Case: Disney
Taping Date: June 20th, 2017
Interviewer: Gregory P. Williams, Richards, Layton & Finger, P.A.
Interviewee: E. Norman Veasey, Gordon, Fournaris & Mammarella P.A.
(Former Chief Justice, Delaware Supreme Court)

Williams: We are joined by Chief Justice Veasey who wrote a very important decision in the Disney litigation back in 2000. A reported at 746, a second 244, Brenn V Eisner. And your honor, you reviewed, your court reviewed the first decision by Chancellor Chandler on a motion to dismiss where he did dismiss the derivative litigation. And in a way in that in and of itself didn't seem terribly out of the ordinary. He examined the relations between the directors and the allegedly interested folks, and also dealt with the second prong of Aaronson. When the case came up to the Supreme Court, did you have any sense that it was going to turn into this seminal Delaware litigation?

Veasey: [00:01:07] Yeah

Williams: It was just another derivative action.

Veasey: Well it was more than that but we never thought it would go to the lengths that it did.

Williams: And in the time that this case was being litigated there was a lot of focus in the financial press and academia on executive comp. Was there a view, either that you had or that you think maybe your fellow members of the court had that eventually this case was going to be a meaningful opportunity for the Delaware Supreme Court to weigh in on executive comp decisions?

Veasey: Probably not. I think we looked at this case as a very important case in terms of its facts. And it was a close case, as we said in this opinion because it involves so much money. And in involved a process that was not clear in terms of what the Board of Directors did. And it also involved this complaint that Chancellor had dismissed that was a mess. It was, we wrote in here, the complaint consisting of 88 pages and 285 paragraphs is a pastiche of prolix invective. And it is permeated with conclusory allegations of the pleader and quotations from the media mostly of an editorial nature, even including a cartoon. [00:02:34] So we just thought that the plaintiff had something here but didn't articulate it well enough to let it go the way it was. The complaint was a mess, and it wasn't clear exactly what the court did with it because we found a few glitches in the court's opinion. And we found that there had to be something there because of what Crystal Grave had said in the media after the fact, that he said something like I wish I had

spreadsheet or I wish had done something on the math, the economics of this transaction. But it was a mess.

Williams: And one thing that you commented on was the lower court's articulation of due care, of what was necessary to satisfy the duty of care. Do you remember that aspect of the decision?

Veasey: Yeah, it was more of a cryptic comment that the court had made that we thought needed to be corrected, but it was not reversible error.

Williams: Yeah, you wrote we conclude that the formulation of the due care test by the court of chancery in this case, while not necessarily inconsistent with our traditional formulation, was too cryptically stated to be a helpful precedent for future cases. The court below had talked about directors being reasonably informed.

Veasey: Right

Williams: As opposed to being informed of all reasonably available information. And so the court gave some guidance in that regard. With respect to prong one of Aaronson dealing with the independence of the directors, you affirmed and you dismissed that with prejudice, correct?

Veasey: I can't remember.

Williams: You did. You did. So that prong one was affirmed and dismissed with prejudice. It was prong two, whether or not the complaint had raised a reasonable doubt as to the exercise of reasoned judgement by the directors that caused the court to look at it very closely, look at the language employed by the lower court. And ultimately decide that while based on the existing complaint, you might have come out the same way as the lower court. You really wanted to give the plaintiff another opportunity. [00:04:54] Tell me about that decision? Was that something that was at all controversial within the court?

Veasey: Yes

Williams: And can you speak about that, the discussion?

Veasey: In general terms, yes. The court was very troubled by this case because of the magnitude of the dollars involved and the lack of clarity about the process that they used, and certainly the complaint didn't help. And we thought the complaint could be articulated more carefully. I, for one, was concerned about these comments of Crystal Grafe, who

was, I think an outside expert. And they quoted him saying things, but we were not clear whether he was the expert to the committee that they relied in good faith on under Rule 141-E, or exactly how that came about. So we were very reluctant to affirm the dismissal with prejudice. But we were very concerned about the fact that we almost never referred the case back to articulated with the dismissal without prejudice. But that's the direction that we went. [00:06:13] And you can see that Justice Hartnett wrote a concurring opinion in which you probably got the flavor that there was a lot of concern about the case, whether it should go forward or not. And so as we tried to do, we tried to come up with the unanimous decision. We had a unanimous decision and we all thought at the end of the day this was a good way to resolve it.

Williams: And you explicitly pointed the plaintiffs to Section 220?

Veasey: Yes, that's not the first case in which we did that, because we thought that that was, we had written other cases in which we said getting votes and records under Section 220 was a way the plaintiffs could come up with tools, the tools at hand, in order to articulate something. Because lawyers had said, out-of-state lawyers had said your honor, how could we possibly articulate a Rule 23.1 complaint that would survive Rule 23.1 with particular facts? We don't know the facts. And we would say, well, you know, you have the securities exchange filings, you have a Wall Street Journal, you have other media that you can look to. And you can also get books and records. Look at this 220. It's a wonderful way to get information. [00:07:39] And so we developed a jurisprudence that Section 220 was the way to go. These plaintiffs had not done that. And if they had they might have been able to as it turned out, express something that was actionable.

