Case: Smith Vs Van Gorkom
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FRIEDLANDER: Good afternoon, Mike. We're here to go back in a time machine and talk about the origins of Smith Van Gorkom. I believe it was December 1980. Can you tell me about... I know you're at Prickett Jones now and you were at Prickett Jones then. Can you just tell me about what the Prickett Jones firm was like in terms of stockholder litigation, or you know, where this fit in?

HANRAHAN: Well you may remember that in 1979 Rod Ward and a number of others had left the firm.

FRIEDLANDER: Steve Rothschild, I think.

HANRAHAN: Steve Rothschild, Ed Welch and John Small who later came back and had left and gone over to Skadden Arps. So we had a corporate litigation group that Bill Prickett and Jim Holt built. And then John Small when we came back and myself and I guess Vern Proctor was very new then. And we did not do a lot of stockholder cases but there were some that would come along and it was an area that particularly Bill Prickett had developed real interest in. In December of 1980 I think it was December 17th, actually, Bill Prickett was contacted by some lawyers from the Shanker Win firm in Texas who represented Alden Smith who had been a stockholder or Trans Union. [00:01:55] And that's how the case began for us. The initial complaint was filed only two days later on December 19th. And there are some interesting claims in that complaint. And a lot of that stem from the fact that a large part of the complaint was drafted by the Texas lawyers who really weren't that familiar with Delaware practice.

FRIEDLANDER: And also Alden Smith, he had I guess a unique stockholder position in the case and it served maybe a unique interest in what bothered him about this transaction, the sale of Trans Union.

HANRAHAN: There was a heavy focus on tax treatment because he had gotten his stock in Trans Union in a stock for stock merger where his company had been acquired. And so one of the major effects for him was that because it was a fifty-five dollar cash prize, he was going to have a huge tax bill. So that was an early focus of the case, but really later on it shifted to more the due care aspect and disclosure aspect.

FRIEDLANDER: Right. Well let's take it I guess from one Plaintiffs lawyer to another. Let's start at the foundational question who paid for this case? Alden Smith had a lot of shares. Was this an hourly case or a contingent case?

HANRAHAN: There was and frankly this isn't from memory, it's from looking at some things in the file. Alden Smith paid some money toward the case I think initially, but it was really fairly nominal and largely it was handled on a contingent basis.

FRIEDLANDER: [00:03:38] So how was that decision made to sort of take the case? Who was it up to and any conception of how long the case would last? It went on for about five years as it turns out.

HANRAHAN: Well, I think Bill Prickett almost never met a case that he didn't like. So Bill was very enthused from the outset. And I think was probably the primary person. He was consulting with John Small and Jim Holzman and somewhat with me as well. But I think Bill was really the primary driver. And initially the focus was on trying to join the transaction. And there were as you know expedited proceedings. And back then it was a simpler time. Bill walked the papers up the street on the 19th of December and got the chancellor to order for expedited proceedings. And it was only a few days later that Gil Sparks and Bob Pacen surfaced as Delaware counsel for the defendants. And then it went forward from there. And when you had someone as tenacious as Bill, and he believed in this case from the outset. So we went through the preliminary injunction and that was unsuccessful. [00:05:02] And then very promptly Bill pushed the case to trial. Trial actually occurred in 1981. And he was unsuccessful after trial. And then it went up to the supreme court, and it was up in the supreme court, I checked back, it was 2 years and 7 months. And so that's where a lot of the case, and there were I think seven briefs filed, there were three oral arguments including a court entering an order for supplemental questions that they wanted the parties to address. And that was a major part of the case. It was in the supreme court a very very long time. And then after the supreme court's opinion it actually settled within about five, six months. But the case wasn't over with the supreme court decision. It was going to go back and we were preparing for trial on damages. And that would have been an interesting further chapter. But ultimately the case was resolved.

FRIEDLANDER: Right. And you said Bill was very strong on the merits from the get go?

