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Participants:

Andre G. Bouchard, Chancellor, Court of Chancery

Martin Lipton, Founding Partner

Wachtell, Lipton, Rosen & Katz

Bouchard: This is a total privilege for me to sit down with a legend of corporate law. I mean, I can't tell you how excited I am to sit down and to have the opportunity to have this conversation today. And I hope what you take from it and what we get out of it will equal the excitement I have from being here. So Marty, you graduated NYU Law School 1955, I have the year correct? Tell us a little bit about your early career and how you got particularly interested in corporate law?

Lipton: Well, first thing was when I graduated I received a fellowship, a teaching fellowship at Columbia Law School for the purpose of getting a doctorate, writing a thesis for Adolph Berle, who was still teaching at Columbia at that time. And interesting, he insisted that my thesis be on the impact on corporate law - we didn't call it corporate governance in those days, it was just corporate law - of the institutionalization of shareholder ownership. At that point about eight or nine percent of shares were held by pension funds, institutions, and he said that ultimately they were going to control most of the major listed companies and how was corporation law going to change, how should it change and so on? I failed to write that thesis. And that sort of changed the direction of where I was going. I was actually contemplating a full time teaching career at the NYU Law School and instead I ended up clerking for a federal district court judge in New York, Edward Weinfeld. And I then went to work for a small corporate law firm. And I'll come back to it because it was the kind of firm that in the mid-1950's still existed and had a different relationship with corporations than law firms do today. In any event, first thing I worked on at that firm was an SEC registration statement. And I went to a reception at the NYU Law School and the dean asked me what I was doing and I said I was working on an SEC registration statement. A few days later I got a call from him and he told me that the professor who was teaching securities regulation had died, and since I had taken the course would I teach it? I guess it was two days later and he ended with "Don't worry, Marty, next week

I'll have somebody who knows how." Twenty years later I was still doing it. Sort of ended up as teaching on an adjunct basis securities regulation and corporate law. And that's how I got here. [00:04:20] Going back to the law firm called Seligson, Morris and Neuberger... Lincoln Morris who was one of the senior partners was a director of the Pepsi Cola Company and Metromedia and a number of say half dozen large companies. And he was the lawyer that Lehman Brothers looked to when their clients had a takeover problem. In those days it was a proxy fight problem.

Bouchard: This is before Wachtell?

Lipton: This is before. This is before. And I was with the Seligson firm 'til 1964, we formed Wachtell in the beginning of 1965. The Seligson firm basically came apart the end of '64. But the interesting part about that firm was the relationship that Morris had with his clients. He was on the board. I don't think there was a client, you know, a public company client that he wasn't on the board of. And he was part, really, much more than just a director. He was part of the senior management of each of those companies. There were very few independent directors, generally three or four independent directors. Everybody else was either an officer or an investment banker or a commercial banker who worked for the company. Each of them had an intimate knowledge of the company, all of the people, and it was just a totally different relationship from what the relationship is today with most boards consisting of a CEO and nine, ten or eleven totally independent directors.

Bouchard: I was going to get to this topic a little later, but since you brought it up now. Do you think that evolution, going away from boards where you had the CEO typically, other managers, the company lawyer, the investment banker often having representation on the board, to the model that we have today, that many may well attribute to a lot of Delaware case law of being largely independent, maybe just a CEO. Do you think it's a good thing or a bad thing?

Lipton: I don't think it's either a good thing or a bad thing. I think it was an evolution that took place in response to what happened in the markets and what the courts were faced with in a very fluid period with dynamic changes. The '50's and '60's were a period of conglomerization, where literally thousands, I think it was two and a half thousand public companies kind of disappeared into conglomerates and then followed in the later '70's by

a period of deconglomerization. And also a beginning of this financialization of the industrial equity in America and which created various legal problems that were thrown to the courts, there was virtually no legislation or regulation to deal with them. And particularly the Delaware courts. And the Delaware courts had to fashion solutions for the different problems that arose as corporate raiders, the '60's and '70's came into existence. And then the various new kinds of financing that appeared on the scene and how it changed everything. And then also we have as is always the case, it's sort of each decade there was a significant corporate scandal: defalcation, phony books, whatever, which resulted in litigation, resulted first with the stock exchange insisting on three independent directors for an audit committee. And it just evolved year after year. And then as you got to Enron and WorldCom and Sarb-Ox and then on to the subprime mortgage problem and Dodd Frank you had a series of legislation which I think we'll come back to, a kind of federalization of corporate governance.

