

Case: Moran v. Household International, Inc.

(Delaware Supreme Court 1985)

Taping: October 16th, 2017

Interview with: Rodman Ward, Jr.

Skadden Arps Slate Meagher & Flom, LLP

Interviewer: Donald A. Bussard

Director - Richards, Layton & Finger, PA

Bussard: Morning Rod. Since you're now retired and of counsel at Skadden, there are likely some younger members of the audience watching this who aren't familiar with you or with all you've done in the Delaware legal community. So perhaps you could give us a brief description of your background and your work with the Delaware State Bar Association and at the firms that you were with during your career.

Ward: I've never practiced in any state but Delaware. I've sometimes gone out of town. But I was born here. I went to college at Williams College, which you did, too. And then I went to Harvard Law School and roomed initially with Judges Stapleton and Quillen.

Bussard: Really?

Ward: Yeah, Walter, of course I think is one of the finest federal judges we've ever had. And Bill has decorated every position he took. But he never stayed around in any of them very long. And alas, he has passed away. I came back to clerk with William Prickett Senior after my second year... first year at law school. Then I clerked again with them after my second. What interested me about the Prickett firm was it had a very large docket of trial work. Largely insurance defense work. And so when I started practice, which was 1959 after I had passed the bar here and in DC, I started practicing in court. But then I went away for three years in the United States Air Force where I was a Jag. And that was very exciting, too. It got a little criminal practice going in there. [00:02:41] And I ran military justice at Itazuke Airbase in Japan. When I finished that, I came back to the Prickett firm and I worked on an enormous case involving a contract with William Prickett Senior involving Scott Paper in a construction case. About halfway through that, Mr. Prickett died. And then Bill and I and Warren Burt and Roger Sanders formed a partnership. And I was with that partnership until 1979. And I actually changed or morphed considerably in my practice. I did personal injury work seriously... how could you do it otherwise, but anyway, for maybe four or five years. And then I started representing plaintiffs in corporate cases. And that was fascinating. I worked with two of the brightest and finest lawyers I ever knew: Harold Kohn and Aaron Fine from

Philadelphia. And I learned an enormous amount particularly from Aaron who was very patient. And then I started doing some defense work. And the most important defense came to me, really, initially, from Sam Arsh, who was a very distinguished and capable lawyer, litigator at Morris Nichols, Arsh and Tunnell. And he had a conflict and he introduced me to Skadden Arps. [00:04:29] He may have regretted that. [laugh] I don't know. But I liked Sam very much and I learned a lot from Sam also. I worked with Skadden here as their, I think, one of their first choices for local counsel. And through a friendship which I developed with Stu Shapiro, who had gone there from law school, we decided it would be a great thing to have a Delaware office for Skadden Arps. His father was chairman of the board of the DuPont Company, chief executive officer, and he thought it was a good idea, too, but I think that was somewhat helpful in doing it. We proposed it to Joseph Flom of once again, that's a person for whom I have a special reverence who was the senior partner at Skadden Arps, Slate, Meagher, and Flom, which at that point was the hottest law firm in the world. It was really sort of taking the New York law practice by storm and it was doing great good, I think, for the basic nature of that practice. Anyway, Joe was enthusiastic, and so we decided that we would start an office. And I initially went to Walt Stapleton and said would he like to do it with me, he was on the bench. And I was never going to talk about that but he talked about it, and so I guess I can. And he was interviewed by, or he interviewed them, I guess, and then I called him up afterwards and he said, really Rod, I think I better, I'm a better judge than I would be a lawyer. He's a better lawyer than anybody I knew, but anyway. He wanted to be a judge. [00:06:30] And he liked being a judge, and he was a fabulous judge.

Bussard: And a very humble fellow.