HANRAHAN: Oh Bill always believed that the law is that which is boldly asserted and stoutly maintained. And Bill was very much a trial lawyer and I think what really intrigued him was not so much the corporate law principles as the factual record and how in his view, how badly the board had performed particularly in the first meeting and then the

second meeting. [00:06:55] And then you know, with the help of Bob Pacen and Gil Sparks, they try to go back and fix it. And I think they could at least to the majority of the supreme court, they never fixed it to the satisfaction of the court, and certainly not to Bill's satisfaction.

FRIEDLANDER: When you say boldly asserted and stoutly maintained, so part of what we know about Bill's thoughts about the case were an article that he wrote after it was all over. I think it was a special issue of the Delaware Journal of Corporate Law in 1985 just devoted to Trans Union which of course was a landmark historic case, controversial. And what's funny to go back and to read that article, is Bill Prickett saying he was just adamant that the law was clear from the get go, there was no new law to be made. He says in Trans Union the court relied entirely on existing Delaware law and posing the duty of care on Delaware directors, there was no necessity of getting the court to reverse or modify existing Delaware case law. And then to your point about the facts, he says the challenge was to build a factual record that the directors had been grossly negligent. And I think one thing we see from the beginning of the court papers is this insistence that there's a basic principle of law that his whole case is going to be tied to.

HANRAHAN: [00:08:26] Yeah and it's interesting when you go back and look at these things. Cause a lot of the defense was based on these directors are people who had been CEO's of companies and they were solid citizens. And Van Gorkom had been at the company for 25 years. And so the emphasis on that side was well, all you had to have was a collection of very qualified directors and some managers who were experienced with the company. But the specific issue was the decision to sell the company. And that was not something that Van Gorkom had never done a transaction of this size, and the others really hadn't. And I think Bill's view was that you had to not just be competent, you actually had to bring that competence to bear on the particular decision and have the information that was necessary. You know, for example, he felt that Van Gorkom may have known a lot about the company, but he really didn't know what the company was worth as a whole, which was a different thing than knowing the individual parts.

FRIEDLANDER: Well I wonder if we can go back to the very beginning because I suppose when the case walks in the door, when Mr. Smith and Shanker and folks from Texas first called Bill Prickett, Prickett doesn't know anything about the facts the deal was deliberated over at the board meeting. That comes out at the discovery. So the initial theory was it was a little bit of a mish mash of theories about why this was a problematic transaction, some of which I think was based on Alden Smith's, his personal attack situation.

HANRAHAN: Yeah, and you also have to remember going back to that time the amount of information that was available publicly was very limited. You didn't have an internet,

you didn't have Edgar where you could go and readily look at various FCC filings. Now there were particular FCC filings that had been obtained, and they're referenced in the complaint. But your universe of information starting out was much less than what you'd have in evaluating a case today. And you were much more dependent on getting discovery. And the discovery was much more limited than it would be today. Bill sometimes invented funny documents. But he--

FRIEDLANDER: What do you mean by that?

HANRAHAN: He'd put it into the record in Smith V Van Gorkom, a list of all the documents that had been produced by the Pritzker group. It was like 174 documents. And then Trans Union, and it was like 150 something documents. And that was basically your discovery universe, and then you took depositions. Today of course with electronic discovery you'd have so much more information. And I think it would make it easier to make the case out because you'd have emails with the directors and what have you. So you had to go along [00:12:01] and then try to develop a story much more through depositions than might have been the case today.

FRIEDLANDER: Right. I guess unless you had people that kept their hand written notes, you're really at a disadvantage of what they're thinking contemporaneously.

HANRAHAN: That's right.

FRIEDLANDER: I guess the funny thing about the case is that really sort of boomeranged against the defendant as it turns out because they had trouble digging up the original draft merger agreement that was shown to the board. And so had that been emailed all around obviously that would have been easily preserved.

HANRAHAN: And you don't know how it would have ended up cutting, because there were representations about what that did and didn't contain. Well if you had the actual document then you'd know what it would contain.

FRIEDLANDER: Right. So let's go back to just the very beginning, the original complaint. Alden Smith I think I remember, the defendants raised an issue that he was a guy who had been a short seller of the stock and made a bunch of money and then engaged in some hedging transaction that by which he didn't have to pay taxes. And then he was saying an inappropriate plaintiff because this litigation was just designed to defer his tax liability or something along those lines, and by cashing out he had to pay a lot of tax.

