Insights from Practice: Did Delaware Get it Right or Mess Up in Addressing the Takeover Boom of the 1980's?
Panel: Peter Atkins, Martin Lipton, Arthur Fleischer
Moderator: Lawrence A. Hamermesh
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University of Pennsylvania School of Law

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MR. HAMERMESH: It's a pleasure, an honor, and a little bit daunting to do these introductions. As Dean Ruger said, we are talking about whether Delaware got it right or messed up in addressing the takeover boom of the 1980's. That requires us to look back a considerable ways in time to appreciate some of the decisions that were made and where they left us. Just for background because not all of our programs have stage lights and fancy recording going on: this program is being recorded as part of something that we call our Oral History Project, which Professor Wachter and Chief Justice Strine are the impetus for and the creators of. This is an effort to try to capture the thinking of those lawyers and judges who were actively involved in these famous cases that we still read and teach about today. And so, if you want to sneak in front of the cameras, you too can be part of history that we are trying to capture. #00:01:25#

I want to introduce our panelists in a peculiar and very selfish way, with a story about me. The story about me is

that I went to the law firm of Morris, Nichols, Arsht & Tunnell in Wilmington Delaware in 1976, when there were about 24 lawyers in the firm. That would be a tiny firm today, of course, but it was one of the bigger Delaware firms at the time, and now it still is, although it's much bigger. And in 1976 I had some vague interest in corporate law, but I didn't appreciate until several years later and into the 1980's what a central place Delaware would become in these hugely significant economic battles that we now describe as takeovers. And my role in that was as one of the litigation shock troops. I got documents, and I would help other people prepare for depositions. There was a small circle of people whom I held, and all of us at Morris Nichols actually held, in awe because they were the transactional lawyers in New York who shaped the battlefield that us litigators fought on. And we knew those names. And there are four names in particular that I have in mind today; sadly, one of them is no longer with us. Joe Flom from Skadden, Arps, Slate, Meagher & Flom, was one of those people who helped shape these battles. But, of course, he is not with us. Fortunately, his partner, Peter Atkins, on my far right and your left, is with us here today. And Peter is another one of those names who we used to conjure with. Atkins says we should be doing this. This is – these are all names you're looking at who, I was their apprentice, at

best, they were our masters. And speaking of masters, the next one, alphabetically, is Art Fleischer of Fried, Frank, Harris, Shriver & Jacobson. Again, we used to do, when I was a litigator, a lot work with Fried Frank, and Art was the person sort of at the top of the chain who made the, as far as we could tell, the negotiating decisions that shaped the merger battles that we fought about. And last, alphabetically, Marty Lipton of Wachtell, Lipton, Rosen & Katz, who is, of course, a legend in his own right and a Penn undergrad, apparently, and nice to have you back here on campus, Marty. #00:04:09#

MR. LIPTON: Thank you.

MR. HAMERMESH: But it's a pleasure to have these folks here to talk about this question that we pose as the title of our panel.

So, I want to set the stage a little bit before I turn it over to these gentlemen, because as our oral history project reflects, the premise of it is that to understand the developments in Delaware takeover jurisprudence that occurred over the 1980's, you need to understand where things stood before then, in the late 1970's. And so the first question I want to pose to our panel is, what was the state of play, what was the state of jurisprudence, what was the legal framework governing mergers and acquisitions in the United States, back in say 1979? And to kick that off, I'd like, Marty, if you

wouldn't mind taking the first crack at that question. What was life like when dinosaurs walked the earth? #00:05:07#

MR. LIPTON: Well, life was Guth against Loft and Levien against the Sinclair Oil Company. There were really no merger cases or takeover cases. It was, the law was essentially around control shareholders and what was expected of control shareholders and corporate opportunity. The famous Loft case, and one of the things that practitioners sort of were seeking at that point was guidance as to how to deal with proposals, friendly or hostile, for a takeover or acquisition of a company and whether the business judgment rule applied particularly with respect to dealing with a hostile tender offer. It sort of has to be put in the context of 1968, the Williams Act was enacted, and deal with takeovers on a federal disclosure level. Not much really was going on at that time. And as time went by, into the seventies, it wasn't until 1974, when Joe Flom and a banker by the name of Robert Greenhill at Morgan Stanley, represented the International Nickel Company in making a hostile bid for the Electric Storage Battery Company. Why they wanted Electric Storage Battery Company is beyond ... in any event. But it was – it was the first time that major companies were involved in a hostile takeover with major investment bankers. And that sort of opened the floodgate of tender offer activity, which of course, opened a

floodgate of litigation in Delaware, and the Delaware Chancery Court had to basically write on a clean slate to deal with the various aspects of hostile takeovers and takeovers and M&A activity that started to really blossom in that period. #00:08:16#

So, I think the best way to answer the question is there wasn't very much at the beginning of the seventies. There wasn't very much at the end of the seventies. And it was really in the eighties that the law began to take shape.