Bouchard: Let me bring that back a little bit. The Chief Justice mentioned an article in 1979 that you wrote in the Business Lawyer called Takeover Bids in the Target's Boardroom, and it's probably considered the most influential article on directors having an active role in the whole takeover process - how to respond to it, what considerations they should go through and so forth. What led you to write that article? And this is before, just to sort of set the stage, there wasn't very much law sort of in this area.

Lipton: [00:10:22] What led up to it is we became very active in the takeover practice in '74 and it expanded in '75 and '76. And sort of just as chance would have it, we ended up basically defending and not attacking. And it was necessary in advising boards of directors as to defending against a hostile takeover to answer the question whether they had the right to defend, what were the standards, what did they have to do in order to sustain a vigorous defense against a legal attack. It has to be kept in mind that at that period the hostile takeover was a ten day affair. Under the Williams Act, it was all over in ten days unless the target obtained a temporary restraining order, preliminary injunction, or the target found a white knight who was going to pay more. There was no time, it was pretty much a panic from the very beginning. Virtually no company was prepared for this. You would get a call, not infrequently on a Friday night or a Saturday morning, and you essentially had to be in court by Tuesday.

Bouchard: I know that side of it.

Lipton: In any event--

Bouchard: There's a set of minutes in your article that basically looks like it's set up for how a board should have a conversation when they're faced with this. What was the origin of that?

Lipton: The origin of that, it actually was modeled on the minutes of the McGraw Hill Company, who in 1979 successfully defeated a hostile bid by American Express. But we were very concerned with, you know, the opinions we're giving and kind of the state of the combination of what the law was and what these corporate raiders were innovating on a basically weekly basis. And the board of McGraw Hill was very erudite board and very concerned with their reputations and so on. This was two of the ultra establishment companies going after each other and it was in the media every day, it was cause celebre ... and the board insisted on a full legal opinion as to their right to defend against this takeover. And in large measure the article was based on the legal memoranda that we did with respect to advising the board and the minutes that - the board insisted on long form minutes. I won't get into the debate between long form and short form minutes, but the board insisted on the entire story being laid out in the minutes. And when I came to write the article I changed it somewhat, but--

Bouchard: I think you became Gerald Lipton and it was Marty Flom.

Lipton: Any event. And Flom was representing American Express. Any event, I thought that in connection with the article it would be a good idea to kind of lay out what one did, saying this isn't something that you do in every case. This is sort of a pattern that you can look to as how to advise the board, what the board should consider, and what the board ends up deciding. And that's how it all came about. The purpose of the article was kind of twofold. One, I was hoping to get academic support and judicial support for these opinions that we were giving that had no real judicial support.

Bouchard: To date.

Lipton: To date, and which kind of flew in the face of the Chicago school of economics, and some of the academic articles. But it turned out to be just the opposite. It provoked a cascade of articles by Chicago school people, particularly Frank Easterbrook and Dan Fischel. And a young graduate student at that time, at Harvard Law School, by the name of Lucian Bebchuk who--

Bouchard: His name's been brought up a few times today.

Lipton: Wrote a comment criticizing the takeover bids article, which ultimately ended up in a kind of a three different way- Bebchuk rejected Easterbrook and Fischel's position, that in the face of a hostile takeover bid the board of the target had to remain passive, not even look for a better bid, whereas Bebchuk also disagreed with me completely but disagreed with them and said that the board should look for a higher bid.