Ward: And a very... yes, that's the appearance. I think he has a lot of self confidence, though. Anyway, so he passed on that. And I didn't want to start it by myself because I figured I wouldn't ever get any sleep. So then Steve Rothschild who was a partner of mine at the Prickett firm, won a couple of major cases in the Court of Chancery, and got somewhat of a national reputation. And Steve was a good friend of mine at the firm. I had not thought that I would be able to persuade Skadden to make him a partner, but after those two cases, and the reputation he made, it wasn't hard at all. So he and I started the firm in April through June of 1979, and the start of the firm was we had an office for Skadden here and that grew to seventy lawyers, actually, in the first ten years. And the reason it grew was I think primarily because that was really the hottest time for takeovers. Skadden Arps had the majority of those cases in the United States, and so it just naturally expanded. We have never gotten bigger than that. I guess you know, this business hasn't really increased. Skadden has increased considerably because it's

gone international. And the most of the growth of Skadden in recent years has been overseas. But anyway, that's how I got to Skadden Arps. [00:08:22]

Bussard: Got it. So turning to the case we're here to talk about, the board of directors of Household International adopted a preferred stock purchase rights plan on August 14, 1984. How and when did you first become involved in that?

Ward: You know, I don't know. And I don't remember it. I tried to think about that. I... what happened John Moran was our client. John, I think. And Dyson Kissner and Moran, which was his firm. And they were major stockholders at Household.

Bussard: Right, they were the largest.

Ward: Yeah, they were absolutely. And he had looked into an LBO, I think. And I have the feeling that maybe Mr. Clark thought that Mr. Moran was looking down his throat and might come after him.

Bussard: That's exactly what he thought.

Ward: And nobody really admitted that, but I think... whether he would have or not, I don't know. I think he said he wouldn't, he would do something consensual. But any rate, I think the reaction of Household was of some concern about being taken over by somebody and maybe Moran and DKM. So Moran was a client of Joe's, and Household was a client of Wachtell Lipton. I guess they brought him in because of that concern by Mr. Clark, I think that's probably why. [00:10:06] The pill that you were talking about there is the creation of one of the finest corporate lawyers in America, Martin Lipton, for whom I have huge admiration. And he is, he and Joe together were sort of re-forming, and they sort of...

Bussard: Weren't they kind of like Ali and Frazier?

Ward: No, not at all.

Bussard: No? I thought that they were highly competitive, but good friends and respected each other greatly.

Ward: Well, ok, maybe I don't fully understand the relationship between Ali and Frazier in that case.

Bussard: Well, they respected each other as opponents.

Ward: Well, you know, Joe, Joe never told me anything about this, but we had a feeling at the firm, I had lots of friends at the partnership... you would think that would be natural but it isn't necessarily natural when you have as many partners as we had at Skadden. The sort of word was that Joe had developed the practice and he was in favor of... I think he liked disruption. And he needed people, somebody to assign or get his conflicts over to. And he admired Lipton's competence, as we all did, by the way. And I think he brought him into the business, that's what we all believed. Marty was considerably younger than Joe. I think Joe felt that he was bringing on a really talented lawyer that could be really important. And that is what happened. Competitive... they both had more business than they could handle. I never saw... I think in this case, [00:12:05] Joe just totally disagreed that it was an appropriate thing to do, and Marty had developed it exercising considerable genius, I think in doing it, and certainly craft. He had a lot of craft. So that's an answer. If you want more, I'd be glad to go... I never psychoanalyzed either one of them. If Joe Flom had said jump all I would ask is how high.

Bussard: Yeah. Did Joe get you involved or did somebody--

Ward: Well it was a natural Delaware thing and when any major Delaware thing came up we would be involved. Stuart was involved also. Stuart was very close to Joe, and so Stuart was involved. And then Mike Mitchell got involved. Mike Mitchell I think was the litigator at the firm that Joe admired the most. He had been in the United States Attorney office in New York and done very good work there. He's a brilliant lawyer. He's still, by the way, around, if you might want to talk to him. And he was a very good friend of mine. So I think all three of us got involved at about the same time.

Bussard: Ok. Were you involved in the decision to bring the suit?

Ward: [00:13:32] No, I think it was decided that we would bring the suit before I... Well, yes, I guess they asked me whether I thought it was a good idea, and I did.

Bussard: So you must have said yes.

Ward: I still think it's a good, our side is right.

Bussard: Well, as any good lawyer would, right?

Ward: Well I don't know, I felt persuaded I was wrong a lot of times by judges.

Bussard: What did you expect to be the major legal and factual issues in the case?

Ward: I have always been concerned about the place of this device in Delaware corporation law. I'm less concerned now since it seems to have been covered over and become part of Delaware law, and I mean, it was...

Bussard: Well and all the anti-takeover statutes that got adopted around the country have kind of diminished in significance.