Williams: As it turned out, they did in fact use 220, and they wrote a complaint that was much different than the complaint you focused on back in 2000. Among other things, they learned that while they had plead that the board had approved the no fault termination of Ulvis which allowed him to get his full termination severance package, in fact, the board hadn't acted at all with respect, as a board, with respect to that termination. And so they found that out through the 220, they amended their pleading, and then that fact that the board quad board had not acted with respect to the no fault termination, was one of the key facts that really drew the chancellor's ire when he wrote his opinion on the next motion to dismiss, where he denied the motion in really pretty critical terms, critical of the defendant's behavior, saying many many times in the opinion if these facts as alleged are true, this looks like bad faith to me. This looks like a conscious disregard of duties. And so I think that the Supreme Court's strategy of directing the plaintiffs to 220 to see if in fact they could put forth a complaint that was viable and would present troubled issues, did in fact work. [00:09:16] As you left the bench, before the trial and appeal was heard

in 2006, I believe it was, before then, Chief Justice Steele's court, did you follow the litigation to see how it involved?

Veasey: Greg, I saw your final argument.

Williams: Were you present that day?

Veasey: I was present that day in the Dover courtroom because I had an opportunity to go and hear the argument. I didn't know anything about the case. I didn't know much about the case from... See, this decision of Brehm V. Eisner was the year 2000. I retired in the Spring of 2004. I believe the chancellor's next decision on the second motion to dismiss was a year later, 2005.

Williams: It was actually 2003.

Veasey: Ok, 2003, right.

Williams: But then that was not appealed.

Veasey: Right

Williams: So we went to trial.

Veasey: His final decision was 2005 after trial.

Williams: Yes, exactly.

Veasey: And the supreme court decision was 2006.

Williams: Yes

Veasey: So I did read all that, that's what I knew about.

Williams: And did you, as you sat and watched the argument that day, I mean, I know you weren't on duty, but did you form any view as to where you thought this thing was going in terms of potential reversal on appeal?

Veasey: [00:10:36] I thought it would be affirmed on appeal, probably I was dazzled by your spectacular argument. But I did think it would be affirmed on appeal.

Williams: It was, as we talked about with Dave McBride and Anne Foster, it was a case that had legal issues but not very complex issues. It really was a fact case.

Veasey: It was.

Williams: At the end of the day it was a fact case and all of these directors came up and testified one by one, the chancellor made factual findings. And so by the time we got to the second appeal there really wasn't a lot of meat left on the bone, it was certainly our perception.

Veasey: And that was a correct perception as I saw it as an outsider looking in. Reading the chancellor's opinion, two opinions, motion to dismiss as you said was in '03, and his opinion at the trial on the merits in '05, I got a pretty good education about what the issues were, and it was a fact case. And I think when we wrote Brehm V Eisner, we said this is a fact case, and the facts are very intricate. I don't know whether they were complex, but they were intricate, and that this complaint doesn't paint a picture about what happened and why what happened was bad. So that was in the back of our thinking.

Williams: Well the supreme court's decision, your decision Brehm V Eisner really did pave the way for the rest of this litigation, and of course it turned into one of the most closely followed litigations in chancery history. I think the other part, and not just the Disney case, but the other part of Brehm V Eisner that really resonated, it wasn't the first time, you're right. But it was certainly a high profile instance, of the Supreme Court pushing the plaintiffs to 220. [00:12:33] And the law has really changed in that way. When you were with Richards, Layton & Finger, 220 was rarely used vehicle that was never something that we worried that much about. It has become from the defense side, it has become you know, here we are in 2017, a major vehicle by which stockholders learn facts about transactions they might challenge and very frequently used. And it's no longer simply a six inches or a foot of documents that are produced in 220 actions. It often many hard copy documents, but volumes and volumes of electronic discovery.

Veasey: One of the things that we were concerned about with this poor complaint that was in front of us, was that the defendants were arguing that we had to pay a lot of deference to the chancellor's decision on the motion to dismiss because some cases had said on a motion to dismiss for failure to make a demand under 23.1, the scope of review was the abusive discretion of chancellor in doing that. And we said no, [00:13:49] we think that's wrong. We have said that we think that's wrong. We think that it should be a plaintery denove of a review because we can read the English language as well as the chancellor can. And we thought that was part of the problem with this case is that the chancellor had paid a lot of, had given the benefit of the doubt, if you will, to the plaintiff's pleading. And

we thought well we don't have to follow the benefit of the doubt. We can look at this pleading and decide for ourselves. And so we made that doctrine of the scope of review, henceforth, that will be. And all the cases you read now, you read a citation and it says overruled on other grounds by Brehm V Eisner, in that one instance.