HANRAHAN: Yeah that was one of the contentions. And that was ultimately addressed because a second plaintiff came in. And then I think also what happened is when a federal action was filed in Illinois, the defendants decided they much prefered being in Delaware with chancellor Marbel who denied the injunction than to risk being in Chicago. [00:13:38] So suddenly they became much more willing to agree that Mr. Smith would be an adequate plaintiff. And is turned out he did alright by the class, I think.

FRIEDLANDER: Yeah, I think it was a 25 million dollar settlement. So in terms of the counts, probably the law wasn't very clear about what the counts would be. There would be no count under Revlon, for example, they hadn't sold the company properly. So one of the counts, count 4 is discriminatory tax treatment is what we were just talking about, that some people, including Smith have a low basis in their stock for tax purposes and many stockholders would pay substantial tax liability under this particular transaction if it had been a tax free, as opposed to a tax free opposition. Count 1 for breach of judiciary duty does say under sub part B the defendant, officers, and directors of TUC, Trans Union, have not made an adequate effort to determine the availability of other potential merger partners. And could offer terms more beneficial of the company and the public stockholders. And then the next sentence actually have not made, the officers and directors have not made a diligent effort to obtain a merger on the basis of a tax free exchange of stock. Now I was just wondering, does that bring back any recollection? Was that sort of a tax driven claim or was it a proto kind of Revlon like there must be a better deal out there even if it's a cash deal?

HANRAHAN: Yeah and I think it also came out of a feeling that the board had not really been proactive and had not really tried to get it. The deal came together really quickly and really it was Mr. Van Gorkom and Jay Pritzker who kind of struck the deal at 55. And then they didn't... It's interesting when you read some of the briefing and all that, there's reference to market tests and all this, things that would later develop. But those concepts were really sort of in their infancy at this time. And the other strong case that you had that had a real influence on the claims was ultimately Gimbel and the whole due care concept, that where there was a quick decision and it hadn't been with real care. That rapidly became a focus of the case.

FRIEDLANDER: So you think that's what the due care focus on the case from the get go came from?

HANRAHAN: Yeah

FRIEDLANDER: Ok, so at the time of the initial case, the restoration, the background facts, as you might expect at discovery and without a proxy statement, was the 8K that

was prepared at the time, the merger agreement, the press release, an 8K that came out later, a 13D. And really just about the basics. And so from that we had to frame some of these counts and come up with some counts.

HANRAHAN: Yes

FRIEDLANDER: Now I think you said the discovery started off just about instantaneously. So the initial complaint is December 19th, so just two days after you say Bill Prickett got the call. And then things really start moving fast. A bunch of depositions, a preliminary injunction hearing, the end of the very end of January. There's an amended complaint that's filed after the proxy material comes out and after some depositions had been taken. And that I think was to flesh out what came out to be some key facts of the case.

HANRAHAN: The amended complaint particularly added disclosure claims. And again, disclosure you had had Lynch V Vickers and a few other cases had focused on disclosure more developed than, but it became you know, very quickly a central focus because of the defendants wanted to use a stockholder vote really as a way to try to cure any defects at the board level. And so then the question becomes well is it going to be an informed stockholder vote. The initial proxy statement I think was about 75 pages long. And I thought oh. But when you looked at it there was about 13 pages of disclosure and then the rest of it was just financial statements. So disclosure was a bit different in those days. And they ended up then putting out a fairly detailed supplemental disclosure., And then there was a big issue of whether that was timely or not. And again, you gotta take that in the context of the time. It wasn't a situation where if you filed the disclosure document with the FCC it would be readily and immediately available to all stockholders. So you had a real question about well was there enough time for the stockholders to receive and act on the information?