MR. HAMERMESH: As a format matter, what I am going to do is ask each of the three of our panelists to respond to these questions. No need to repeat what the others do, but Art, do you have anything to add to that? #00:08:49#

MR. FLEISCHER: Well, I am in full accord with what Marty said. I think a critical division point is the year 1985, because essentially in that year, and I am just going to recite these case names, and all of you are familiar with them, but Van Gorkom, Revlon, Unocal, and Household; those cases were decided basically around 1985. So that the essential foundation of modern Delaware takeover law was in the middle of the 1980's. And prior to those cases, there were decisions which you will understand and see, grew into something else. I mean the Delaware courts were obsessed with the primary purpose test. In other words, if you bought stock

in, was your purpose to entrench the board and the management? And if you issued stock in a situation in which there was a control shareholder, was that done to dilute the controlling shareholder? And these issues of concern were the issues that we have been dealing with and focusing on since Unocal. In other words, actions that are taken and what is the purpose of those actions? They are less sophisticated, perhaps, in how they dealt with them in the sixties and seventies, but when you read these cases, and one of the cases was the Weinberger case dealing with a controlled company merger in which they had the entire fairness doctrine, which is still alive, but not alive with the same subtleties as it was then. But in the course of reading the opinion, the Justices talk about the benefits of a committee of independent directors to negotiate on behalf of the target. So, one of the themes that is so common in contemporary law was being talked about right at the turn of the early part of the 1980's. But what this points out in a way, there was a foundation there, and what the Delaware Justices and the Chancellors and the Vice Chancellors have done have built on this foundation in a very imaginative way. #00:11:15#

MR. HAMERMESH: And Peter, what was your sense? If you can recall back then about where things stood or didn't stand? #00:11:22#

MR. ATKINS: Well, I'll give you two perspectives. One is the personal perspective that's probably as good as anything I can say. So, I started off as a corporate lawyer in 1968. I did everything. There wasn't M&A; there was no M&A practice. By 1985, the chosen date that Art just described, I was a seasoned M&A lawyer. There was an M&A practice. I was an exhausted, seasoned M&A lawyer. But in the process of getting from a neophyte to exhaustion, there were actually a bunch of things that happened, but I think the characterization that nothing much wasn’t nothing much but nothing much that got in the way of pretty much a wild West approach to takeovers. It was completely new. There was some legislation around, the CFIUS was around in the mid-seventies, Hart-Scott was around. And those, by the way, grew out of a debate about control because it was an issue at that point. But nobody actually put up a stop sign. Delaware law certainly didn't create any part of it. There was a set of first-generation takeover statutes that had arisen by the time the seventies was over. But those were immediately challenged every time somebody started a takeover. It did not really prevent them and, ultimately, they were declared unconstitutional.

So, it's not like nobody is paying attention, but nobody paid attention enough. And the dynamics of acquisition interest, which - Marty was absolutely right, the Inco-ESB

thing triggered an enormous amount of activity and actually produced some changes in the Williams Act, which started out having only a seven-day time period. The seven-day time period because you know, known as the Saturday Night Special in the takeover world. So, that was extended to 20 business days. And some of the other provisions that we see now, but not all of them, were there. But it basically legitimized the ability to do takeovers as opposed to stop them. And it was more or less a free-for-all. #00:13:46#

MR. HAMERMESH: So, I'm going to come back to you, Peter, for our next stage-setting question. But what I am hearing is that, it accords with my primitive recollection, that back at the end of the seventies, yes, Art, there were some doctrinal foundations, but how they would apply in any particular case in this new wild West era was, at best, uncertain. So, the next general question is looking back on that state of affairs and how it played out over the next 10 years, over the 1980's, and even after that, I just wanted to get your general impression of how the Delaware courts coped with this state of affairs. If you're looking back on it, do you think that there were better ways to do it? Do you think the right people were involved? What's your sense of how the courts performed? #00:14:49#

MR. ATKINS: Is there only one answer to this question? I'm sitting close to Delaware with a lot of Delaware lawyers...and the Chief Justice over there is going—

MR. HAMERMESH: Totally, totally candid.

