the board meeting. So you'll never know the answer to those questions.

Friedlander: Now the case basically stays on appeal for two years, or more than two years. I think the first argument in the Delaware supreme court is on February 24th, 1983. And then the motion for reargument after the decision is February 18th, 1985. So for two years... and the world's changing.

Sparks: Very very very rapidly.

Friedlander: In a way not favorable to your side.

Sparks: In a way not favorable to this case. And frankly I think the judges are thinking about this and they're thinking about it in the context that all the cases that they see coming up next on their docket. And we're only a year away, by the time this is decided, I don't think we're even a year away from Unocal and Grant v. Household. And only two years away from Revlon. So we're, all of these cases became compressed, and this is sort of... this case marks, I think, the first, one of the first real efforts of the Supreme Court to grapple with some of these basic concepts that it then builds on when it gets to Unocal for example.

Friedlander: I'm wondering, so during this 83-85 period while the case is on appeal, do you remember how you thought of it.

Sparks: I'm going to be really candid with you. [01:14:36] During this period from like 1983-1987 or 1988, maybe even a little past that, I was doing four or five of these cases at a time. And I would tend to the case that needed tended to, but I didn't have a lot of time to think about the one I wasn't working on. And some of the ones that I was working on were involved in developing some of these same standards. And so I represented Unocal, I represented Revlon. I was... and other parties at the same time that we're doing these types of things. So yeah, I think as time went on and you began to see some of the literature that was coming out and you began to work on some of these problems, that this case... which by the time it was decided, five years later was... it's almost like you were living in a different age by that time.

Friedlander: Well let me cross examine on that point a little bit because from the perspective of your client, who ultimately had to pay 25 million dollars in a settlement or deal, funded.

Sparks: It wasn't quite that bad.

Friedlander: Oh, I'm sorry, you're right because there was insurance.

Sparks: There was some insurance.

Friedlander: Did you think that you know, Pritzker indirectly and the directors directly were, did you feel like wow, these guys are really at risk for a money judgement here, that you know, this is something that you gotta worry about.

Sparks: Well when you... my recollection is, and you probably got it, I haven't gone back and looked at this specifically. But my recollection is we had an argument, an oral argument among a panel of--

Friedlander: Three on February 24th. Then there's an argument en banc on May 16, 1983. There's an order from the Delaware Supreme Court on March 30, 1984. So ten months later an order saying we want supplemental briefing and supplemental argument on certain key questions. And then the next oral argument is June 11, 1984.

Sparks: So under Delaware practice as it then existed [01:16:47] when you made an argument to a three judge panel and you're called back for a reargument en banc, under the rules of the court at that time, that meant that at least one of the judges was against you. So it was at that point, you were dealing with a 2-1 case and you didn't know if you had the two or if you had the one. And from that point on there isn't any question that you're worried about the case. And then to have multiple rearguments en banc and to have this huge amount of time between these arguments, you know that something's going on and that a lot of things are being discussed and mulled over and you're not confident about how it's going to come out. You cannot be at the same level of confidence that you were when all that started.

Friedlander: Were there ever any settlement discussions or talk about whether to engage in settlement discussions?

Sparks: I don't remember. I just don't remember. I don't think so but I don't remember. And if there were, I wasn't at the center of them, I don't think. I just don't remember that.

Friedlander: [01:17:58] At the Supreme Court, Bill Prickett is again taking on directly the business judgement rule and saying, citing all of the old questions saying what the judgement rule means, citing these Sam Arsht articles about how the business judgement rule works. And he has this long footnote where he says it just can't be that board directors can approve a merger in this way so quickly. And I guess... and then you had to come in for some questioning about that, how the board decision making went. Some tough questioning by Justice Moore.

Sparks: Was it of me or was it of Mr. Payson? Because at this time the Supreme Court was tired of hearing of me. I represent the buyer here and the focus now was solidly on these directors. My clients had basically been dismissed. And I think at one point, and it may have been on another case, but there was one of these cases that happened about this time where I was in a similar position and the court basically told me to sit down because they didn't want to hear from me.