Ward: And there aren't any really, or very few hostile takeovers anymore. This may be one reason actually, but maybe not. Yeah, I... what was the question?

Bussard: What did you expect to be, at the time, to be the major legal and factual issues of the case?

Ward: I always thought this was a terrible gimmick and so I thought that the major issue in the case, I thought that right down through the end, was whether this was a [00:15:11] dividend, whether it was a right, whether it was preferred stock, or whether it was a Rube Goldberg contraption to transfer the control of the negotiations from the stockholders to the board. I still think that.

Bussard: As you said in your opening statement in Chancery Court, you used that exact...

Ward: I guess I did say it, I think I said a number of other things.

Bussard: You did. You described the rights plan as a Rube Goldberg contraption in form, which at every step distorts the purposes of the statutory provisions on which it relies, but which, unlike a genuine Rube Goldberg contraption, is deadly effective.

Ward: Yeah, that's what I said.

Bussard: That's what you said.

Ward: That's what I'd say today.

Bussard: Ok. Can you tell us a little bit about the leading actors in the case, John Moran, DKM, John Whitehead, and Don Clark?

Ward: I never knew John Moran except to shake his hand, and he mostly dealt with Joe. I think they had a pretty good relationship. And Whitehead, he was at Goldman Sachs, and Goldman Sachs had advised on the pill, and that put him in a little bit of a strange spot. What he said was, as I recall, he said he voted against it, by the way, at the board meeting, and I think he said he thought that was like adopting it would sort of put a thumb up, and people would look at Household and maybe more people would come against them.

Bussard: He testified that he didn't oppose it on the merits, he opposed it because he thought it was the wrong time.

Ward: Well that's what he said--

Bussard: And it would put a target on their back.

Ward: Ok, that's what he said, there's no question about it. I have huge admiration for John Whitehead, too, by the way. I think... I did not know him well, but what I did know that he was one of the most competent investment bankers in New York. You know, let's see, who else are we talking about...

Bussard: What was your impression of Don Clark?

Ward: [00:17:26] He was a corporate CEO who didn't want to lose his job.

Bussard: Ok

Ward: But maybe he thought that was bad for the stockholders. I think, I have no indication that he was a bad CEO. I think he probably was pretty good actually. But that's not my field actually.

Bussard: Ok, all the directors who voted in favor of the plan were named by defendants except for Ray Trough. Have any recollection about why Ray Trough was not named?

Ward: None

Bussard: Was he a Skadden client?

Ward: I just don't know. Hadn't focused on that.

Bussard: Who was your team for the Chancery Court trial?

Ward: Well just the people that I mentioned for the chancery court trial, it was Michael and Stuart and me and Steve Lamb, and was Andy Bouchard involved? It's all in the opinion.

Bussard: I don't remember to be honest with you.

Ward: We put together our A team.

Bussard: But I know Steve was on it.

Ward: Oh, I know Steve was on it, too, yeah.

Bussard: Cause I remember I first encountered Steve in the Grand Met case when he was there as representing the SEC as an intervener or they weren't--

Ward: He appeared in the Supreme Court as a friend of the court. Stu and I had dealings with him, shouting matches with him before we ended up in the Supreme Court and he had intervened. And he came in and made a really brilliant argument.

Bussard: So Skadden decided ...

Ward: So on the way out I said to Stu or he said to me we gotta get that guy.

Bussard: And you did.

Ward: Yes.

Bussard: At the outset of the case, did you expect the case would be a significant part of development of Delaware corporate law?

Ward: I thought it'd be, turn out to be a wild hair that had been pulled out of the eyebrow.

Bussard: Ok. Did you have an expectation? I know you had a hope but did you have an expectation as to how the case would come out?

Ward: I thought we'd win.

Bussard: What do you think your strongest arguments in the case were?

Ward: Well I think the strongest argument is the one I just went through. You know, in all strangely I had a little deja vu as I was reading over this stuff, and it amazed me about how much dither there was over the business judgment rule, which I think, you know, if you take this thing as a legal thing, if it's adopted the board, the business judgment certainly applies. My view is the business judgment rule has no business in supporting something like this. It's not an independent source of power.

Bussard: Right

Ward: It's just an evidence rule, really.

Bussard: So your thought your best arguments were that it was not statutorily authorized?