MR. ATKINS: Okay. Notwithstanding all those comments, I actually think they did a very, very good job and from a number of different perspectives. The one thing I think that was probably – I mean I wasn't inside the courtroom, so I don't know that is actually what was going on but when you sort of look at the landscape we just described, and the rising tide of opposition to takeovers that did exist in the mid-eighties, there was what you might call an imminent threat, certainly an imminent push for federal legislation legislating state corporate law, basically. That was what was in the wind. There were people who thought takeovers were the product of the devil himself. There were people who actually thought it was a good idea. But that debate was pretty hot. And you know, kind of looking at what happened, particularly that seminal year of 1985, you have to – at least I have asked myself the question, was this a protective response, not to a takeover—well, to a different kind of takeover, if you will. Because you know, we had a perception that, I think the Delaware courts had, certainly I had, and many lawyers had, a perception that there were some real pressure points that were

developing. I think that the perception or the insight in the Delaware courts was that they needed to do something. They needed to do something that was balanced. They needed to be mindful of some fundamental aspects of Delaware law. But if they just sat back and did nothing, then you know, Washington could show up at the doorstep. #00:16:59#

And it was really interesting if you look at it from that perspective. As, I must say this was an insight, if you call it that, but at least a thought that I didn't have until Larry forced me to think about this. But in thinking about it, you know, those four cases, and particularly the two that dealt with defensive activity, Unocal and Household, what the combined set of cases did inject the judiciary, the state court judiciary that was ruling over half the – more than half the public companies of the country - you can't forget that - that court, rather than sort of being completely reactive and just sort of deciding things in a minimalist way, stepped out and stepped up. And they did it—so, that piece of it, in and of itself, sort of sent a message to Washington, I think, you know, we could take care of this. But also, the way it was taken care of. Because I think the most powerful voice and the most powerful threat was this onslaught of takeovers was really threatening, and we've got to do something about it, and if somebody else won't, we'll do it in Washington. Well,

the somebody else was the court. And in the defensive area, to be sure they established an enhanced scrutiny standard, but the application of that standard, the identification of threats and the permissiveness in responding to those threats, which was pretty broad, that as actually sort of a counter, some real ammunition in opposition to takeovers. And you know, my thought was, my feeling now is that they were pretty smart guys. They knew that if they didn't do something – but they didn't want to go all the way and sort of abandon Delaware corporate law, so they did it within the boundaries of what was a pretty established and pretty sound system. #00:18:57#

MR. HAMERMESH: Art, what were your thoughts about looking back on it how procedurally, substantively, how the courts dealt with this morass or wild West, or whatever you want to call it? #00:19:08#

MR. FLEISCHER: Well, yeah, I think everybody had a sense of being a pioneer in an exciting venture. And when you analyze and look at what the Delaware courts did, it's quite extraordinary. And in deciding whether or not you think they did a splendid job, the question is, what were their objectives? And if you go through, I think, what the objectives that are evident in the decisions they made, you will see a whole systematic view of corporate law. And of course, the most fundamental and obvious point in something

that had driven home especially hard by Marty was the directors have the primary role. And after all, the simple, most signal, most important aspect of Delaware jurisprudence is the business judgment rule and the presumption of regularity and the power and responsibility it gives to directors. And then, what followed from that is, and as a result of Van Gorkom, restrictions on liability. That is, we are not going to get directors who are going to be willing to participate in this venture if we expose them to unnecessary threat of liability. #00:20:36#

Another objective was obviously restricting conflicts of interest. And that flowed from, if you think about the Weinberger case, I mean, that theme was evident in Delaware law, but it was something that was focused on and expanded. And then, you get something as technical and basic as deal protection provisions. You know what, whether or not when you sign an agreement up, and you get a termination fee if someone tops your bid, that's a deal protection provision. And early on, I think it's fair to say that the Delaware courts looked at this and said deal-protection provisions are not – they are not going to be a vehicle for restricting competition for Delaware companies. And that's very basic. #00:21:30#

Also, in a theme that fit where Delaware had always been, Delaware corporate law is facilitating, and it continues to be facilitating. And a perfect example of that is this merger statute 251(h), which simplifies how you do a merger in two steps with no cost to investor protection. It's just something that makes sense.

So, I think if you stand back and you look at these objectives and how they were fulfilled and made significant and incorporated into the jurisdiction and incorporated – one of the things that is so interesting, it was so interesting and still is – about being a participant in the takeover area is the constant necessity of adapting the latest decision into the operating mechanics of a takeover. And so, when a decision comes down on deal protection, then the next day, that decision has to be embodied in response to what the court has said about deal protection provisions. #00:22:48#

And I think all of this together required an unusually talented and thoughtful series of Justices, Chancellors, and Vice Chancellors, which has been the case as well as an attentive and very sophisticated professional bar, plus a legislature which pays attention to corporate law.