FRIEDLANDER: [00:19:22] Well one theme I guess is picked up is really the amended complaint in terms of the limited disclosure available. There seemed to be no concept of stockholders should be able, to say, perform their own DCF and get a sense of what this company is worth. I look at the original, first paragraph in a lengthy disclosure claim, the amended complaint says that testimony of senior management, that the great strength of Trans Union was its cash flow. Van Gorkom himself described the company as a cash cow, a senior vice president said the company is an engine of cash. But nowhere in the proxy statement would you have any sense of what the cash flow of the company is.

HANRAHAN: Right, well, you have to remember back in those days we were still, evaluation was still under the Delaware block method. It really wasn't until Weinberger in '83, I think, that discounted cash flow was accepted as a valid method of evaluation. And

Duff and Phelps, who was the expert in Weinberger, they were also the expert in Smith V Van Gorkom, different person, Ken Bornstein in Weinberger and Milton Meigs in Smith V Van Gorkom. But the whole DCF concept was still very new to the Delaware courts in that time. And there was defendants in cases would dismiss it as speculative and what have you. Of course, the reality was that was the type of analysis that people were actually using in deciding whether to sell or buy a company.

FRIEDLANDER: Right. And it's where the facts of this case really bore out. Van Gorkom approaches Pritzker with this idea of if you can buy the company, this sort of early generation leverage buy out, you can repay the debt in five years based on the cash flow of the projected future cash flow. So that becomes a focus of the case. And then what you were saying Vice Chancellor Marbel does disregard the DCF as a, I think he refers to it as unproven and speculative, which then it could become an appeal issue because Weinberger was decided in the interim. [00:22:00] And of course another sort of fact of the case being known for is the absence of a fairness opinion, so you didn't have any kind of investment bank advising the board about any kind of DCF.

HANRAHAN: Yeah I think they brought Solomon in afterwards as part of sort of trying to put a band aid on the situation and do it sort of after the fact. But at the time the board made the decision there really wasn't any kind of analysis there. There had been, management had done a little bit of work in terms of what they thought you might be able to do with a management leveraged buy out. But... and that just wasn't always done back then. It was really after Smith V Van Gorkom that now it'd be rare for a sizable company to do a transaction without having some sort of fairness analysis and fairness opinion.

FRIEDLANDER: Right. So let's get back to January 1981. So when Duff and Phelps was brought in by an affidavit or there's some sort of expert position of some sort, their deposition was taken, and conjunction with a preliminary injunction briefing. It's really intrigued to look back at some of the briefs you dug up in where the plaintiffs brief in support of the motion of preliminary injunction, the conclusion's on page 105, and this is served on January 29th, 1981. Then there's a plaintiff's supplemental memorandum that, with some attachments, that's filed on January 30th, 1981. And that's a conclusion on page 34 of that. And then there's a post hearing memorandum, you know, not as substantial but several pages long. So it was a major effort.

HANRAHAN: Oh there was huge effort, and of course it was done at a time where you didn't have the kind of word processing capabilities that you have now. So it was a lot of work, and it particularly at this stage, it was very much an all hands on deck effort. And they put it together and but the outcome was very disappointing.

FRIEDLANDER: Well before we get to the outcome, just putting in effort. The names on the brief, Bill Prickett, Jim Small, Mike Hanneram, Vern Proctor, Jim Palapas in the opening brief. And I think that's the one place your name appears in the significant block.

HANRAHAN: It's interesting. I was in and out of the case at various points. And we were litigating other things and I know I think Jim Holzman and I were very heavily involved in a patent case of all things. And so there are times when Jim and I were involved, times when we weren't. The cast of characters shifted, but the one constant was always Bill Prickett. And he was really the driver of the case and just devoted enormous energy to it, and just believed in the case from the beginning.

FRIEDLANDER: And so the case becomes known as a duty of care case. And going back to what you're saying about the law is that which is boldly asserted and stoutly maintained. We see right from this beginning of the breach of this injunction, this taking straight aim at this is not a business judgement rule case because there's a lack of due care. And the thing that strikes me is the principal legal authority that's being relied on in the brief is a couple of [00:26:05 inaudible] articles by Sam Arsht about the business judgement rule that had just come out. One is Arsch [00:26:13 inaudible] directors, officers, and key employees, 1979, and then see also an Arsch article in the law review in 1980, where Sam Arsht from Morris Nichols talks about a precondition of applying the business judgment rule, is that the directors must exercise due care to ascertain the relevance of the available facts before voting to authorize the transaction.