Bouchard: So I want to follow this up a little bit by reading just a couple passages from the end of that article which I think will set up the next question really well. These are conclusions after what's a very lengthy article and sort of bullet point fashion that I think will obviously show the point of view you're expressing here. Point one: directors are not required to accept any takeover bid that represents a substantial premium over market. Point two: when faced with the takeover bid the directors are not required to declare an open auction and sell the company to the highest bidder. Point three: the director should consider the impact of the takeover on employees, customers, suppliers, and the community. National policy is a proper consideration. Point four: if the directors believe that the takeover is not in the best interests of the company as a business enterprise, there's no requirement that the takeover bid be submitted by the directors to the shareholders. [00:18:33] Now I'm going to skip over and go to the punchline, which I want to follow up on which is: the business judgment rule applies to takeovers in the same manner that it applies to other major business decisions. Now at this point, again, this is 1979, a couple years later decisions started coming down mostly in the federal courts - Panter v. Marshall Field, Treadway, Johnson v. Trueblood I think endorsing this point of view. But then Unocal came down. Tell us what you thought of the Unocal intermediate standard.

Lipton: Well, first I thought very well of Unocal and I was kind of overjoyed with the decision. And Unocal, keep in mind that we're right in the middle now of the question of the validity of the poison pill. So our eyes were on the Delaware Chancery Court on an hour to hour basis. We were not involved in Unocal, and but we were watching it very very closely. I was a bit concerned about the enhanced scrutiny that... But I basically concluded that what the court was really saying is they agreed that business judgment was the standard for determining a takeover response. But like in any business judgment situation we expect the board to be acting appropriately and not vindicating or supporting a management not being conflicted. In other words, we're going to look at the duty of care aspect of the business judgment rule rather carefully and that's what enhanced scrutiny meant.

Bouchard: Balance, you're comfortable with the outcome of it over time?

Lipton: Very comfortable because Justice Moore cited Takeover Bids in the opinion, in the footnotes. So yes, I was flying high on Unocal.

Bouchard: Well and Unocal also had an expression recognizing legitimacy of other constituencies, which is, and I want to go back to one of the points in your article as well, which is your view, they should be considered. Tell us what brought you about to having that viewpoint?

Lipton: What brought it about was the impact of hostile takeovers on people. You know, you don't really focus on a legal issue that you deal with whether it's a tender offer or a proxy fight or even a contract, until you get to see what happens to the people who are affected by it. And as we defended more and more companies, and in those days you know, you would fly out to Wichita or Kansas City, wherever it was, and essentially, for a few days you would set up in the office of the target and everybody there, the secretaries that you worked with, the accountants, the people in the legal department, the CEO and the executives asked, sooner or later what's going to happen to me, and clearly people were hugely affected initially psychologically and then the realization of the impact on them and their families and on the community. And we came to the conclusion that this was wrong, that the fundamental corporate law said that the merger and acquisition of one company by another was basically a matter for the board of directors and the law

was that the board had to exercise its business judgment but it had the right to reject. And indeed in a merger it could not be submitted to the shareholders unless it was recommended by the board. So it was clear that the board had authority over mergers and so on and should have it over tender offers. And it wasn't that clear but I thought it was right that in making that business judgment decision the board should take into account the other constituents and that was the proper responsibility of the board of directors. And to some extent, as I mentioned, I was hoping for people to join in on that position. And we were also at that point, beginning to think about legislation. Our first thoughts were with respect to what came to be called shark repellents, amending the charter for staggered boards and fair pricing and make tender offers very difficult. And by 1979 it was becoming harder and harder to get the vote to approve the charter amendments to get shark repellents in the charter. So we had in mind getting legislation of one kind or another. And we had already been quite successful in getting takeover approval disclosure type legislation in the states. The Mite case had not yet been decided. So we didn't recognize the constitutional issue at that point but we certainly thought that it would be very beneficial if states would enact a statute of the kind that came to be called a constituencies statute which reflected each of the points that were mentioned in the article.