MR. HAMERMESH: Thanks, Art. And Marty, I know from your memos that you have not always been laudatory about all opinions from the Delaware courts. But I also know that you

have had a lot of dealings directly and indirectly with them, and your sense of how they had performed overall? #00:23:28#

MR. LIPTON: Every one of the cases I have won, I thought they performed magnificently. Every one that I lost, I had a problem with. I think I echo what both Peter and Arthur said. It's a little hard to recreate today the situation that existed in the late seventies and through the eighties. You had lawyers constantly trying to innovate, to develop a better defense or a better tactic to be successful in a transaction. You had the emergence of the leveraged buyout business, going private transactions and so on presenting another new type of issue for the courts. And then, you had lawyers who were trying to convince the court where the law should go. #00:24:51#

I wrote an article in 1979 because we didn't have a precedent that said that in dealing with a hostile takeover, the board could exercise its business judgment. And so, I wrote an article that said, of course, when a board is dealing with a hostile takeover, the board can exercise its business judgment. And besides, it can take into account, not just the shareholders, but the other stakeholders as well. No one thought that was the law at that time, and just about everybody in Chicago and in Cambridge attacked it. But it did, ultimately, show up in Unocal in 1985. And that's what was

going on. If it wasn't law review articles, it was transaction genius; Joe Flom was a true genius at transaction shaping. And there were bankers like Bruce Wasserstein and Bob Greenhill, and Felix Rohatyn, who were constantly coming up with new methods to accomplish their objective. #00:26:35#

So, for a court, basically of five Chancellors, to deal with this, and a Supreme Court that had not seen this kind of activity before, the kinds of appeals, and the power of the Delaware lawyers – your colleague at Morris Nichols, Lew Black. I shopped for a lawyer who would give an opinion that the poison pill was legal. Lew was the only lawyer who would give an opinion that the poison pill was legal. A should opinion, not a will opinion, but and without that, it never would have seen the light of day because no one would want to do it unless – since most of these cases were Delaware corporations, that unless there was some hope that the Delaware courts would find it legal. #00:27:52#

So, that's what was going on, and that’s why I think all three of us think Delaware did a magnificent job and without the help of the legislature. #00:28:04#

MR. ATKINS: Can I add just one point because the legislative point, I was to give a little bit more of a shout out the legislature because they did the 102(b)(7) exculpation

provision, but they also, it was in 1988, adopted 203. #00:28:22#

MR. LIPTON: But that's later—

MR. ATKINS: Well, it's within—

MR. LIPTON: I'm talking about a period before.

MR. ATKINS: You're right. You're right. But if the question was how did the courts and the legislature, did they do a good job, a bad job overall? I think you can't dismiss 203; the timeframe is – it was still in that time when all of those miserable, bust-up, coercive, two-tiered terrible takeovers were happening. They come up with a reasonable – I say reasonable because there were much more extreme statutes even in the second-generation era. But it did put a crimp because essentially, unless you got – I mean there were other exceptions, but essentially, unless you got board approval in advance, you couldn't go over 15 percent, and if you did – you could go over it, but you couldn't access the assets and cash flow of the company – the target company - for three years. That was a big problem for the kind of highly-leveraged junk bond type takeover. So, they were doing what they wanted – they needed to do. They weren't the most active legislature in the world, but they did what they needed to do. #00:29:39#

MR. HAMERMESH: I want to drill down in some more specific subtopics now with you folks. And Art, you mentioned

something I want to take off from, which was sort of the essential premise of the key role of the board of directors. And of course, if the law places that level of responsibility on the board of directors, which the statute clearly does, and the courts underscored that in their opinions, it becomes important to ask what steps there are, what mechanisms there are, to hold the board accountable in appropriate ways. And Peter, you mentioned Section 102(b)(7), and Art, you mentioned Van Gorkom and all that was going on in the mid-1980's. Were those decisions – this is sort of a broad question, but were they right or wrong? Did they come up with the right balance? And do we have, as a result of all that, the right level of director accountability? Or too harsh? Too lenient? What's your sense? Peter, let me ask you to lead that off again. #00:30:53#

MR. ATKINS: Okay. Well, Van Gorkom, obviously, was the atomic bomb in the area of director risk. It actually sort of started in 1980 but didn't get up to the Supreme Court until 1985. And when it did, it produced a three-two; it was a three-two decision, so you could see there was less than unanimity there. On a set of facts, this was all about director conduct in responding to and trying to do a deal and in the context of one party wanting to do a deal in a way that more or less locked it up. And the CEO of – I'm not going to

go through all the facts, but basically, the CEO of the company negotiated a deal. Took it to his board on a day's notice, and they had a two-hour meeting. They had no documents. They had no investment banker. They had no valuation information. They didn't really know what the deal was all about. If you read the – and you believe the majority opinion recitation of facts – and they approved it. And it also had a couple of protective measures built into it just for good measure. #00:32:20#