Ward: I was always a zealot for saving the corporation law from this gimmick. I think Mitchell and Shapiro felt much more that we had to create an atmosphere in the court where what was happening was not a good thing and had been done quickly and without proper information. I never thought... those arguments are very hard to win, except in those days when Drew Moore gets upset.

Bussard: Well the Van Gorkom case was decided right in the middle of this.

Ward: Yeah, so I guess it was.

Bussard: Yeah, it was decided Van Gorkom was rendered by the Supreme Court on March 14, and that was five months... The Chancery Court's opinion on Household was January 29 in '85. Supreme Court oral argument was May 21st of '85. Van Gorkom decided by the Supreme Court on March 14. So it was in between Chancery Court and oral argument.

Ward: Yeah. I wasn't paying a whole lot of attention to Van Gorkom. We were not in it. It had been brought in by Bill Prickett when I was at the Prickett firm, and you know, I understand it came up earlier in this series and I was quoted by somebody as having I said it was the reason I left the Prickett firm. It's not correct that that was. I may have said it. But I, the reason... I might as well say it because a lot of people have asked me about that since then, and my recollection of that is quite clear. I was running part of the practice which was defending, and really I love telephone calls from any lawyer in New York asking me to work on a case. And I got a number of them cause I had a number of friends I had been in law school with, and also people I worked with before. I was

always hoping maybe Wachtell would call but they never did. But and Bill was looking to developing a major plaintiff's case, plaintiff's law firm. And Bill felt strongly that a lot of the plaintiff's cases were pro forma for settlement. And Bill never filed a lawsuit for that reason, he believed in warfare. [00:23:40] And he enjoyed it, and he was very good at it. And so I was developing a feeling that maybe our practices were antithetical and would have to be separated. And I made a couple proposals, and one was that I move our department uptown where we had offices where we actually had furniture and things. They didn't like that idea, my partners didn't like that idea. And the previous year I told you I talked to Walter Stapleton about that. But what happened with the Van Gorkom case is that he sued Lehman Brothers. And Lehman Brothers was a part of the team on the street. And if you get your reputation that you're suing Lehman Brothers, Morgan Stanley, Goldman Sachs, that's not very good for your defense practice. And so we made, I thought a deal, that we would talk to each other before, he would talk to me before he brought, and he did not. And whether he forgot to or whatever, I don't know, but I think he would have anticipated I would say, well why don't you sue everybody but Lehman Brothers, you know? In a way, that's sort of the way I think we should have worked that out. As it happened, you may know, that he dismissed Lehman Brothers in the Supreme Court. And the reason he dismissed Lehman Brothers in the Supreme Court is he wanted the chief justice to be on the case, and that was Dan Herrmann at that time. And I think he felt that Chief Justice Herrmann would be more favorable to him on the court than off, because he, as I, had huge admiration for Chief Justice Herrmann. I thought he has great, had a great broad mind. He was a very formal person but he was good. So I think that--

Bussard: And Chief Justice Herrmann couldn't sit on something involving Lehman?

Ward: Yeah, for some reason there was a Lehman Brothers conflict that was causing him to recuse, so Bill got rid of that by dismissing Lehman. Lehman had nothing to do with this case. Well, I'm sure they had something to do with it but it was--

Bussard: They were investment banker for one of the parties?

Ward: It was an aiding and abetting claim, I think. [00:26:08] And it wasn't necessary to the case, and so I was pretty upset about that. And that was a trigger that got me to talk to Steve and go forward with separating out. And Bill never held it against me. Yeah. I mean, let me say that Bill Prickett's father and my father were great friends, and Bill Prickett's father and my grandfather were great friends. And that... So I grew up knowing Bill Prickett and his father and all of this. Bill never held my departure against me, that I know of. We were always cordial.

Bussard: Well that's good.

Ward: I think so.

Bussard: Well I think the Wilmington bar tends to be that way. [00:26:57]

Ward: In some cases, yeah.

Bussard: Not all.

Ward: Nevermind. We can talk about that endlessly, I think.

Bussard: Ok, so your strategy in the Chancery Court appeared to have three prongs to it. One was corporate governance, and on that score you said in your opening statement in Chancery Court, you said this case involves quote a fundamental distortion of the distribution of power between the two key components of Delaware corporations.

Ward: That's for my case, too.

Bussard: Well that's what you said.