Bouchard: So this is a good segue to not so much statutory regulation but self-help, mainly the poison pill, the shareholder rights plan. You're famously the inventor of the shareholder rights plan. How did you come up with the idea?

Lipton: Well as happens with ideas frequently, it's pure accident in a way. By 1982 even though the SEC regulations had been changed so that you had the ten day period had been extended to basically call it 30 days, 20 business days, you still had an almost impossible problem in getting the time necessary to effectively deal with hostile takeover. And it was also we had an experience with a company called St. Joe Minerals where we tried to get... it was controlled by 12 institutional investors. They had fifty percent of the stock among them. The bankers for the company--the bid had been a hostile bid by the Seagrams Corporation--thought that the bid even with the premium was less than half of what the company was worth. So we thought we could go to the 12 shareholders and get an agreement that we would amend the charter to provide we would liquidate the company if within 18 months the stock was not selling at a higher price than the Seagram

bid. Not one of the shareholders would agree to that. So it was clear that litigation was the only way you could stop a bid, either litigation or a higher bid. So struggling to come up with something that a board of directors could do sua sponte to get time. And I was reading an indenture for convertible issue, and I just kind of stumbled over the nondestructive clause. Just about every convertible and warrant has a non-destruction cause so that the option value of the instrument is not lost if the company merges with another company. That the security flips over to the surviving corporation and gets adjusted for the price of the merger. And it preserves the option value of the security. And I said oh well why couldn’t we issue warrants that flip over but at a huge advantage to the shareholders and create huge dilution if the company is acquired and then it's merged, [00:30:12] as most of these deals were at the time. And we figured out a formula and so on and in September 1982 I sent a memo out called the Warrant Dividend Plan.

Bouchard: Right. So that was, by the way, all the young lawyers in the room should not short their time reading the debentures because you never know what you're going to come up with obviously. But Warrant Dividend Plan, I went through some of your old memos and I saw that. And I'm thinking Warrant Dividend Plan, how did this become the Rights Plan? Is there a story behind that?

Lipton: There's a story that involves Dick Grasso that later became president of the NY Stock Exchange. He was then the number two person in the department of stock list. But he was basically the last word on these things. And we needed to get the Stock Exchange to list the warrant so that it could trade with the common stock. And the stock exchange rules then did not accommodate a ten year warrant and he was denying--

Bouchard: This is Grasso?

Lipton: Yeah, he was denying.

Bouchard: Was he poorly compensated at the time? Just curious.

Lipton: At that time I don't think anybody at the stock exchange was well compensated. In any event, he said no. I said well, you know, I just don't get it. You allow the listing of rights to trade with the stock when a company is doing a preemptive rights offering and

so on and granted they’re generally short term but there's no rule about the term. And he said well if you call it rights I have no problem. So it became the shareholder rights plan.

Bouchard: There you go. Now at this point this is a totally new terrain. It's sort of experimenting in corporate governance land. I assume you were walking around talking to some other people, maybe even some Delaware lawyers and trying to get their reaction as to whether this thing would actually be upheld.

Lipton: Well there's a lawyer sitting here right now named Gil Sparks. Gil and actually I first went to Lew Black. Lew and Gil and I had been working on various things over a period of time and we were working on something at this time. And as Gil tells it he approved it standing in his kitchen. In any event, no one else would give an opinion. We had given opinions and the other law firms said they didn't think it was valid, legal. And but Morris Nichols did and turned out that we were right.

Bouchard: So how do you take something that nobody's ruled on yet before you have a judicial decision and convince clients to implement it? Who were you pitching to, what kind of reaction were you getting?