So, that was the deal that was struck, and that deal was challenged. And it was challenged on the basis that the board failed to live up to its duty of care, which was a, well, a pretty – it's wasn't so much a novel point. What was novel was the result was the three-two found them to have been grossly negligent, but the consequences, this was before and actually the reason – one of the main reasons for 102(b)(7) – the consequence was monetary damages for breach of duty. That was a rare, rare bird in that time and place. #00:33:04#

And so, again, when looking at the case or looking at the outcome, looking at the dissent, which clearly was not comfortable, but the facts weren't really so good, the question you ask; what was going on? What – was this – and I sort of concluded that this wasn't just about the majority deciding a case. This was the majority sending a message. And

it was a heck of a wake-up call to corporate America, to the legal profession, to Delaware, that something as odious as this could happen. I mean the company, in effect, was sold for a substantial premium over market. There was some other information; you wouldn't call it valuation – that suggested that that was probably the best price that anybody was going to pay, and it turned out it was. And yet, that they got. And yet, the directors were derelict in their duty. You could imagine the shock that that produced. It reverberated in terms of real concern that directors would not – independent directors, in particular, would not step up and perform or go on boards. 102(b)(7) moderated that significantly. Interesting statute. It's an interesting statute because it starts out saying thou shalt be exculpated. And when I started reading that statute, I remember wait a minute, you know, this sounds like it's a pretty broad statement. But when you read through it all, you get down to the specific circumstances of Van Gorkom. And it's not about duty of loyalty; it's not about good faith, it's not about intentional misconduct. It's good faith, unintended gross negligence that you can be exculpated for if the shareholders put it in the charter. And by the way, there is no company that didn't do that. #00:35:02#

MR. HAMERMESH: Before I ask Marty to comment, I'm going to throw you a curveball and give the other two a chance

to think about it ahead of time. And that is, how did, when Van Gorkom came down and 102(b)(7) followed it fairly soon after, how did that inform your M&A practice and what you did in doing deals? #00:35:19#

MR. ATKINS: Actually, that's a really interesting question because you know, thinking back about advice one gave before and after that, at least I gave, it didn't make any difference. It did not make any difference. Because the fundamental point was, and you know, I was sort of in the same camp as Marty in the business judgment rule was what people could rely on, but in relying on it, they actually had to do something. And what they had to do was comply with their duty of care. And I thought then, I have thought you know, I thought all along, and I think even more so today that with all of the uncertainties, and there are still plenty uncertainties around, you know, you've got to tell a board you've got to do your job. And that never changed. And I don't see what it would have changed. #00:36:14#

MR. FLEISCHER: I agree with Peter. I think the facts in Van Gorkom were outrageous. And one of the changes, I think, with the takeover movement, and I can't speak before it, so I don't know if it's a change, but the lawyers had a very prominent role in the takeover movement. And they were dealing constantly with senior management and they were part

of the managers of what went on. And they understood. The lawyers who understood the phenomenon, understood what the necessary requirements were. And they knew they had to give sufficient information to the board of directors so that the directors could make an informed judgement. And this required extensive cooperation between the senior management, the investment bankers, and the lawyers. And when they had finished putting everything together, the director – and then, as time went by, the directors themselves got more and more active, more and more aggressive, more and more involved in the process. And I think we have now reached a point where people generally understand what the necessity is for a fair presentation of what's going on. I mean is this bid adequate? What are our possible financial alternatives? What are the regulatory issues that involve? But the idea that you'd have a board meeting in which nobody understood what was in the agreement and then the directors sign the agreement. And whatever gross negligence means, and it means reckless but not intentional, I can't think of anything that's more reckless than authorizing the execution of a merger agreement when nobody had the slightest idea what was in there. #00:38:21#

And so, I think 102(b)(7) is a legislative antidote; it gives a lot of comfort to directors. But one point I also want to make in that connection is the reputational damage.

Maybe there has been a meaningful reduction in liability potential, but no director wants to look ridiculous, all right? And he doesn't want to be part of a machine that made a decision that has no rational foundation when examined by third parties. So, that's a very important driving factor in today's M&A world. #00:39:06#

MR. HAMERMESH: And Marty, in addition to speaking to the question about whether the accountability balance is right, or where it went wrong, how did that play out in your practice? #00:39:22#