Friedlander: Yeah, you're right. I guess Bob Payson had to deal with the brunt of it. I think it was the second argument, May 83, Justice Moore says now it doesn't speak well in my opinion for a CEO and chairman of the board to say he doesn't trust his board, wouldn't tell them, was fearful it was going to get out on the street. That was in the record. And Payson says well Mr. Van Gorkom was concerned about leaks, and Justice Moore says don't you think directors are going to be viewed with such cynicism there really is something very wrong here and maybe the business judgement rule shouldn't apply. But it seems to me that's a terribly cynical bit of testimony. And he says, talking about selling the whole company, don't you think there's something the board ought to know about? I guess pretty strong signals from him that he's not happy about how the record looks at least as of September 20th.

Sparks: [01:20:07] I think that's right.

Friedlander: Yeah. You know, one thing... something that appears very late in the briefing, in the supplemental briefing, the... the Pricket firm's brief, their supplemental brief has an extended quote from the business lawyer article by Marty Lipton from 1979. And there's a subsection of that article. I think the article is Takeovers in the Boardroom. Subsection What Directors Should Do? And he just block quotes that whole section of the article, like a page and a half in his brief. And I was just...

Sparks: Well you see that's part of the story of how by the time this case finally got decided the legal landscape was well on its way to change. There are other cases getting decided in this period also. And it didn't all just happen overnight with Smith v. Van Gorkom decision. The practice was evolving. The role of the lawyer in the boardroom, the role of the investment banker in the boardroom, all of these things were undergoing a revolutionary change in this period from roughly 78-88. And so by the time this case got decided you were in a different legal atmosphere then you were at the time of the merger. And Marty Lipton, who was along with Joe Flom, who was sort of on the other side of a lot of these cases, was perhaps the most prominent government spokesperson in terms of how you'd be doing these things. And there was in the country, people were reading what he did and there were other cases frankly, that I... One I can recall very distinctly that I truly felt was influenced by the fact that Marty was vocal about the status of the Delaware law and how it needed to be more deferential to directors, and if they followed certain processes. [01:22:34] So we were in a dynamic dynamic period.

Friedlander: Now what did you think of the analogy between say this friendly buyout offer and tender offers? I know you made this argument in front of Chancellor Marvel and you said something along the lines of you know, smart people, smart directors, the world moves fast, and you just gotta be ready, nothing is unusual about this ultimatum and you just, people just have to be able to deal with it.

Sparks: Well that was a decent argument then and it's still a decent argument.

Friedlander: Yeah, well it gets to the analogy that is if you talk about takeovers of the boardroom, if you're confronted with a hostile tender offer, you have 20 days to respond. And this is when maybe you have three or four at a time, you're assembling your bankers and your lawyers and the board [inaudible] at least I got 20 days, right?

Sparks: At one point it was 10 and then it became 20. But yes.

Friedlander: And here you have the Delaware Supreme Court and the courts dealing with two days or one day depending on the person. Or maybe a week or maybe they put themselves in this position.

Sparks: So it's not a whole lot different than some of the time pressures you felt in these other cases. Now you can say the Pritzkers' excuse was we want to announce this before the opening of the stock market in London.

Friedlander: So it wasn't the Asian markets back then, it was before the English markets opened.

Sparks: I don't think there were any Asian markets or at least none anymore cared about them.
Friedlander: Yeah. But it had to be Sunday evening in any event.