HANRAHAN: I believe that contribution probably came from John Small. John is a great transactional lawyer, didn't like to think of himself as a litigator, but he was actually pretty good at it when he did it. And I think he was the... I'm guessing Bill Prickett probably hadn't read those articles.

FRIEDLANDER: But it is interesting because it's kind of like old school law in a sense, but it's not relying so much on cases as a first principle of law laid out in a couple of law review articles by a leading practitioner at the time.

HANRAHAN: There weren't that many cases then, that's the interesting thing is. Opinions tended to be short, because the court didn't have great resources either. So you had unreported opinions and things but not nearly as many and they were not nearly as detailed. So you didn't have as much to go on.

FRIEDLANDER: One thing that strikes me looking at the briefs is how many of the opinions that were relied upon by the parties were issued decades earlier. Even now we look back to the 80's cases or the 90's cases, but here you're looking back to the 30's or

40's or some stray principle of law which even sounds archaic, things like constructive fraud or stuff like that about what it takes to prove a case.

HANRAHAN: There just wasn't that much available.

FRIEDLANDER: But from Bill Prickett's perspective the law was, he says anybody who thinks this is a radical decision or represents any change at all in the law of Delaware is a mischaracterization reflecting ignorance of what the existing Delaware law was and still is, as he put in his article in 1985.

HANRAHAN: [00:28:24] And you should have seen the first draft of the article.

FRIEDLANDER: How so?

HANRAHAN: Well it's one thing I did do is I spent a fair amount of time cleaning up that article. It was even more strident in its original form. And cited very little law, so I added some cases and what have you. But Bill really had the view that people were blowing the effect of the case out of proportion. It was a case where you had a somewhat unique set of facts, and that got developed very well in depositions and what have you. And that to him was the key to it, was the factual record. And then it was just you had the concept of due care, and you applied that to this factual record. And you know, if a board conducted itself in the same manner today, I think you'd have the same result. I think boards are a lot more careful these days and get a lot better advice, and often get advice from Delaware lawyers early on and not only after a suit gets filed.

FRIEDLANDER: Yeah, I think people talk about sort of Van Gorkom as the investment banker's employment act or something of that sort. But in a sense of maybe it's also the Delaware lawyers full employment act, because one thing that Prickett points out in his article which was the facts is that no Delaware lawyer was on hand in initiating this transaction or advising the board about this transaction.

HANRAHAN: Yep. And I think even then when you had two of the best Delaware corporate lawyers involved and they tried to fix it. But I think they could never sort of overcome the problem that it had been messed up initially. And any effort to fix it sort of suffers from a credibility problem because oh now these same directors are claiming oh now we've looked at it more carefully and we come to the same conclusion. But it's a little hard to convince a court that they're not just basically covering for themselves.

FRIEDLANDER: Right. And just to be clear what we're talking about is Bob Pazen for Potter Anderson on behalf of the directors, Gil Sparks on behalf of Jay Pritzker or the

buyer had this legal strategy that came about I guess in January of 1981 to have the board to sort of reaffirm or have like this whole ratification defense, or board ratification defense and then a stockholder ratification defense saying well going back we sort of, this all makes sense to us, you know?

HANRAHAN: [00:31:30] Yeah there was a Yeah, there was a, I think it was a mutual, the Western Union case where that type of strategy had worked. So they were relying on that to try to fix things afterwards.

FRIEDLANDER: Ok. One thing that really comes through, well, I mean, from the preliminary injunction oral argument is really striking to get a sense of unorthodox or I think a better word would be theatrical and dramatic Bill Prickett was is how he couched his oral argument where he, the way he made it right from the get go is he was saying I was trying to figure out what to say to the court this morning when a stockholder called me up last night and asked me about the case, so I told him about it. And then the argument is just dozens and dozens of pages, and I told him the facts of the case and he asked me this and I answered that. And the stockholder had all these follow up questions and how can that be how can that be? It reads like kind of like a play.