MR. LIPTON: Well, I think it played out in everybody's practice to some extent. There was a real cascade of law review articles following the Van Gorkom case with recommendations as to how board meetings ought to be conducted and what should be done in order to avoid a Van Gorkom decision and before the exculpation statute. And the interesting thing is that at the final draft of the merger agreement had to be some lawyer said, at least one day, some said two days, in the hands of the directors before, there had to be a summary of the merger agreement. The lawyers had to take the directors through the merger agreement, paragraph by paragraph, at the board meeting. You had to have an opinion of a major investment banking firm before the board be, before it, yeah. And that, interestingly enough, not that much of

that wasn't being done prior to Van Gorkom, but it became sort of an absolute requirement, at least insofar as the law review articles were concerned. And it really made an impact on directors themselves. And directors would say, well, is this sufficient to deal with that case? They may not remember Van Gorkom, but is this sufficient to deal with that case? You know, maybe we need our own lawyer. Are you sure this is okay? Of course, that case was you know, it was a really bad case. #00:41:37#

So, I can't think of a better example of a decision in a lawsuit that had a wide-spreading impact on how people acted in the context of that kind of situation. In the future, and I think, really, to this day, the procedures that evolved from the Van Gorkom response are pretty much the procedures that are followed today. Nobody feels that they have to get a merger agreement in the hands of the directors two days before. Nobody takes the directors through a merger agreement, every paragraph, paragraph by paragraph. But I think it's the rare lawyer who doesn't still have Van Gorkom in mind in thinking through the presentation that should be made to the board of directors in connection with the approval of this kind of transaction, and particularly, a transaction that involves conflicts. #00:43:02#

So, I'd say that Van Gorkom is one of those cases that has had a continuing impact on the procedures that are used in connection with this kind of transaction. #00:43:22#

MR. ATKINS: Larry, can I just add one more comment on the accountability point? On the overall – is this the right level of accountability? It's not a static point; it changes in terms of the things that affect how directors conduct themselves. Obviously, the legal standards and exculpation is a piece of it. And even in the legal requirements area, I think there are people who would say that you know, the direction of some of the law in Delaware has lightened up over the last few years. But the counterpoint to that, and Art, you had a great point about independent directors are - have their own sort of enhanced self-accountability because they care. They care. It's much more of a reality today than it was in 1985. There is an external accountability that has come from the shareholder base that never was there. Certainly, not the way it is today, and that's concentration of ownership, large institutional holders pushing on issues of governance and board conduct, and the activists themselves, you know, they do have an effect on how directors conduct themselves. This concept of you know, which is not new, but it's certainly gotten more attention recently, of shareholder ratification. But that shareholder

ratification, which could eliminate all liability, is something which requires full disclosure. And that's an interesting point because not only has it been made by the Delaware Supreme Court recently that if you don't make good disclosure, the shareholder ratification doesn't work. #00:45:05#

But I think the lawyers, and it's back to the lawyers here. The lawyers who practice in this area tell their clients, tell their boards, that you understand that you're going to have to disclose what has gone on here, because of federal disclosure laws and state requirements for full disclosure, you're going to have describe, and there are things that went on that raised questions as to the independence of directors, their conduct, the relationship with the investment banks; that's now going to be on the record. So, that kind of pre-warning I think is actually very effective in just getting directors to understand they don't have – and not that they are off running amok here, but they just need to understand that it's going to be a spotlight opportunity and you don't want to be in it. #00:46:01#

MR. HAMERMESH: It's interesting sitting here being someone who has written an article or two about not liking Van Gorkom very much, to hear the three of you suggest maybe it had some good and did some good, so... #00:46:20#

MR. FLEISCHER: Well, Van Gorkom was like BarChris. It was, and I think Peter used the word, it was a wakeup call for the bar and how people – those people who had slid into habits that were exhibited in Van Gorkom, it's just intolerable. And I don't care whether you get into this long-debate or subtlety about is it gross negligence or otherwise. It's not conduct that any law firm should be a party to, period. #00:46:51#

MR. HAMERMESH: I stand chastened. Marty, I want two things from you. One, thrust that mic closer to you so that we can not miss a word. And second of all, it's particularly so because the topic I want to get to next is one on which I know you have some – you have expressed some feelings about. And it's a topic that seems to be with us continuously, and that is figuring out whose interests count in the merger and acquisition business. And the question broadly is how did that play out in the 1980's? And were the right decisions made? And were they made right or wrong not only by the courts but by the legislature as well? So, how did that story develop from your perspective? #00:47:46#

MR. LIPTON: Well, the story basically developed in the context of the litigation that surrounded the hostile takeovers and what – and sort of pre-Unocal and post-Unocal. The pre-Unocal, there was little to work on in Delaware and

some states. Some states had adopted constituency statutes, and some of them had adopted the takeover statutes that were held unconstitutional. And so, the issue revolved around, was the board of directors acting within its authority in rejecting a hostile tender offer? #00:49:07#

And the issue got framed, primarily, with respect to the poison pill starting in '83, and then running into '84 and leading to the Household decision in '85. And the question came down to, is the board acting appropriately, properly, in resisting a takeover? And Unocal decided that yes, it is, but not the business judgment rule. The board really has to meet an enhanced business judgment test in taking an action that deprives the shareholders of a premium and, at the same time, imposes a penalty or absolutely blocks someone from accomplishing a transaction.