Sparks: But yeah. And so you sort of ask yourself today, well, why, because somebody's going to leak it? What's so magical about that? And could the board have pushed back? And these are all questions, they're rhetorical. Could they have? Maybe they could have. But of course if they pushed back and Pritzker didn't agree with it, then the deal would go away. And then of course their lawyers tell them if the deal goes away maybe you'll get sued. So I mean, we tend to look back at these things sort of as academics, but there's nothing--this board was not put in an easy position. [01:24:55]

Friedlander: Ok, well let's just talk about the opinion. Cause just a little bit, I'm thinking actually the dissent to 3-2 decision, and Justice McNeilly, in one paragraph he uses a couple of colloquialisms that go right to the point we were just discussing. He says directors' of this caliber are not folks ordinarily taken in by the fast shuffle. And then later in the second paragraph he says these men in this corporate world they operate on what's called the fast track, you know? So that's just, we've got to move at the speed of business, right? And in a way that's become the dissenting view. The directors filed a motion for reargument that's rather long and rather direct, where it starts off by saying this opinion has shocked the corporate world with its unprecedented holding. And just looking back at something, and said the decision by the Delaware Supreme Court got referenced in Time

Magazine, you know, when it came out. So even before that motion for reargument, this is a big deal.

Sparks: It was a big deal. And the idea that honest directors of this caliber could be personally liable based on a court's finding that they had been negligent or grossly negligent was a wake up call to corporate America.

Friedlander: I just wanted to mention in the gross negligence, this is something that's just more focused on I think questioning both sides about to get both sides to agree that gross negligence was the standard. So there wasn't, even though he had all these other phrases about badges of fraud and gross and palpable overreaching,

Sparks: [01:26:44] My recollection is that we were fighting seriously against the concept of gross negligence, assured better than simple negligence. And what's the difference between gross negligence and recklessness? And to this day I don't think I'm quite sure. Maybe one has a little more seienteo in it than the other. But it really was an effort on our part to convince the court that these guys had sufficient facts to make an informed decision, certainly by the end of the game. And maybe even at the beginning.

Friedlander: Ok. Now you say you're focused on the cases that are before you at the time. So when the decision comes out, do you remember what your thinking was? Like this was a travesty or not a surprise, or what?

Sparks: I think I was disappointed, but I don't remember going into some huge funk about it. I mean, you knew that something was up, and you were either going to win this by a hair or you were going to lose it by a hair. And we ended up losing it by a hair. And so it was sort of on to what happens next. And don't forget, this case hadn't been revised after the decision on the merits. This case would have gone on. It was remanded for a determination of damages. So we're talking about all of this stuff, and it still wasn't clear that $55 a share wasn't a fair price. You could have, I mean in Weinberger v. UOP, for example, a few years before, we had gone through all of this stuff with all of these important rulings about special committees and the like. And then when the case was finally litigated in terms of damages it was a dollar a share and it was only seven million dollar case. [01:28:42] So this case had a way to go. And so you didn't view it as a--you viewed it certainly as a negative development, but you didn't know what it meant in terms of monetary damage.

Friedlander: Ok so the decision comes out in February, the reargument's rejected, and it's settled and the settlement hearing is in October of 1985. And I believe you were involved in some level or maybe a great level, in the settlement.

Sparks: I was involved at a great level in the settlement.

Friedlander: Tell me about some of the factors about what happened--

Sparks: Well let me tell you what I remember. [01:29:26] I don't remember the back and forth or exactly how we arrived at the ultimate settlement price which was 23 million dollars, ok?

Friedlander: Ok

Sparks: But I do remember the fact that we weren't just settling this case, but we were also settling the Ridings v. Pritzker case which was moving forward in Chicago which was a disclosure case. It had some of its own problems which I won't go into, but they were sort of different than these problems. And there was ten million dollars of D&O insurance.

Friedlander: By the way, the deal was 690 million.

Sparks: 690. So we're talking about 23 on top of 690.

Friedlander: 23.5

Sparks: Yeah, I don't remember how much that is per share, but it's, you know, somewhere... Nobody ever thought this was more than a 65 dollar case. Always the question was it 55 or is it 65 or is it somewhere in the middle? Although I'm sure you could have found an investment banker with an appropriate multiple that could have come up and said it was 75, and you probably could have found one that said it was 45. [01:30:40]

Friedlander: Right. And when you say 55-65, Romans was the CFO. He came up with some study at the time.