HANRAHAN: Bill could tell a good story and you know, in a way ultimately that's what was successful is the story of how did Van Gorkom and Pritzker reach a deal, what did the board know and not know? And Bill struck one of, in one of the supreme court arguments he starts out by telling the court he's not going to discuss. And the chief justice Herrmann says so like Cicero you're telling us what you're not going to say. And then Bill then responds, now like Plato I will tell you what I am going to argue. So that was just Bill.

FRIEDLANDER: I think Bill Marbel had some sort of classical illusions looking back at these arguments.

HANRAHAN: Oh the chancellor was again, these were sort of renaissance men and they would make these classical references and you know, Bill was always entertaining. And he just had a series of phrases, and could also just come up with things on the spot.

FRIEDLANDER: Right, there's one colloquial, I don't have it at my fingertips, but where the justice asks Prickett at oral argument, well have you ever thought about this? And Bill Prickett said I scarcely think about anything else. Like whether ratification could take effect or something like that. But trying to get a sense of the time and how it was back then, going back to the preliminary injunction hearing, Gil Sparks argues this is an arm's length merger, we've gone through all the cases, and we haven't found any case where the merger has been joined, and the burden of proof is to show constructive fraud by the

plaintiffs. And the plaintiffs have their duty of care argument and all the facts about the care, and Perkins telling this factual story, and there's a question of whether is there, what the roles are and how to characterize Van Gorkom who he says is a very foolish man. They say they think he was taking advantage of by Pritzker. And just trying to put, trying to tell a story about how this deal came about and why it's wrong.

HANRAHAN: [00:35:35] Yeah and you know, it's consistent with the idea that Jay Pritzker knew how to buy companies. He'd done it numerous times before. But Van Gorkom compared to him was an amateur.

FRIEDLANDER: He says about Van Gorkom, I don't suggest that he's a villain, I suggest that he's a very foolish man who does things so hastily and so ill conceived panicking as he obviously did, that the young Turks were going to replace the old man who had dominated the company so long. So he had this, this motivational story, but it's not a classic self-interest story as applied to Van Gorkom.

HANRAHAN: Well sometimes stories recognized people may be motivated by other than financial factors. And Bill always stressed that Van Gorkom is coming to the end of the line and that this sale of the company would be sort of the crowning accomplishment of his career. But the real question was it the right time to sell this company? And he kind of made that decision pretty much on his own.

FRIEDLANDER: Right. So what's interesting about this law is it's before 102 b7. To come up with a story about motivation some respect, but it's all in support of this duty of care theory that you could apply to not just the preliminary injunction stage but all the way through trial and for liability.

HANRAHAN: Well 102 b7 basically came out of Smith V Van Gorkom. It was a reaction to it, and you know, the idea that... because after the supreme court's opinion came out, then the question was were these directors going to be personally liable. There was an effort to get the corporate defendants out, and you had a question of would there be sufficient insurance, and would the directors have sufficient assets to satisfy any judgement. [00:37:47] Ultimately, Bill concluded that if you were going to settle the case you really had to settle it with Jay Pritzker.

FRIEDLANDER: Let's talk about that because I guess one of the great aspects of the case or maybe this luring of the case, is well, Bill Prickett developed this relationship with Pritzker, is that the case? Talk about that.

HANRAHAN: The two really came to like each other, and you know, remember that when Bill went out to Chicago one time and I think it was for depositions in the case and Jay Pritzker asked him where he was staying, and Mr. Pritzker wasn't really impressed with the talents, next time you come out let me know and I'll get you a room. He was just a very gracious man, ultimately one of the things that may have helped is that after trial Bill actually dismissed Pritzker from the case below the opinions are Smith V Pritzker.

FRIEDLANDER: Well the complaint is Smith V Pritzker, right.