So, post-Unocal, the question became what do you need to show to meet the enhanced business judgment test? And we came down to the Interco case with Chancellor – actually, I've forgotten Bill's name. #00:51:12#

MR. ATKINS: Allen. Bill Allen.

MR. LIPTON: Bill Allen. And taking the position that okay, you can block something for a while, but ultimately, you have to give the shareholders an opportunity to make a decision for themselves. And of course, those of us

who were seeking to maintain the power of the pill and the right of the board of directors to permanently block a hostile takeover, did not like the decision in the Interco case. And the question with respect to the enhanced business judgment or whether the pill could remain in place permanently, really continued. It didn't get finally, finally settled until the Airgas case, but it became an issue of contention and litigation, and that spilled over into other states. #00:52:41#

MR. HAMERMESH: I want to come back to the poison pill after a little bit. But to take the clock back to 1985, we see the Unocal opinion from the Delaware Supreme Court, and it quoted a certain article, as I recall, on the subject of what constituencies the board could take into account in responding to a tender offer. Specifically, your article that Chief Justice Strine and Professor Wachter and I teach, when we teach this subject. So, that 1979 article is still very much with us. But lo and behold, in the Unocal opinion, we see that the board is not only permitted, but maybe even obliged to take into account the interests of customers, suppliers, communities served, et cetera, employees. Do you recall your reaction when you saw that? That must have been gratifying. #00:53:31#

MR. LIPTON: Well, they cited the article in a footnote. And obviously, whenever you write an article like that, and the court cites it, you feel well—

MR. HAMERMESH: That hasn't worked so often for me, but okay— #00:53:48#

MR. LIPTON: -- and kind of nice. But the, as happened with every one of these key decisions, it immediately provoked a cascade of law review articles. And just about every corporate professor had – came out with an article as to what the meaning of enhanced corporate business judgment is and so on. So that, in a way, it creates a bit of confusion as to what the law really is. But I think that you know, I guess it's what, a twenty-year period between Unocal and Airgas. They follow several of the Delaware decisions prior to Airgas pretty much satisfied that the court would not – the Supreme Court would not follow Interco. Interco, of course, was not appealed. The transaction, actually, the company was acquired and so that there was no Supreme Court decision with respect to Interco. #00:55:30#

MR. HAMERMESH: Yeah, we will come back perhaps on this, but yeah—

MR. ATKINS: So, just back on the subject of constituencies or other constituencies, I mean, I guess the way I would see it, Unocal had this throwaway line in it. It

wasn't an issue in the case. It was just a throwaway line. And it also had a phrase that sort of preceded that litany of other constituencies, which said something like "and its effect on the enterprise." So, there was a suggestion, I, at least, I thought at the time, and fortunately didn't have to give any advice on this until six months later when the issue was resolved, that maybe it's connected to the concept of enterprise, company, stockholders, but it wasn't clear at the – when, at least I didn't think so. #00:56:20#

Fast forward to Revlon, and the issue in that – one of the many issues, in that case, was that there was, in the back and forth battle, Revlon had issued some notes. Those notes declined in value; they issued in repurchasing shares. And that became a factor in their thinking to protect the directors. That was certainly the way the courts thought about it. But one of the things that the Revlon board apparently took into account in deciding to strike a deal with Forstmann Little was, Forstmann Little was going to shore up the value of those notes. There was nothing that served any shareholder purpose there. In fact, it probably resulted in some – something coming off, either price or other terms. But it didn't benefit the shareholders. That issue was then presented squarely in the Revlon case as to whether or not the directors were entitled to take into account an interest not related to

shareholders, but to some other constituency. And the court was very clear. The same judge as the Unocal judgment, Justice Moore, basically said you can take other constituencies into account provided there is a rational relationship to shareholder interests. So, that – and that is the essence of the shareholder primacy governing law in Delaware. Still the governing law in Delaware, I believe. And so, whatever mystery there was around the ability to, independently of shareholders, provide something to some third party that doesn't – that either – that doesn't protect shareholders or that diminishes value for shareholders. You know, unless the legislature changed the rule, that's the rule. #00:58:22#

MR. HAMERMESH: Speaking of legislative change, I mean that's the issue that's still with us today. We have Senator Warren's Accountable Capitalism Act, which proposes to sort of redirect that thinking into a more broadly other constituency focused role for directors. And I guess the question is whether or not, at least in our limited M&A world, whether you think that that decision in Revlon was where we should have ended up. #00:58:48#