Sparks: At the time, that said 55-65. Right, exactly. So one of the things I just remember very clearly was I was assigned to go up to D'Amato and Lynch, which was the insurer for the directors and officers. By this time... we owned the company. And my job was to persuade them to hand me a check for ten million dollars, which was the total amount of the D&O insurance that was available. And I had this great speech for them. I maybe even started to make it, and it went like this: you know, there are lots of outs in D&O [01:31:34] policies, but there's no out for this. There are outs for breaches to the duty of loyalty, conflicts of interest and the like. But this is a pure gross negligence case, and the Supreme Court says that there's no bad faith or duty of loyalty involved. I said this is the D&O insurers' nightmare. And somewhere in the middle of that speech the guy reaches into his desk and hands me a check for ten million dollars. And I get on what was then the Metro liner and I come back home. So that was an easy part of the case. The other 13 million raised an interesting indemnification question. The Delaware indemnification statute for those who aren't completely familiar with it, basically says that you can indemnify somebody, a director, if he or she reasonably believed that their actions were taken in the best interest of the corporation. And the interesting question here with this type of case was you could certainly look at the Supreme Court's opinion and say well, the Supreme Court basically said that they were ill advised, that they didn't reasonably make a judgement.

Friedlander: Or grossly negligently.

Sparks: Right. So how do you match that up with our statue and what was at stake was whether or not the company indemnified the directors or whether the Pritzkers, who in effect owned the company, said no, you don't meet the standard and we litigated on for many more years while the individual directors personal estates were at risk. [01:33:19] And in the end Jay Pritzker stepped up and the company which he wholly owned paid the 13 million dollars, but required that the individual defendants all make substantial charitable contributions. I don't know if they matched 13 million dollars—but they made substantial contributions to charities of Mr. Pritzker's choice.

Friedlander: And there's some to that choice, isn't there?

Sparks: Well, yeah. I mean, it was... there was a bit of an undercurrent in the case in that this was what we could have been, what called a complete WASP board. And the Pritzkers are of course of the Jewish faith, and they would not have been the same charities that the individuals would have given to had they had the choice.

Friedlander: So Pritzker chose Jewish charities? Yeah. Any questions from the group?

Voice: [01:34:25 inaudible] There was something I wanted to visit, and it's a question of the chronology of UOP. The Supreme UOP opinion didn't come down until February of 83. [inaudible]

Sparks: So when I said that things were developing rapidly, by the time the decision came out in the Delaware Supreme Court, between the time of the trial and that, the Supreme Court had clearly spoken in favor of the concept of determining intrinsic value and the use of the discounted cash flow method as being appropriate in that context and had discarded the block method. That had not happened at the time the Chancellor had decided his opinion. And that's just one example the court looking back and saying well, wait a minute, this is out of line with our existing jurisprudence even though it wasn't at the time of the chancellor's decision.

Friedlander: Right. And a theme of Prickett's argument, ever since the very beginning, I think ever since the amended complaint when he first came upon this in discovery was the key undisclosed fact was that this company was, as he called it, an engine of cash. It had tremendous cash flow and those cash flows are nowhere disclosed. And so that feeds into, I suppose, how, just how people in the market could assess how much to bid or how to properly value the company.

Sparks: [01:36:027] Yeah, I don't remember that argument by him. I'm a little surprised to hear that, because they would have had financials that would have been disclosed on a regular basis.

Friedlander: But not projected cash flows, right?

Sparks: Not projected cash flows, but you certainly would have been able to glean with some sophistication from the existing financials that the company was a quote cash cow close quote.

Friedlander: Right, ok. And indeed, the original Van Gorkom suggestion to Pritzker about 55, it was all originally designed by Van Gorkom working with some assistance from the controller of the company, the accountant. Could you pay off in five years, from the cash flows of the company, the debt you would need to pay 55 dollars a share?

Sparks: Right, and they weren't showing they could pay off all of it, but 60 million over 5 years.

Friedlander: Right. So it's like an LBO analysis without quite a DCF analysis?

Sparks: Right, exactly right. Ok, should we turn off the--

Friedlander: No, we have a question.