HANRAHAN: And Bill's feeling was at the end of the day with all of discovery and all that Pritzker was just a very smart businessman who saw an opportunity and he took it. [00:39:19] And I think that may have been helpful later on when he was the guy you had to settle with. And Jay Pritzker was always very complimentary of Bill, and he'd say oh you took this nothing case and you turned it into, you convinced the majority of the Delaware supreme court to go along with you. And then they, it ended up that for years thereafter Bill and the Prickett firm ended up doing work for Jay Pritzker, and that rose out of the relationship that developed from Smith V Van Gorkom. And it was basically the two of them who really settled the case. Initially there was a meeting with some of the directors, and then Bill really concluded that if you're going to get this case settled you needed to settle it with Jay Pritzker. But he was concerned because Mr. Pritzker had some heart problems, and Jay was actually concerned that well will he be around? So there was a real interesting getting a settlement done. And back then Bill was insistent of driving to New York all the time. And one of the things I ran across is New Jersey Turnpike receipt from, I remember going up with Bill and Jim Holzman and Bill had this old diesel Mercedes, and he kept cans of diesel fuel in the car and driving up and back. By the time we got back Jim Holzman and I decided we were not going on another trip like that because we both had headaches from the fumes. But ultimately they went forth and I think the ultimate settlement was I think 23.5 million. And then there were issues even then with the suit that had been filed out in Chicago. Those folks suddenly woke up and they thought their suit had brought this about somehow, even though they had been stayed and sat idle for years. And so they had to be looped into the process. And that was also interesting because the Chicago lawyer was Art Susman. And while Art wasn't that popular with us at that moment, we ended up later doing cases with Art and developing a great friendship with him. Law can make strange bedfellows, I guess it it.

FRIEDLANDER: Well it's the virtue of winning ultimately, right? Or settling, or winning a liability and being able to settle it. So that process was so long from losing the preliminary injunction hearing at the beginning of January and in February 1981, losing a trial, and then being all the supplemental briefing and the multiple arguments in the Delaware

supreme court that takes you to 1985. Was there ever a lack of confidence in the case or feeling like oh my gosh what have we gotten ourselves into?

HANRAHAN: Well, you know, with Bill it's always full speed ahead so he had confidence in the case. [00:42:55] And you know, you either give up or you play it out. And Bill you know, in both Smith V Van Gorkom, but also Weinberger V UOP, you know, which followed a similar course.

[00:43:19 crosstalk]

HANRAHAN: Well somewhat but I think the supreme court's opinion about Weinberger came out in '83. And while that was a different context it certainly gave some hope. And I think there were some trends developing. But you didn't know. And then there were other things where the initial hearing wasn't in front of the chief justice Herman, justice Moore, and justice McNeally. And then it went on Bonk. And so you had a sense that at least there was probably one justice who may not agree with the chancellor's opinion. So you didn't lose hope entirely, but still you felt like you were swimming up stream.

FRIEDLANDER: Right. So was there any feeling about how the case if it went to trial, you know, in terms of what was expected to be some giant pay day or how the prospects for success lurked, if it looked if you took it to trial on damages?

HANRAHAN: No, I mean first of all you were going to be taking it to trial in front of the same chancellor who had denied the motion for preliminary injunction. So I think there was some sense that if you were going to win the case you'd probably need to win it in the supreme court. And you know, again, it was a different time. I think you didn't have a lot of successful stockholder side cases where you were saying oh well they'll be some great award. Yeah the law was very tough and you hadn't succeeded at the preliminary injunction level, and I think the focus was much more on just trying to win the case, not expecting there was going to be some great payoff because it's pretty dicey as to whether you were going to end up with nothing.

FRIEDLANDER: Right, I sort of hesitate to say it, but I think the attorneys fee payouts were as a smaller percentage than we see now. There was not this concept of getting a whole third necessarily.

HANRAHAN: [00:45:50] Yeah. I think it was, it varied from case to case. Sometimes I don't think the court was quite as rigid as I think it can be now. On the other hand you also have to consider the size of the settlements, even though they were very large for the time, they were also somewhat smaller than by today's standards. So there are a lot

of factors for what takes into account for what percentage of the funds it would award. And I think as I recollect in Spiff, you also had the issue of the Chicago lawyers had to get some piece of the fee in order to get them to go along with the settlement. So you know, ultimately I don't, I suppose I don't ever recall Bill being dissatisfied with the--I think we were treated very fairly by Chancellor Berger who ultimately heard the fee request.

