Joseph A. Rosenthal Interview
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McNally: I'm here today with Joe Rosenthal. Joe was the dean of the plaintiffs' lawyers in Delaware for, I can't remember how many years. Certainly from the time I started in 1972 for thirty years.

Rosenthal: You're too generous.

McNally: Well you were a--

Rosenthal: I'm not that old.

McNally: Well you're possibly the most well respected plaintiff's lawyer of your era and certainly my era. I want to start--

Rosenthal: Thank you.

McNally: You're welcome.

Rosenthal: Can I have a transcript please?

McNally: You were a member of the corporation law council of the Delaware state bar association. I don't remember when you started but I know you were a member in the 1980's.

Rosenthal: Yes, it was about twenty years I served.

McNally: And what was--did you have a distinct role as the representative of the plaintiffs in that council?

Rosenthal: Well, I spoke out on behalf of the plaintiffs and the concerns of shareholders and investors. I mean there were others at the plaintiffs' bar that did the same kind of work, so I don't claim I was alone in that. And so I'm not sure that dean is quite the proper

word. But you know, I just want to make sure that to the extent I could I was able to protect the interests of shareholders and investors as legislation was considered or proposed legislation was considered by the council. [00:02:11]

McNally: And the council's role in connection with the corporation law was what, how would you describe it?

Rosenthal: We drafted and recommended proposed legislation to the bar association as a whole, and then that proposal if carried would go to the legislature and I'm pleased to say that the legislature respected the recommendations of the council and the bar and was very, how shall I put it, let me say welcomed our contribution the development of Delaware corporation law.

McNally: Alright. Now let's turn to what was going on in the 1980's. We know that in the 1980's there were a lot of famous court cases decided such as Smith v. Van Gorkom in 1985 and Revlon I think in probably in 1986 or so. At that particular period of time, can you describe for us what was the general atmosphere with respect to the concerns of directors of Delaware corporations in light of this increased amount of litigation over their roles?

Rosenthal: Well, you must understand as a well known plaintiff's lawyer I was hardly privy to the inner sanctum of corporate boards. So I'm not sure that I can separate fact from fiction. By that I mean there were a lot of rumors circulating around but what was in reality affecting them, I don't know. I can only say that there were events happening which focused attention of directors on the travails of being directors of a Delaware corporation which they ran. It's interesting, I think. I think I'm right, the first class action where a class notice went out on sort of a large scale was I believe in 1982.

McNally: Really?

Rosenthal: [00:04:39] I think so, yes. Was it Lynch vs. Vickers? One of those. It was an oil and gas company. Yeah, Vickers Oil, I think.

McNally: I remember the name of the case, I can't tell you the name of the--

Rosenthal: I do believe that's the first one that utilized Rule 23 and the class action device, or too, that really magnified the potential liability that directors faced. So that was 1982 if I'm right. And then you get to Smith Van Gorkom which imposed liability on directors for what most would say was mere negligence. Of course a director would say that. They

were a bit worried, but Smith Van Gorkom really galvanized corporate America's attention to what was going on in the corporate jurisprudence.

McNally: Yeah, and I know from looking at the minutes of the council there was also some concern about the decline in director and officer liability insurance, do you recall that?

Rosenthal: Oh yes. I mean we talked about that. How real it was, as I say, I'm not in a position to separate fact from fiction, and you know, I often wondered if a lot of that was an attempt by the insurance industry to make life easier for itself and were there real concerns, I'm not sure. Because in my view in derivative litigation the, I won't say the death knell, but certainly derivative litigation was on the decline side starting with Lewis vs. Aronson. And its progeny which made demand on directors so acutely important in derivative litigation and derivative litigation really fell off. [00:06:56] So it was really the class action that worried directors and their insurers. And the insurers probably--I won't say probably--in all likelihood, were aware that the possibility of large recoveries were there and they better do something about it. So that was their concern and they try to do something about it. And corporate America did the same thing. Again, is it fact or fiction that they were worried that they wouldn't be able to get qualified directors, independent directors, to serve on boards out of concern that they wouldn't be insured.

McNally: Well certainly we know that in 1986 various proposals were made and we both looked at the minutes of the corporate council. And I notice that in April 13 of 1986 there's a set of minutes where various proposals were suggested including a cap on liability. Do you recall much about the discussions concerning the desirability of a cap on liability for directors?

Rosenthal: I don't. I mean the minutes refreshed me. But I think that was shot down pretty readily as I recall. Because if we put a cap on, some other state would put a lower cap, and then pretty soon it would be a zero cap, and it's that kind of thinking, the parade of horribles argument, it just would not help matters, it would make it worse in fact. These other states would come in and try to compete with Delaware as you know, what happens in the corporate world has a major effect on Delaware's finances and that was a concern, more than just the bar.