Lipton: We frequently got reaction that that's crazy or our lawyers think that... Remember we're kind of brought in on these situations and so you know, the regular law firm, the general counsel had doubts. And you either are successful in convincing them that it's something that at least has a reasonable, you know, it's not unreasonable, not flying in the face of a legal decision that it's not legal and that it was worthwhile. We were successful. Interesting thing is what the impact of the denial of a temporary injunction can be. The first use was at the end of 1982, the beginning of 1983, for El Paso Corporation which was the target of a hostile tender offer by Burlington Northern Railroad. And we used a variation. I won't burden you with it but it was a variation of the poison pill of the same concept. And the lawyers for Burlington Northern ran to the Chancery Court for a temporary restraining order which was denied. A precedent!

Bouchard: But it didn't actually assess the validity, it just denied the temporary?

Lipton: Yeah and it all came to agreement and it was never further litigated. But there it was. They denied and we explained that the denial of a temporary restraining order was not a legal precedent but at least one judge didn't immediately say this is the craziest thing I ever heard of and therefore grant. So we ended up using it I guess six times in 1983. And there were no adverse decisions during '83.

Bouchard: Let me focus on 1983 for a second before you go forward. So you write a lot of memos that you send to clients. There's one memo, this is June 20th, 1983, and I was struck by it. It talks about the Warrant Dividend Plan, it talks about how you've implemented in some of these companies including El Paso. And then there's this line: we have no doubts about the legality of the plan. I don't see too many law firms writing stuff like that. Did this become a bet the law firm issue for you?

Lipton: Yeah, you can't tell, advise people to do something like this without taking a firm position that it's not a should position it's a... you can't hedge. It's just if you aren't comfortable to give a firm opinion without a hedge you shouldn't do it. Not in something like this. And we convinced ourselves that this was legal. We thought that we... And we were giving opinions, we were giving unqualified opinions at that point.

Bouchard: So November 1985 the Household decision comes down, validates the pill at that point, it's a flipover provision. Can you tell us about your involvement? I know you were representing Household at the time or involved with advising Household at the time. Tell us maybe what we can't see in the opinions about the thinking that went into the boardroom about adopting the pill?

Lipton: It's an interesting story.

Bouchard: I was hoping you might say that.

Lipton: The adoption of the pill. And I would say this is July of 1984 and I was home because this young lady over here had just been born. And the call was put through from the office and I took the call and a voice came on the phone, My name is Donald Clark, I'm the chairman of Household International Corporation. I hear you have something called a poison pill? And I think I need one.

[laughter from crowd]

Lipton: And that led to working with Goldman Sachs to fashion a presentation to the Household board to approve a poison pill. And I was working with a partner at Goldman Sachs who just happened to be six foot six, six foot seven. And we went to the meeting in Chicago and their headquarters were there in Chicago. And there were two directors of note on the board. One was Mr. Moran who was the raider and the other was John Whitehead, the co-senior partner of Goldman Sachs. And the Goldman Sachs partner presented with the typical twenty-five pages of analysis and so on, values and so on. And I presented the pill and how it worked and so on. And then Mr. Clark asked the board for comments and Mr. Moran was first and argued against it and so on. And then Mr. Whitehead was next. And Mr. Whitehead said well I don't think we should do this. I don't think a company like Household should adopt something that could deprive shareholders of a premium. [00:41:17] The six foot six partner suddenly became four foot four and there were two votes against the pill: Moran and Whitehead. And of course as you know in the opinion that it was made clear to the board that it could stop a tender offer was a factor in the court's decision sustaining the legality of the pill. So sometimes little things like that happen that stick in your mind. Now Clark was just a fabulous client, sat through the trial, attended the appeal, never doubting, always saying I know this is going to come out right.

Bouchard: Now on the opposite side of the caption, DKM or Dyson Kissner Moran was represented by Skadden Arps, and Joe Flom your longtime adversary in many of these contests was representing DKM. Tell us a little bit about how you saw his interaction in this whole process?