Ward: No, no, I agree with that.

Bussard: So the stockholders and their fiduciaries on the board of directors.

Ward: Yeah, but I mean my theory of the case, the only reason for the Rube Goldberg contraption was to make this distortion. To me stockholders receive tender offers, and this took it away from them and nobody ever argued that. I think in the end everybody agreed to that.

Bussard: Well the second prong of your argument was federal preemption.

Ward: Yeah but I never believed anybody would buy that. I think it's a good argument, I wish the SEC had more guts than they did. They filed a namby pamby brief that was of no use, whatever, to anybody.

Bussard: That was on appeal, right?

Ward: Yeah

Bussard: And did you have a role in getting them involved?

Ward: No. [00:28:34] I think that was worked out by, I don't know, maybe Flom. It might have been Mitchell. Mitchell had good relations with the SEC.

Bussard: Did Lamb call somebody new?

Ward: Well it could be Steve, I don't know. He had very good relations still does.

Bussard: And the last prong of your argument appeared to be stated corporate governance, the federal preemption, and then the particular feature of the [00:28:55] rights plan, which I've already quoted your Rube Goldberg argument.

Ward: Exactly

Bussard: Did you see these three points as roughly equal in importance?

Ward: No

Bussard: Which was the most--

Ward: Well I think I have said I thought--

Bussard: The pieces of the rights plan.

Ward: No, it's in... it was chapter five, section five of chapter eight. But that's 157 says, you know, you can have rights, and they gotta have consideration, ok? What's the consideration, tell me? But anyway, and 151, which is the other source of power, and then they've got 141 as a source of power, that's like hocus pocus. So I mean, look, I mean, I have views. It doesn't really matter whether I have views or not anymore, I'm retired.

Bussard: Yep, I understand. And you also appear to target Wachtell pretty strongly [00:30:04] in your opening statement.

Ward: You mean Marty?

Bussard: No, I meant the firm, well, maybe ...[00:30:10]

Ward: Marty was Wachtell Lipton ...

Bussard: You referred to special counsel. You said, special counsel, this case has thrust itself to the forefront. That firm had initially advised management that the rights plan was quote the most effective anti-takeover device in existence. This very plan with special counsel's imaginative creation, they had offered it to twelve other clients, only one of whom had adopted it when it was adopted by Household. They wrote the description, it was given to the board, and the August 14 minutes and major portion we will show were drafted by special counsel. Then you continue to say special counsel also advised quote, a plan in no way restricts or inhibits or makes more expensive a proxy contest to elect a new board. We will show that this statement is flatly incorrect. No market professional is so ignorant as to not know that a proxy fight rarely occurs and is very rarely successful unless a challenger is acquired or may openly ally himself with others having a substantial percentage of the stock. And then lastly you said what the professionals advising the board knew but failed to tell the board was that the pill is a doubly effective entrenchment device because it protects not only against tender offers but also against proxy contests as well.

Ward: Yeah, I said all that.

Bussard: And was your goal to make the board look like they were being led by the nose.

Ward: Well the board didn't know how the thing worked, if you look at the evidence. And Walsh said that in his opinion. He said well some of them didn't quite get it but it was not easy to get, by the way. I think we were all very familiar with poison pills now, and they seem much more humane or whatever they are, than they were--

Bussard: At the time they were challenging.

Ward: Yeah it was a real challenge to understand. And I think the board, what they said, well, we hired Marty to protect us, this is what he's doing. And I think that's what happened. So I don't think it's inappropriate at all. I wasn't saying that they were bad lawyers, nor was I saying they were giving illegal advice. Throughout I think Wachtell Lipton acted totally appropriately within the appropriate norms of conduct by really skillful lawyers. That's about as skillful a law firm that you'll find anywhere in the world.

Bussard: Agreed. Did you believe that the fact evidence at the trial court was going to be important?

Ward: I'd hoped it would be more pointed than it was in the end. Did I take any of those depositions?

Bussard: I don't remember, to be honest.

Ward: You know, I have a line of questions I brought along.

Bussard: I defended the one that Stuart took of the--

Ward: [00:33:23] Well Stuart's an able lawyer, I'm sure he--

Bussard: Well he was a bulldog [00:33:26]

Ward: Yeah, well I guess he had that part. I will give you the here is how the side of the deposition should have gone.