McNally: Well as a plaintiff’s lawyer did you have a predisposition against caps?

Rosenthal: [00:09:14] Well the trial lawyers association--

McNally: That's what I was thinking of,

Rosenthal: … certainly didn't like them at all because they were worried about malpractice cases-- they kept malpractice, proposed malpractice legislation, there was always somebody would say we have to put a cap on liability.

McNally: And I know from the minutes there were suggestions at this particular point in history that the indemnification provisions of the Delaware corporation law be broadened if I can use that word to permit more indemnification of directors, even when they had been held liable for acts in that could be character as grossly negligent. Do you recall the reaction to that?

Rosenthal: Well my recollection is, and this goes back thirty years, and although it's been refreshed by looking at the minutes, uh, I can't say that it was that refreshed. It seemed to confirm my own view that – and I'm not trying to pat anyone on the back -- but I think the council took a very responsible attitude toward all the issues that came before it, but particularly this one, and they just didn't want Delaware to appear to abandon all rights of corporation, shareholders, investors, by just saying to directors, you know, you do whatever you please and we'll indemnify you and you have the circularity problem that we're all aware of.

McNally: Circularity meaning there would be a damage award in favor of a corporation, which the corporation wouldn't have to ultimately pay?

Rosenthal: That's correct.

McNally: All right, well we know from looking at the minutes that somewhere along the way, I think it was former chief judge Veasey, chief justice Veasey, then a prominent corporate lawyer suggested that perhaps an amendment to section 102 of the general corporation code could deal with exculpation of directors. Do you recall all of that?

Rosenthal: [00:11:45] After I read the minutes. I mean it happened, I know it happened, but do I recall specifics, that's hard to say.

McNally: Well I want to turn to something that I know you do recall because you were so responsible for the way this thing turned out. If we turn to the minutes of April 23, 1986, in particular I'd like you to look at page 4 of those minutes.

Rosenthal: [pause] Yes, I got it in front of me.

McNally: All right. And now if you go down. The minutes begin at the top with a discussion that the new 102(b)(7) should extend only to directors and not to officers. And then the

minutes begin to discuss the language to be proposed for 102(b)(7). And there is a discussion of reckless conduct versus gross negligence, and then if I can put it this way, you pipe up and say, Mr. Rosenthal continued. You see that line?

Rosenthal: Yes

McNally: And it goes on to say that you had suggested use of a ALI formulation that precludes a limitation on liability for conscious regard, disregard, etc. You see that sentence there?

Rosenthal: Yep

McNally: And then what I particularly want to focus on though this minutes doesn't say this comes from you, it is my distinct recollection that this comment is your comment, which is that you said that it was not appropriate to exculpate directors for actions that were quote not in good faith close quote. And I recall distinctly that that is a Joe Rosenthal point. [00:14:11] What were you getting at by making that point, which is of course referred to in these minutes?

Rosenthal: Well at that time, although there was some debate about what the state of the duties of directors might be, the law governing the duties of directors, there was plenty of authority for the proposition that there was a triad of duties, loyalty, care, and good faith. And it just seemed to me at the time, it still seems to me right, but I know the supreme court doesn't agree, that as long as that triad was out there, we ought to cover everything except duty of care, strict duty of care. So I suggested, I probably said acts in bad faith at the outset., but then as I said before this interview started, it occurred to me that the litotes formulation of that thought would perhaps be more palatable and that is the phrase we came up with, acts not in good faith, good faith being the opposite of bad faith, and it's the expression of the negative to sort of an understatement of the positive which is bad faith.

McNally: So the idea was that--

Rosenthal: If I said that to everyone's understanding. I didn't use the word the litotes at that time. I assumed everyone was a semantic genius.

McNally: [laughter] That's pretty kind of you when you're talking to me who is pretty didn't know what that word meant until you explained it to me. So let me make sure I got this. The idea was that some violations of the triad of duties such as disloyalty or such as acts not in good faith would be still matters for which directors would be liable.

Rosenthal: That's correct.

McNally: But it would be actions that arguably violated their duty of due care for which they could be protected from liability, provided the stockholders agree. Is that correct?

Rosenthal: Yes, that's correct.

McNally: And from your point of view as I'll just put it to you, the stockholders' lawyer, was it important to you that the stockholders have a point of view or say in exculpating directors for their negligent acts?