Sparks: Oh we have a question.

Voice: [inaudible] talked about a missing document, the original merger agreement. What was that like, just searching for it? Do you think it would have made a difference if you found it?

Sparks: I don't know. I mean, as I mentioned, I would have prefered that it had been found. I don't know, what, it was just a mystery throughout the entire case. It wasn't like people didn't look for it.

Friedlander: Right. Well one thing that's in the motion for reargument, I don't know if you recall this... which was a Potter Anderson individual director drafted document, was reading in the opinion about the missing original merger agreement. And they talk about well drafts sometimes get thrown away, things happen to drafts. And it says after the trial of this case various of the merger agreements were produced to plaintiffs counsel. See exhibit A here, too. So they took a bunch of these drafts and just appended them to the motion for reargument. And which shows there was at least just one draft which expressly prohibited the disclosure of proprietary information, and which did not contain the competing fiduciary obligation language. So there was a draft found, at least for the motion. [01:38:55] But after trial and presented to the Delaware supreme court after trial.

Sparks: I don't remember. At that point... Well I'm sure I had an opportunity quickly to look at whatever it was Potter Anderson was preparing. I didn't have any role in the motion for reargument. I didn't have any standing in the motion of reargument. At that point there was, because of this indemnification issue there was actually a little bit of adversity in terms of some of these issues. Where they found those and why they weren't found beforehand, I don't know.

Friedlander: But let history record that the motion for reargument references a bunch of drafts were produced after trial.

Female voice: Well, Mr. Sparks, you mention this conception that some saw leveraged buyouts as immoral, and I was curious about that and how widespread that view was in corporate circles and is it possible that any of the justices that heard this case were sympathetic to that?

Sparks: [01:39:59] I sort of think... certainly by the time this case was decided, I think that concept had gone away. That was really a 70's concept, and it had two aspects to it as I recall. Number one, and I can remember encountering this in a case I did in the New York Supreme Court in the mid 70's. There was certainly a concept that something was wrong about taking out the public stockholders, especially if you took them out at a time when it wasn't a good time to take them out. In other words, if the public stockholders suffered along with the company and saw just before the company turned the corner that you bought them out in a forced transaction, that was problematic. There was a lot of academic and other concern about that. And the second part particularly applies to management buy outs and whether it's ever appropriate for the fiduciaries to in effect deal with their stockholders that way and buy out their own stockholders. That makes it even more sensitive. I'm sure Van Gorkom was not alone in what appears to have been his antipathy. I call it kind of tyrannical, but that's probably not quite fair. [01:41:35] I don't think he was alone in thinking that was not the kind of business practice that he wanted to end his career with. By the time we got to 1985, we were getting into a much more rough and tumble world and I don't think people were thinking as much about this.

Friedlander: But when you go back to the beginning of some of the documents and the beginning of the case, Chancellor Marvel in his initial opinion says this is what's known as a leveraged buyout or CFO Roman saying I just read about a leveraged buy out that's some new media article.

Sparks: These were relatively new concepts, and there was... I mean, the whole concept of going private was a early to mid seventies creation. So I mean it seems completely alien to us now, but these were concepts that were still being developed and still being thought about as we moved into the next decade.

Friedlander: But from a generational perspective, it's something Van Gorkom had very conflicting feelings about. But the younger generation management they were interested, right?

Sparks: I think that's a very astute observation. The younger people were into the eighties and Van Gorkom was a creature of the 60s and the 70s. And I think that's a fair statement.

Male Voice: You mentioned Van Gorkom's impending retirement. And the court calls that quote noteworthy. It doesn't explicitly say how that factored into their decision. So I have a two part question: how do you think that affected their decision, and secondly, how should it have, given as a matter of law, this wasn't a duty of loyalty case?