Lipton: Yeah, Joe was against the pill from the beginning, long before Household. And they hadn't... When Household came along he was determined to get a decision denying the legality and I thought he went to some extremes in doing it. There's a young fellow who summered with us I guess in '83, '84, who wrote a note in the Harvard Law Review arguing the validity of... And Joe just claimed this had all been a setup and whatnot. It became unpleasant. I don't want to go into great detail, it became unpleasant.

Bouchard: So we've been discussing the flip over provision of the pill. How did things evolve to the point where you thought there was a need to have a flip in provision in the pill?

Lipton: In 1984 Johnson Controls became the target of a raider by the name of Victor Posner. And Posner had a different methodology. He did not do a second step merger. He went to basically try and get control of the company buying 20 or thirty percent of the stock. And then he would put relatives on the payroll. He kind of took advantage of companies that he controlled. And so when Johnson Controls came to us we knew that a flip over pill would not be effective against him.

Bouchard: Cause it's only triggered in the second step merger--

Lipton: Of course it only works if the raider is going to do a back-end merger. So we devised a pill that said if someone crossed the 30 percent or the 20 percent threshold and engaged in a self-dealing transaction with the company, all the other shareholders would get a stock dividend but the raider would not, which was a flip in. And that was the first use of the flip in. Johnson Controls eventually greenmailed Posner and that was the end of that.

Bouchard: Were you more concerned with the validity of the flip in than the flip over?

Lipton: Much more concerned.

Bouchard: Explain that to us.

Lipton: Well, it's one thing to have an instrument that is designed to protect shareholders in a second step merger that may be unfair to them and so on. And which had a basis on the non-destructive clauses that were used. It's another thing to have a totally unique transaction with just issuing a stock dividend to everybody except the raider. Of course Unocal hadn't even begun, the transaction had not even started at this point. So we were very hesitant with respect to a flip in. And then in 1984 a California company, the Crown Zellerbach Paper Company became the target of a corporate raider by the name of James Goldsmith, an English entrepreneur who came to the United States and sort of corporate

raided for about a dozen years and then went back to the UK with a couple of billion dollars that he made. And he started to acquire stock in Crown Zellerbach. And we thought long and hard about a flip in and ended up not doing it. And Goldsmith then bought through the threshold, got control of Crown Zellerbach, and did not immediately do a second step merger. And of course everybody was then saying that's the end of the pill, it doesn't work and so on, but of course he had borrowed the money to buy the fifty percent of the stock and he had to do a second step merger and ultimately the flip over worked and the people who held onto their rights got the extra money. So the pill did actually work. So we weren't sure what to do and we were even hesitant even after Household was decided, very much more confident then but didn't want to go all the way. And eventually we did a year and a half later.

Bouchard: So Household comes out, validates the flip over provision. You have the decision in hand, but the opinion was really looking at the adoption from the clear day perspective. And there was language in the opinion about not being able to arbitrarily, I think is the word the Supreme Court used, refuse an offer in the future. And the directors' conduct would obviously have to be analyzed under the circumstances at the time of a particular offer. A couple years later Interco gets decided, Pillsbury gets decided on the heels of Interco and it's getting your blood pressure up, I can tell. And obviously the court enters injunctions causing the redemption of the pill. Going back to some of the memos you wrote at the time, some pretty strong language. I remember as a young Skadden Arps [00:50:06] associate seeing these in real time. One right after Interco you wrote a memo saying well it's time to start thinking about migrating out of Delaware, maybe going to Pennsylvania or New Jersey or Ohio. After Pillsbury, I'm not sure you could control the words on the page. What was your reaction? Were those idle threats, were you appealing to a broader audience, or were you really saying no, no, this issue is enough to make people go somewhere else?