Rosenthal: [00:16:58] Yeah, the proposal was to either have it in the certificate, original certificate of incorporation or in a provision in the corporate documents, that the shareholders would vote on and that's the way the proposed legislation was written. If the stockholders wanted it, that's fine. Realistically or pragmatically, that's really not satisfactory if you've got a large corporation and they, so the shareholder approval, back in those days at least. And that may be true beyond those days back in the '80's, you know, shareholders generally did what management, or approved what management proposed. But nonetheless, it was the shareholders saying this is ok. But more generally I think the threat to shareholder interests was somewhat parallel to the threat to corporate interests as well. I mean they should merge together but by that I mean that the healthier corporations, the better if it's able to, the better its board of directors is able to manage the corporation, I think that's in the interests of all shareholders. And so the threat of jeopardizing the ability of corporate boards to manage the affairs of Delaware corporations was really out there. I think largely because of Smith Van Gorkom. And--

McNally: Well, I think from what you say is that while the stockholder approval was something that you advocated, you did see the other side of the argument for the defense bar about the need to have good directors who were not overly concerned about making a mistake.

Rosenthal: [00:19:24] Well...

McNally: Or have I put words in your mouth, which I didn't mean to do?

Rosenthal: No, not at all. Again, pragmatically there were two threats not on the horizon, they were really in the forefront of what was happening in, I call it, corporate America. But that includes legislatures. One was the threat that other states would jump on the problem and make life much easier for corporations and directors to do business in their states.

So if we wanted to retain the primacy of Delaware and not as Professor Cary said, engage in the race to the bottom, we better do something fast. The second thing was there was a considerable movement on the part of corporations to propose their own legislation to the general assembly, which is just an unheard of thing in Delaware. I served on the council for twenty years and that's the only time that threat had enough force to make us really really worried that the corporate council and the whole structure that had been developed, the relationship between the council, the bar association and the legislature, was jeopardized. So there was a lot of interest, but those two - corporations proposing legislation to the general assembly and other states competing - were really the driving forces after Smith Van Gorkom produced sort of the catalyst that set all that in motion.

McNally: Well I know that the amendment to 102(b)(7)--

Rosenthal: Yeah you're going back to the good faith, yeah?

McNally: I'm following up on what you said. I mean, we know that the decision to amend the statute was not without controversy. There were people in the bar association, at least initially, who opposed the proposed amendment. Is that...

Rosenthal: Oh yes, absolutely. I mean the notion that we would exculpate violations of the duty of care really runs contrary to the development of corporate jurisprudence in Delaware and elsewhere. But elsewhere would just soon compete with Delaware and other states and probably without that background of... that we had in Delaware. And they simply were more interested in the financial gain than they were doing the right thing, you know?

McNally: What do you mean by the background? You mean in effort to reach a compromise or what's the right thing to do?

Rosenthal: Yeah, the latter. I mean Delaware corporate law developed over decades and it really, Delaware became as we know, the leader in corporate jurisprudence in this country. And we couldn't possibly have attained that position without paying close attention to good principles of corporate governance. So we had to do something but it still had to be measured and we thought we would do a much better job than the corporations' proposed legislation, the corporation shall remain nameless. [00:23:49] Not that I knew them all, I think there were 23 or 24 who were ganging up on the legislature and lobbying and all that, but there were members of the bar who took a contrary view who still believed that it would be sort of out of character for Delaware to say that a director could violate his duty of care to the corporation and be exculpated from liability. It's hard for me to say it but that's what they decided to do.

McNally: Well the [00:24:33] not in good faith phrase that you coined it did have a certain element of balance to it, wouldn't you agree? That conduct that was not in good faith was still available as a cause of action against the directors who had not acted in good faith?

Rosenthal: Oh yes, I agree. But I think there's a different... Again, if you believed in the triad which at that time a lot of people did, it's a different duty. Why is it a different duty? Well, there are characteristics of the two. I mean if you want to parse them out care versus good faith which good faith smacks a little bit about loyalty. It's probably closer to loyalty than it is to due care.

McNally: Right

Rosenthal: At least that's my view.

McNally: And in fact that's kind of how things kind of evolved eventually, right?

Rosenthal: Yes, absolutely.

McNally: You talked about the triad but the triad, at least in Delaware today, it doesn't exist anymore.

Rosenthal: So I understand.

McNally: Yeah. And it's really just a double duty of loyalty and then the duty of not loyalty, and I forget the other one all of a sudden, help me.

Rosenthal: Care

McNally: Care yes, ok. And those still remain of course, but now loyalty and not in good faith have come to mean the same thing pretty much. Is that where we are?

Rosenthal: That's what the supreme court says.

McNally: [laughter] Have you ever thought about going on the supreme court and complain?

Rosenthal: They have the last word.

McNally: Well I'm sure you could have done that if you had chosen that career path.

Rosenthal: I don't know about that.

McNally: But it's a big jump for you, I understand that. Well, after the proposal was presented to the corporate bar, you recall that there was some opposition particularly from some prominent members of the corporate bar such as Bruce Stargatt and Charles Crompton. You recall that?

Rosenthal: Oh yes.

McNally: You remember how that worked out?