FRIEDLANDER: Right. So in the [00:47:14 inaudible] this was a happy result all around and as you said a new plaintiff relationship or co-counsel relationship and then a new relationship with Pritzker as well.

HANRAHAN: And we also did a lot of work with the Shank Irwin firm in the future as well. So it was kind of interesting that out of that case there grew a lot of different relationships.

FRIEDLANDER: Mike, I'm wondering if we can sort of talk about the judicial personalities? I remember once being said when I was starting out that Bill Prickett wouldn't even care if he won at the chancery level because he would try to win on appeal. And I was just wondering if you go back in time to 1980-1985, would that ever be a fair characterization or what you thought about the odds or what he thought of the odds before the different judges? Whether Marbel at chancery or the supreme court?

HANRAHAN: Well at the chancery level I think there were sort of fewer cases so you maybe had less of a read. But certainly you knew Chancellor Marbel very well, he'd been on the bench a long time, and I don't know that you would have had, initially, a strong reaction of oh the chancellor won't rule in our favor or he will rule in our favor. Obviously after he decided the preliminary injunction motion adversely to the plaintiff's, you know, going into the trial I think Bill very much felt like well you had to go to trial and make your record, but that probably you were not going to prevail at that level. And that doesn't mean that you know, he didn't feel that the you know, the chancellor was treating him unfairly or anything. You know, the chancellor was well known to us, and he was always such a gracious man. And at the time of Smith V Pritzker, I was still a very young lawyer and I just remember the chancellor was always very kind to me when as a young lawyer I would make mistakes in his court or do something that was incorrect. And if he corrected me it was done gently. He was a very fair man. So I think you thought you'd get the chancellor's fair decision but certainly after the preliminary injunction outcome we didn't have a lot of confidence that you were going to come out of trail successfully, and so you were off to the supreme court. [00:50:16] And of course that turned out to be a very interesting process as well, with you know, the court hearing it initially with a panel and then on bonk. And then having supplemental questions and then having another argument. And the transcripts are really pretty interesting the way the different justices.

FRIEDLANDER: Well justice Moore certainly had some harsh questioning of the defense council and seemed aghast of some aspects of how this transaction happened. The idea, for instance, I remember reading how keeping secret Van Gorkom kept secret the negotiations from his fellow directors and senior management until it was presented to the board that here's the deal that I want to see approved.
HANRAHAN: No, justice Moore could be very aggressive in his questioning and it could vary from argument to argument. And I remember Bill Prickett doing an argument in the supreme court and Justice Moore going after him. And it was about as tough a questioning I've ever. I think a lesser lawyer would have just sort of shrunk away from the podium and left. Bill stood there and took it and I think that was something you just learned from the court, that sometimes they'd go after you. And it still happens today. And there's aggressive questioning. And I think particularly senior lawyers feel like that comes with the territory, and certainly that I think that was Bill's approach to it.
FRIEDLANDER: So do you have any other feels about the panel or the expanded group or whether, you know?
HANRAHAN: I frankly don't recall. You know, it is 30 something years ago.
FRIEDLANDER: Mike, I was wondering if you could tell me anything about the appeal strategy that Bill Prickett had?
HANRAHAN: [00:52:24] Well the thing I remember most is that Bill felt that the chancellor had not gotten certain facts correct and that one of his strategies on appeal was to first try to convince the supreme court that there really were factual errors in the chancellor's post trial opinion. And that was the first argument in the appeal brief was on factual matters, which is a little bit unusual as an appeals strategy. And then it went into the due care argument and the other arguments. And that was, again, I think stemmed from Bill's belief that the facts should really drive the case. And if you saw the facts correctly then you'd reach the conclusion that the board had not made an informed and careful judgement.
FRIEDLANDER: Well thank you, Mike, I think that's all I have.
[00:53:49 end of audio]