Lipton: Well it was clear nobody was going any place. First of all you couldn't get the vote to leave Delaware. It was basically designed to try to get legislation, you know, look, the courts are not sustaining this. And something that would be effective in giving time on a hostile takeover or would permit a liquidation or other transaction that the directors felt was appropriate under the circumstances. And look at all these other states who have adopted legislation, it's time for Delaware to adopt. At this point we were very hot and

heavy on both pill validation and constituency statutes. And we were basically working with - it's interesting how we got those statutes. Just about every one was achieved by getting the business association and the manufacturers' association in the state together with the labor unions in the state and there was no other way to get them. It was in fact, the Chief Justice mentioned Massachusetts. Massachusetts, what happened was a French company St. Gobain made a bid for the Norton company, which is a major company in western Massachusetts, and we had them adopt a pill. St. Gobain said that they were going to conduct a proxy fight. So we were worried that they might get a majority of the board to in effect redeem the pill. So we got--Norton was sort of the key to the economy of Worcester, so there was already kind of a concern in Worcester and had become a political matter. So I thought why not amend the corporation law to have mandatory staggered boards in Massachusetts retroactive so that--

Bouchard: As in to the civil war, or retroactive to what?

Lipton: As of the passage of the statute. And if they were doing tender offers in the civil war we may have come up with that, too. Many of that--and again, it was the labor unions and the manufacturing association that made it possible. I ended up testifying before the committees of both houses of the legislature on what it meant. And so... And the labor unions got a price, there were provisions in the statute that were favorable to the unions. And you could opt out. It was not an opt in statute, it was this is it, but if you want to opt out, you can opt out.

Bouchard: Ok, let's go back to sort of the trilogy of Delaware law scripture here. We talked a little bit about Unocal which is early '85, Household in November '85. During this time the case that's steaming along in the courts is Revlon. First of all, why don't you tell us a little bit about what your role was in Revlon, who you're advising and whatever anecdote from that experience you can share?

Lipton: Well we were representing Revlon. And it was what I'd call a classic Mike Milken Drexel Burnham financed takeover. And a subsidiary of MacAndrews and Forbes was the bidder and it was clear that the shareholders were restive. And so we did two things: one, we issued a note to the shareholders - I won't go into the details of it - to kind of assure the shareholders that they wouldn't be left high and dry. And then it was decided that

rather than continue the battle they were going to do a deal, basically a private equity deal. And that resulted in a bidding contest and the bid was advanced by a few [00:57:22] cents, a couple of times. And it was clear that Mr. Milken wasn't going to stop financing it. And we went ahead and signed the contract. MacAndrews went to court and well that's how the case was decided, erroneously, I might add.

Bouchard: Well, we're going to get to that. But let me focus on the notes you mentioned. Because in Forstmann Little's bid they had an aspect to their bid that gave some benefits to the noteholders. And the Supreme Court obviously didn't think very much of that, made it clear that the only consideration when you put the company up for sale is the consideration of the stockholders - notwithstanding the language from Unocal just earlier the prior year about potentially considering other constituencies. I assume the answer to this question is yes, but maybe can you amplify on it but did you feel that was a wrong decision?

Lipton: I always thought the decision was wrong on two bases. One, there's always a question when you're saying you're doing something to maximize value for shareholders. Who are the shareholders? These noteholders were shareholders. And we're talking about a very narrow time frame, it wasn't as if all these notes were in other hands. Probably ninety-five percent of the notes were in the hands of the shareholders. So I thought it was a mistake on the court's part to reject taking into account the impact on the noteholders. I also thought it was a mistake for the court to say that a five cent or ten cent difference in what is being paid in an acquisition would tip the scales with respect to a transaction that a board of directors felt was the appropriate transaction, even though it was a few cents’ difference. And there was no concern whatsoever for the other constituents. And I thought to this day that the court did not give into account all that it should have taken into account. But I don't want to leave the impression that court did anything inappropriate or whatnot. I think throughout this entire period and to date, the Chancery Court has really done a fabulous job of finding a path through a constantly changing economic and social environment, and in effect, really protecting corporations and their shareholders basically, most of the companies in the US, in situations that courts are really not fully equipped to deal with. Some of these situations really require legislation. And in a situation where there's really been bare bones in terms of 203, there are a couple of sections that have been amended or adopted and so on, but all in all, it's