Rosenthal: Well, the corporate section of the bar approved--well, let me go back. The council took those objections into consideration, and so did I. I did not disagree with the objections [00:26:58] But I believed it was very important that we took a pragmatic approach to what seemed to be a serious problem. When I say seemed to be, because again, it's hard for me sitting here today to say what was fact and what was fiction.

McNally: Once a plaintiffs' lawyer always a plaintiffs' lawyer. Good for you.

Rosenthal: But I forgot where we were at. But I agreed with the objections, they were well put. We were a bit worried about Bruce because Bruce had a lot of pull with the legislature. And you know, who knows what kind of fight would happen. It eventually happened in section 203 when that was before the legislature, which was a real dogfight. But that's another story.

McNally: Well it always seemed to me that when Bruce Stargatt and Charlie Crompton had concerns that to some degree the fact that you as the, I'll say it again, the dean of the plaintiff's bar, were willing to compromise.

Rosenthal: I was much younger then.

McNally: I know. Well today you still look the same. But the line is shorter that I always thought your support of the legislation was critical to getting people to go along. And I say that and I don't necessarily ask you to agree with that, but I think that's the truth. Because when Joe Rosenthal supported something, from the stockholder's point of view, then it could hardly be deemed to be a sellout or unreasonable. In any event ….

Rosenthal: I probably spoke with my colleagues, not necessarily in Delaware but out of town counsel that we dealt with and in our inner circle and firm. And we all felt that this

was the pragmatic approach. Again, one of the fears was that other states would come in, who might not be as friendly to shareholders and investors as Delaware on other issues, and who knows what we were getting into. [00:29:21] They were just pragmatic reasons, as I said before.

McNally: Well let's close with the thought that you just came up with. I mean back in the 1980's there weren't as many stockholder plaintiffs' lawyers around. And in particular in Delaware there were very very few firms that were representing stockholders. Isn't that true, at least in the '80's?

Rosenthal: Uh, representing stockholders on a regular basis?

McNally: Yes, sir.

Rosenthal: No, I guess not. There were very few in those days, absolutely.

McNally: And so the person, your firm was the leader and you had the most contacts, isn't that fair to say?

Rosenthal: That's fair to say, yes.

McNally: Ok, and so your cont--

Rosenthal: I never took a poll or...

McNally: Oh you're too modest to have done that, I'm sure. But the point I'm trying to make is the fact that people knew that when you had a viewpoint it was a viewpoint that had in fact not been just the viewpoint of Joe Rosenthal, but also of Joe Rosenthal's, as you put it, inner circle.

Rosenthal: Yeah, I suspect that's probably accurate. I mean, I certainly didn't speak for myself in my role on the council. I'd like to say I spoke for the plaintiff's bar and the interests of shareholders and investors. That doesn't mean we didn't have divergent views. But class actions were in the offing. This was going to be a big deal. I think 1985 was I think the Shell case, Shell litigation. You had Weinberger v. UOP. Very very important decisions, and the question was how we could best... I hate to use this phrase again, but I will … protect the interests of shareholders and investors by going on a strongest suit. It's not a bridge game, but you know, I think all of us felt, in part because of Lewis Vs Aronson. And every one I spoken to about Lewis vs. Aronson agrees that it was wrongly decided [00:31:48] but I--

McNally: You had mentioned that 102(b)(7) did not have a dramatic effect on curtailing the stockholder rights in litigation. And why did you feel that way?

Rosenthal: Well I was concerned that it would cut off some. And I think history showed that it really didn't cut off any. I mean it was always thrown in as a defense but it really didn't affect litigation at least from my perspective and what I was able to see on the litigation front. And the reason is, as I said, the direction we were going in the plaintiff's bar was on class actions, mergers and acquisitions and you know, M&A's. And they really were not affected by 102(b)(7) because in those cases, this is one of the reasons, just one of the reasons. In those cases the corporation generally was a real defendant unlike derivative litigation where the corporation was only a nominal defendant. And so you had the parties to the merger agreement itself - not the shareholders, but the parties, the merger agreement - which could also be brought in. So there were a lot of people to sue and to make sure that justice was done without worrying about whether no the directors were to be liable. When I say not worrying about it, not having to wrestle with the procedural problems of trying to impose liability on the directors individually. So it was a whole new ball game. Also the federal cases started to come to the fore. That was a little later but that happened also.

McNally: You mean 10b-5 litigation?

Rosenthal: Yeah, 10b-5 was one of those, section 14. The late great Chancellor Collins Seitz used to say if you could, shareholder litigation was sort of developed in cycles and that if you could predict the next cycle you could do very well. I mean there were stock options, incentive compensation, mutual fund litigation, and on and on it went, and they were all eras when one type of litigation took prominence over others. [00:34:44] and the M&A litigation was really coming to the fore.

McNally: That was the hallmark of the 1980's, I guess.

Rosenthal: Right.

McNally: Ok, well thank you for those additional points.

[00:35:04 end of video]