Sparks: Well, perhaps the chief justice can speak to this better than I can, but there is a sense that when judges have decided a case in a particular way that some judges then tend to pile on everything that they can put in there to justify what they were doing. And that would be I think more the case in a 3-2 decision than otherwise. Logically in terms of how they decided the case and where they otherwise say this is not a loyalty question, [01:44:03] that statement has no relevance. As far as the atmosphere of the case is concerned, all the way from the time of the preliminary injunction, Bill Prickett was making a point of this, which cast a kind of cloud. A sort of diluted interested management member cloud over this whole picture. And perhaps without staking his theory on it, it also suggests a bit of a motive for all of this. He would have never won on that, I don't believe. But it was atmospherically in the case.

Friedlander: There's a discrepancy I think in a couple of the opinions where one of them says that KKR approached management in August of 1980, so before this came about, about a leveraged buyout. Another one where Roman's is quoted as saying well I read about leveraged buy outs in a media article.

Sparks: Well I know that Romans in effect negotiated with KKR after October 10th or so, in that period. I don't remember the fact that they were around before that.

Friedlander: And Prickett's argument, his initial argument, I think even at the preliminary injunction stage was that Van Gorkom feared getting ousted by the young Turks at management. But you can imagine if KKR or similar shops are sniffing around, the people they'd be talking to would be the Romans of the world, the younger CFO, not the guy about to retire.

Sparks: I took that ousted business basically to mean he wanted to go out. He wanted to go out as the top dog and not be, not go out as having been ousted by these subordinates.

Friedlander: There's a suggestion and then there's perhaps good factual basis for even a finding that Van Gorkom discouraged one of his chief lieutenants from going along with KKR and that's what scotched the whole KKR bid.

Sparks: Well that's certainly what you would glean from the inference that was drawn in the majority opinion where it was, they had this deal and then Pritzker met with him and then he withdrew within an hour or something afterwards, the fella who was the head of the railcar leasing business which was the most profitable and biggest business that Trans Union had.

Friedlander: Right. So if a leveraged buyout happens. And KKR was talking 60 dollars a share. So it'd be another five dollars a share for everybody, including Van Gorkom himself. But his, whether it's moral antipathy or resentment of the youngers or whatever, he wasn't not interested in another five dollars a share from KKR.

Sparks: Again, that was sort of in the recitation of all the reasons that the Supreme Court could think of to justify its opinion. That was one of the inferences making a conclusion about it, it was there. [01:47:14] I don't, I have no idea what happened there.

Friedlander: But I think it is fair to say looking back again because of the era it was. Was that in lieu of having a board dynamic you know, that's now required after Van Gorkom. That so much turns on the mentality of the CEO and how he chose to go about things and who informed and when and what he was thinking?

Sparks: Well when you think about today with our special committee jurisprudence, lead directors, sometimes separate chairs of boards. We have empowered in this type of situations, our boards, substantially beyond the power that the boards had back in this era. And I think a modern board, well advised, and facing a situation like this with a CEO near retirement and arguably wanting to cash out upon retirement, would much more control the situation than was going on here. This was basically a passive board. And it was one of the last gasps of what I would call the imperial CEO model.

Friedlander: Right, but certainly someone who, he would rather cash out for 55 than cash out for 39, right? At the time he was retiring.

Sparks: Oh yeah. Or perhaps leave it to people that he didn't necessarily feel were as good as he was in terms of running the company.

Friedlander: Any other questions?

Male voice: Was there real evaluation from Pritzker? And could that have been used somehow to justify a fair price in the--

Sparks: [01:49:08] First place, I don't think it would have... Well, if hypothetically if there was some Pritzker document that he had done that showed that if a value of 70 or something and that was discovered, that certainly might have been relevant. I don't recall there being anything like that. I don't think the Pritzkers had to do evaluations. I think they were able to look pretty quickly at these numbers and be able to decide whether they did or didn't want to do this deal.

Friedlander: Yeah, between Saturday and Monday they figured out they wanted to do the deal at 55.

Sparks: So I'm sure there was a document or something like that, but to my recollection there wasn't anything like that in the Pritzker's files.

Friedlander: Well, thank you, I think that takes us to the end of the story.

Sparks: Takes us to the end of the story.

[01:50:05 end of file]