just an astounding job has been done in creating a corporate governance regimen that works. And now it faces the problem that the immediate panel before was discussing, is whether it can continue to work in the face of institutional ownership of eighty percent of the stock. The entire structure that we began with in corporation law and was added to--and even in the states with strong constituency statutes: Pennsylvania, Ohio, states like that, none of that matters any more because for most companies between fifteen and twenty shareholders have effective control of the company. May not be the same, fifteen and twenty, and every sense, but it's rare that a major company listed in the US isn't effectively controlled by between fifteen and twenty shareholders. So the focus of our corporation laws was on boards of directors in companies with respect to fiduciary duties and rights to constituents and so on, when today the power is in the hands of relatively few investors who have a totally different raison d'etre. It's to maximize the value of their portfolios and who are in competition with each other for managing funds and so on. So we've ended up now where fifteen activists basically are responsible for just about all of the major activist activity, are capable of mobilizing the holdings of these institutions to force the boards of directors of companies to take actions that the board doesn't necessarily want. But even more significant, the acts that they do make, they essentially force every corporation that is subject to change of the board by a vote of shareholders, every corporation to follow short-term strategies that basically have retarded investment, have enormously, deleterious impact on employees. I'm not sure everybody realizes what short termism does to employees because companies live in dread of missing their quarterly guidance, their stock will go down fifteen, twenty percent. The only way in the short term a company can deal with that problem is to announce a restructuring with the termination of three thousand employees, five thousand employees, whatever is necessary to make the Street believe that that reduction in employment is going to result in a run rate increase in profitability so as to restore the projections that the Street is using for the future. And it has essentially destroyed the old implicit contract between companies and employees that the employees would have a job. Which takes me back to your first real question on the nature of the boards in the mid-1950's. Every one of those boards would rather have reduced the dividend than fire one single person. Those companies were totally focused on employees and the community in which they operated. And that's totally gone today, it just doesn't exist. The pressure that short termism and the activists have put on companies have made it impossible. So we've yet, as you heard, we've yet to evolve the right approach to deal with this problem.

Bouchard: So one final question, our time is almost out. What is the worst decision Leo Strine has ever authored?

[crowd laughter]

Bouchard: You practiced law for six decades.

Lipton: My daughter will disown me if I say anything that's even hinted at criticism of her hero.

Bouchard: You just ruined my setup but it's ok.

[crowd laughter]

Bouchard: So you practiced law for six decades. There are a lot of lawyers in the room who advise board of directors. You obviously have an extraordinary history in accomplishment in your career. What would you tell the lawyers in the room who advise directors, particularly the younger ones that are maybe at the start of their career. What are the key things in your judgment to advising directors well?

Lipton: You know, I don't want to answer with the pat. I think the key thing in today's world is to make sure you understand the pressures on directors in advising them. And the psychological problems that arise from short termism and activism. In a way activists are successful by driving a wedge between directors and the management of the company. Because directors don't want to be embarrassed. And one of the strongest things that an activist or one of the corporate governance proponents like Bebchuk and his shareholder rights effort on destroying staggered boards, is that directors will be embarrassed by a withhold vote or a negative say on pay vote. And that just, you have to understand in advising directors to make sure they understand what's happening and the kind of pressures they're under and their obligation to make sure that their decisions are not predicated on narrowly avoiding the embarrassment of a lower vote than a fellow director has gotten or a negative say on pay vote. And the advice you're giving may result in that but it's the appropriate advice and they should make their decision based on whether they

agree or not with the advice but not on the basis of this is a way to avoid embarrassment by a withheld vote or a negative vote. I think that's the biggest problem. Not just young lawyers. That was our biggest problem we have today, I have today, in advising directors that sometimes, you know, you have to overcome your personal concerns and act in the way that you feel is appropriate in the interest of corporation and what it's attempting to achieve.
Bouchard: Please thank Marty Lipton.
[applause]
[01:12:15 end of video]