Williams: Very important because it is just a paper record. It's a complaint in your testing illegal sufficiency of the pleading, and that is certainly something that the [00:14:45 - guess - pilot?] court is able to do in the first instance.

Veasey: And we had a lot of cases, in fact, some of the cases I had written were reparadoded that discretionary language, and then we finally came to this one and said why should we do that?

Williams: When you look at the many decisions that you authored in your twelve years as Chief Justice, where does this one fit in terms of importance to you personally? Is it in the top ten opinions, top five?

Veasey: I don't know. I haven't thought about that, Greg. It's an important decision for that scope of review question. But there are other important decisions, you know. And as I was saying in the last section, common law judges like we are, have a lot of things they can do and we can overrule the interspousal immunity on torts and so forth. And those are important decisions and we have a lot of other important decisions. [00:15:42] This is an important corporate opinion because of the scope of review thing, I think.

Williams: You'll recall that the council of institutional investors filed an amicus brief in the Brehm V Eisner litigation. What impact did that have, and what was the court's general view toward the importance of amicus briefs?

Veasey: The court in certain cases does like amicus briefs and does think that they move the needle a little bit in terms of looking at a broader perspective on this. In this case, I think we realized what the council of institutional investors was about. We knew those people. We knew a lot of those people. And we knew what their point was. Their point was that the process used by the board of directors in this case was not a great example of best practices in corporate governance. And we got that point. And it was not the best practice, as the courts have said all along in this case, the chancellor said that and Justice Jacob said that in his final decision. [00:16:50] But that's not how you measure fiduciary duty. And we said that's important for the optics, that's important for how they behave and how they do that. But I think we said in this case, in Brehm V Eisner, in footnote, that we considered that, we thought that was important from the overall perspective of corporate governance, but best practices are not having define fiduciary duty.

Williams: You did in fact include that discussion and talked about aspirational concepts of corporate governance that were in fact important. And they should be emphasized but nonetheless they may in fact not be, and they're not standards of liability.

Veasey: But they can lead you to a decision in a direction as a director where you are more conscientious about how you handle the process, and that can save you from liability. Because I think we might have even said this, these are very good aspirational principles to follow generally, and sometimes can help avoid liability. [00:17:57] Maybe we said that, maybe we didn't.

Williams: You did have that thought expressed. And I think one easy example is that with Ovice non-fault termination, which enabled him to get the hundred million plus, there was no full board meeting, there was no discussion of directors around a table able to react to each other's thoughts and form a collectively formed view. Certainly many observers would say that's not the best corporate practice, corporate governance practice. But nonetheless it did not lead to a finding of bad faith, which of course is a concept of conscious disregard of duties. And so that's maybe an important example of things where could have been done better, surely. But the fact that they weren't done in an A+ way did not mean necessarily there would be personal liability for directors.

Veasey: And the lack of good faith has been enduring underlying issue in all these cases, with 102(b)(7) eliminating personal liability for due care violations. There's been always a focus on bad faith and what it is and that law has developed in this Disney case [00:19:12] not our opinion, but later opinions. And in Stone V Ritter on the oversight. So that's the law now, and it's quite clear that that's gotta be the target if anybody wants to challenge the action of lack of good faith and conscious disregard of responsibility.

Williams: Let me just, anything you'd like to add about this case, your honor? Let me just say this on a personal note, and I hope the personal note is ok in the setting that we find ourselves in. I was privileged to be your partner here at Richards, Layton & Finger, and you were always someone who stood for integrity, decency, doing the right thing here at our firm, and then when you went to serve all the citizens of Delaware as the Chief Justice, you carried on that tradition. And we at Delawareans are very much indebted to you in your service to our state.

Veasey: Well you're very kind.

Williams: All very true.

Veasey: And let me just add my work here at Richards, Layton & Finger for thirty-four years in that work, I was surrounded by really good people like you that were younger than I and people like Ned Carpenter who was older than I. And it was wonderful, it was a great learning experience, and the skills as an advocate and the integrity I think was part of it. And then as a member of the court, not just as Chief Justice, but as a member of the court, I have been very impressed with the way the Delaware Bar has behaved in those areas of integrity and civility and so forth. [00:20:52] Sometimes there are aberrations, and we've tried to bring people back to the right place on those aberrations. But on the whole, the Delaware Bar has just been outstanding and wonderful and a great example to other bars about how to do it the right way.

Williams: Professionalism really became sort of a theme of your tenure as Chief Justice. How and why did you adopt that?

Veasey: Because I thought it was an easy thing to talk about in my first state of judiciary message because it got to be that toward the end of my career as a trial lawyer that I was seeing more and more of these Rambo tactics and that kind of thing. And I just decided that what I really wanted to start off with instead of getting into any legal doctrine or anything like that was civility and professionalism. And kind of set the tone for that. That's how and why I got into it, it was low hanging fruit for me.

Williams: Well it served us all well. Thank you Chief Justice.

Veasey: Thank you.

[00:22:11 end of video]