Bussard: Ok

Ward: Cause I did this last night cause I thought it might illustrate to you and to anybody who watches this what I thought about it [reading]: What is the right for? Answer: To buy one hundredth of a ten thousand dollar preferred stock. What's the preferred for? You get up to a hundred and seventy dollars per dividend of share. That's 1.9% return. Question: It's now 1985, is the average return on such preferred shares \$750 or higher? Yes. Question: then who will buy this preferred? No one. That's the point. Would that leave the right unexercised? Answer: yes. What can you do with the unexercised right? I'm asking these questions. If somebody makes a thirty percent offer to Household or buys 20% of Household, the right holder can buy \$200 worth of Household stock or that of its successor for \$100. Question: But that would enormously dilute the offeror's Household stock if it or he bought any. Yes, that's the point. So, the offeror would have to get the Household board to redeem the rights before it made such an offer. Yes, that's the point. So the right would never be exercised and the preferred would never be bought. You're right, Mr. Ward. Question: I've never heard of such a right or such a preferred answer. There never has been, it's a new concept. Question: and the sole purpose of these so-called securities is you shift control over tender offers from shareholders to the board. Answer: yes. I think that's the end of the case. [00:35:26] But I'm not the Chancellor, right? I think if you had Chancellor Allen or somebody, perhaps more schooled in... we might have won. And then when it got to the Supreme Court, that court was made up of two judges who had spent their life on the Superior Court, right? Andy Christie and Jack... the author of the thing.

Bussard: McNeilly?

Ward: Jack McNeilly, yeah. They didn't know anything about corporation law, those guys. In order to understand this seasoned corporation lawyers like yourself had to really struggle. Well they got a couple briefs on either side and things like that. The only person on that court who was skilled in corporation law and was Drew, was Justice Moore.

Bussard: So you think he had an influence.

Ward: Well he had to concur, obviously, agree. He also sat, I don't know, I wasn't there, but I think I have no question in my mind that that result came from Justice Moore. And he never told me that.

Bussard: Be interesting to know

Ward: Yeah, be worth having him here, having him say no, that was Jack McNeilly's idea. I don't think he'd say it.

Bussard: So were you surprised at the outcome of the court below [00:37:10]

Ward: Yes, I was, and for reasons I'm not going to tell you.

Bussard: All right, confidential or political?

Ward: I'm just not going to tell you.

Bussard: Were you happy the way the evidence went in court below [00:37:26]?

Ward: Throughout I thought we were working with a first rate team of lawyers and I thought that the evidence was presented very well indeed. I would not... And I agreed with it at the time, but if I were to do it again, I would have junked everything but what I just went through here.

Bussard: Simple and sweet.

Ward: Yeah, and how can you lose? I mean, there's no consideration for this thing. It goes out and it's under a section that's talking about how you capitalize a company. I mean, come on. It is... And one of the reasons I agreed I might say and I was happy to

help this is because I've always been of the opinion that that was just wrongly decided. And there were a number of people in our firm who didn't agree with me.

Bussard: Well lawyers disagree a lot.

Ward: Yeah and sometimes these cases go--

Bussard: Sometimes you're wrong, sometimes you're right.

Ward: Yeah, you know that, I know that.

Bussard: Ok, do you recall any significant press or media or academic input along the way?

Ward: You know, I don't think the press had the remotest idea what was going on, and they didn't... do you think they did?

Bussard: No, I think you're right.

Ward: I don't think it was even covered.

Bussard: Yeah, I'm not sure the press was there hardly at all.

Ward: No, I've been in cases, like Macmillan for instance, when we're covered with press.

Bussard: But this was at the very beginning of the takeover craze, so I'm not sure that the press had even gotten onto the idea that these were things that the public might be interested in covering.

Ward: Yeah, I just don't think it was a factor.

Bussard: How was it that Irv Shapiro was selected to head the Skadden team on appeal?

Ward: [00:39:33] Irving Shapiro was a dear friend of mine.

Bussard: Ok

Ward: And in fact, I think the original, I got to meet Stuart because I was talking to Irving one time and he said that Stu was clerking for Chief Judge Seitz and then I got to meet him and stuff like that. He has... his career was as an appellate advocate in the Southern District of New York.

Bussard: Irv Shapiro?

Ward: Yes

Bussard: Ok

Ward: Criminal cases primarily with a lot of... he was in the Justice Department. He was their star advocate in the Second Circuit. And the reason he was hired by DuPont is because they had a case in the Second Circuit and they went up there and Irv had been making the argument before hand, and Jack Schmutz, whoever it was, from DuPont, had said that's about the best argument I've ever heard. So they hired him. They went after him to put him in the legal department. He ran the legal department from the second position, and he also was, got the confidence of the people who ran DuPont, obviously, one of the brightest men I ever known. He came to us after DuPont as a partner, and there was a question about whether Stu would argue at the Supreme Court or I would or Mike. And I don't know who made the decision, but I think we all agreed that there was some feeling that the business community in the United States wanted this thing. Irv Shapiro was the business community. He was the chairman or whatever of the Business Roundtable and then he was the emeritus chairman of the Business Roundtable, which is the establishment thing. And I think it was felt by my partners that if Irv is arguing it, one couldn't really say we were talking for the [00:42:03] bust-up takeover people - he had been chairman of DuPont and all of this stuff. He was on the board of IBM, he was on the board of CitiBank, and he was Mr. Establishment. And we thought that he carried that aura and we thought that he'd make a very good argument and he did. And it meant we couldn't decide ourselves, right, who got to make the argument.

Bussard: Well it solved that problem.

Ward: I think that they were concerned that if I made the argument perhaps they were concerned it wouldn't be as good if they had made it. They had their own view. But that I would spend my life on this particular subject and not deal with the business judgment thing adequately. Because I had been a leader on that subject.

Bussard: Well and Irv was positioned to bring a lot of clout, panache, and you know?

Ward: And it didn't work. Well, no, it didn't. And I think... I heard later that the Supreme Court itself was really puzzled by that.

Bussard: Is that right?

Ward: Yeah. Who told me that... you hear a lot of things around here, and some of them are true and some of them aren't, you know? [00:43:41] Maybe they weren't. But he made a fine argument. He understood the case and we lost. They never dealt with my point--[00:43:24] Providence & Worcester, for god's sake. That's sort of a big piece of whitewash that went over the whole argument.

Bussard: So your recollection of the oral arguments is they were both, both sides did a pretty good job?

Ward: Oh yeah. No, I think this case was very well tried on both sides. It was thoroughly tried and it was tried by able lawyers. And we lost. And, you know, a lot of jurisdictions in this country follow it. No foreign country has ever followed it. And in England it's out of the question. In Canada the only reason they allow the thing to be used at all is because the government itself has a very strong hand on these matters.

Bussard: Isn't there a regulatory element in Canada before you do a pill [00:44:22]

Ward: That was when ...

Bussard: Because both--

Ward: That is what I was saying in kind of simple terms. Yes, very regulatory. I have for a while, you know, CSC was supporting the Harvard blog on corporate governance. And Lucian Bebchuk is the guy who handles it, and I'm very fond of Lucian. I think he's a very nice man and I think he's very very smart. And I've had a number of conversations with him on this subject. He thinks it's bizarre. And he's said he's mentioned the device to Europeans and they say, what, what's that? We don't have anything like that? So maybe he's just trying to make me happy.

Bussard: Yeah. So while the case was in the Supreme Court both Van Gorkom and Unocal got decided. Looking back, do you think either of those cases played a role in the outcome of Household?

Ward: No. Well, undoubtedly I think the court was getting more educated in corporation law. But I'm not sure what the makeup was. Were they all en banc?

Bussard: I think they were all en banc.

Ward: Well Weinberger was certainly en banc. Van Gorkom was en banc. Bill always won his cases on a reargument en banc, which is a real tribute to his personality.

Bussard: Unocal, I think was also en banc.

Ward: Yeah, en banc. So I think it was helpful in educating the court as to the takeover business. I don't think the two part takeovers are evil.

Bussard: Somebody told me once, and I don't know if you would agree with this or not, but if Household had been argued two years later, it would have lost. Household would have lost.

Ward: You know, the saddest words of tongue and pen are only these it might have been.

Bussard: That's true. Looking back do you think you would have done anything differently except focus on that?

Ward: [00:46:53] If I had been the sole decision maker and not in a group of people whom I respected as much as I respected those people, I think I would have emphasized less the business judgment aspect and emphasized it only as the change of control aspect, you know, the change of control with a higher degree of proof and but I don't know. It'd be hard to know. When you try a case as I did many with people you respect, you have a tendency to compromise views in respect to the position of the others, and the way this was presented was we all agreed on how to do it. And in the background of the whole thing there was Joe, and Joe thought this was the same thing I thought. But he also thought that... I don't know what he thought cause I never talked to him, Mitchell talked to him about it. And I think Stu did because they were both up in New York sitting around tables talking about things. And I guess, I guess if I were running it myself I wouldn't have put so much about business judgment and two tiered takeovers and things like that in it.

Bussard: Well in the aftermath, Skadden eagerly pursued prescribing a now validated poison pill] right?

Ward: That's the sort of backstories that because... Our firm, I say our firm, I'm retired, but I am still a loyal Skad. Our firm is dominated by corporate lawyers. And not corporate lawyers in the sense that Delaware says corporate lawyers. When Delaware says corporate lawyers, they thought he meant litigators. I found that out when I joined Skadden. There are corporate lawyers... I once tried to get Morris Kramer to testify to something and he looked like horrified. Scriveners, you know, strategists and things like that. Yes, but your firm has always been run by litigators.

Bussard: True

Ward: And our firm has always been run by corporate guys. And you know, Peter Atkins, Roger Aaron, Phin Fogg, Morris Kramer, these are names known to every corporate merger and acquisitions person. And they had a whole lot of backed up poison pills to put in if we lost. And when we lost, well, they just went in like that and obviously that was a piece of business for them.

Bussard: Right. You hit the road and you do your road show and do your poison pill presentation to as many boards as you can get to do it, right?

Ward: I guess. I never did that kind of thing but that's probably it, yeah.

Bussard: That's what they did.

Ward: Yeah. But, sure, no, we... I don't know if they were hoping we'd lose or not, but they didn't dare tell Joe that. And he was really rocked by it. He thought this was really wrong.

Bussard: So Mr. Flom was upset by the outcome?

Ward: He was. Well, he never told me he was upset with me or... And actually one of the reasons we were delighted to have Mike Mitchell along is because he was very close to Joe and could explain what went on better than... Joe Flom dominated the law firm, just like Marty dominated Wachtell Lipton.

Bussard: Yeah. Interesting time.

Ward: It was fascinating. [00:51:12] I don't think if I went through it again I'd be dead halfway through.

Bussard: Well age has its downsides.

Ward: Has its upsides, too, though.

Bussard: True.

Ward: So anyway, does that conclude?

Bussard: Anything else you'd like to say?

Ward: I don't know, is there anything else you want me to say? I'm happy to answer any question you have about this.

Bussard: Well, looking back historically, how would you describe the Household decision in the context of the development of Delaware corporate law?

Ward: It was an outlier. It didn't really develop the concepts of business judgment, I don't think. I mean that was being taken care of in these other cases particularly well. I don't think it altered it. I think... I see this case through the statutory lens and that was sui generis [00:52:14] that was a one off. There's never been anything like it. I think I'm also as you are, a professional lawyer, right? I'll be a lawyer till I die. I have enormous admiration for the skill that Marty Lipton has. And his skill in doing what he did and getting it approved by the court, you know, I think that was perfectly amazing. It's like in medieval England, they learned how to dock the entail, you know? That most property was owned by the duke and his sons and sons and sons. And they figured out how to convey it out and convey it back in, and some manipulation like that. And it worked for many cases. It didn't work in Downton Abbey, but it worked in many cases. In the T&E field, trust and estates, there's Richard Covey who figured out the GRAT. What is it? Grantor retained annuity trust, which stymied the estate tax and let those people exchange... Talk about Rube Goldberg contraptions. People have machines that do GRATs, you guys do it here. I don't know whether you do it or not, but Peter Conaty, who's my lawyer. I'm a client of yours, by the way. He did GRATs. And we were talking about it the other day. Dare I tell you about GRATs, I'm not going to tell you about it here. But it was a really really smart intelligent lawful thing which totally defeated the purpose of the estate tax. So I think lawyers do things like that, and I think that's appropriate. And I admire Marty for it. I don't agree with him, but I admire it.

Bussard: Good. Thank you. Appreciate it.

Ward: Thank you for taking your time.

[00:54:57 end of video]