MR. ATKINS: I personally, well, if, I guess the way to answer the question is, do I think the legislation should change that rule? I don't, right. And that's my... So, I think

it's a good rule, not just good law, but a good rule. #00:59:04#

MR. HAMERMESH: Okay. Art, where do you come out on this whole question of the progression from Unocal to Revlon to where we are today on the question of the board's role in thinking about other, non-stockholder constituencies? #00:59:19#

MR. FLEISCHER: Well, I think, and maybe my memory is faulty. I think I am guided by an article that the Chief Justice wrote in which I believe he said that for the typical Delaware corporation, which is a for-profit corporation, the standard in Unocal that Peter just mentioned, that a board can have regard for various constituencies in discharging its responsibilities, provided there are rationally-related benefits accruing to its stockholders. And I believe the suggestion is you can't do something purely for philanthropic reasons. I think if this is the present law in Delaware, there is certainly plenty of latitude for directors to engage in philanthropic activities. #01:00:18#

MR. HAMERMESH: Marty...do you have things to say on that?

MR. LIPTON: Well, of course, this is the critical issue of the day. The – Senator Warren's bill was one example of it. There was a progression in the states, some 30-odd

states have constituency statutes. Basically, Pennsylvania has the most permissive insofar as allowing the directors to consider the other stakeholders in, and in addition to that, it has a provision protecting of the directors from suit for doing so. So, there is a – there was just, this year, a revision in the governance rules, governance guidelines in the UK, which didn't go all the way, but their constituency statute was broad, and to the point of adding that a company would have to have employee input either by an employee on the board of directors or a committee of the board or a director who is designated to have employee interests. Or, a separate employee advisory committee, not quite the thing on the Continent, but sort of moving to the two-tier supervisory board and management board. France is presently considering a revision of its corporate code, picking up on this purpose concept – the purpose of the corporation, and defining purpose to include the other stakeholders. That has not yet been enacted, and it's still in the process. But it has been recommended by a committee that was appointed to consider it. #01:03:10#

So, I think it's fair to say that the future of corporate governance, basically, is dependent on how the political regulatory response is to whether the purpose of a corporation is primarily to produce profits for the

shareholders, or the purpose of the corporation is broader than that and the directors have a fiduciary duty to all of the stakeholders, including the community as such. So, in effect, some thirty-odd states have also adopted these benefit corporation statutes, as has Delaware. Senator Warren's bill is basically the Delaware benefit corporation statute, and so, the question is, is that the way we're going to go? It sort of reprises the situation back in the seventies and eighties as to whether it was going to be a federal statute that regulated this activity or whether it would stay with the states. Remembering that back then, we had Ralph Nader looking for, in effect, federalization and not on the corporate governance point, but really on an anti-trust and size of company point, which we're probably going to also reprise now, both with respect to the size of companies, and the size of the investors, like the indexers. #01:05:11#

But, I think we're at an inflection point as to which way we are going to go. And whether we will stay with the primary focus on shareholders, or whether we're going to end up with a focus on stakeholders and the impact of what corporations do on the economy and community, is all, and so... #01:05:47#

MR. ATKINS: A huge – I mean Marty said it right, this is the issue of the day. It's a hugely difficult issue. I

mean, there are factors that you know, everybody has a point of view on this one, and everybody has an interest. I just want to hark back to one experience I had when just dealing with a much simpler world, but in a constituency statute context, you know, this is some time in the eighties. It wasn't a Delaware company, because there was no such statute, but there was one in another state, and I happened to be representing the target and the board. And the issue came up, you know. This was a permissive – permissive statute. There are one or two that are mandatory, but this was permissive. And the issue came up about well, what should we do? And somebody looked at their lawyer. And I said, well, I mean what do you want to do? Because you have the freedom to do a variety of things here. This doesn't impose an obligation. Your obligation still is what it is, but you're entitled, under the statute, to consider other – and to a person, once they understood that they have fiduciary duties to shareholders, but they could do something for somebody else, then somebody else got lost. That was – I mean, and it's a natural instinct, and I didn't blame them, frankly, that you know, how do I explain myself later on that I didn't deal with only the shareholders in terms of fundamental value because that was kind of on the table? #01:07:23#

It's much more complicated today because there are a lot of shareholders who have voices on this that didn't have them before. But they are all over the law too, I mean, and trying to connect up – if you think about yourself as a director, sitting in a room, having to face this conundrum of I have, as Marty put it, I have fiduciary duties to everybody, what do I do? I mean and it's not just value. It's somebody believes that we're messing up the environment, which we probably are. Somebody believes that we need to have more diversity, which we probably do. How do you make sense of that in the context of governing a company? I don't think it's a corporate governance issue. I think it's a societal political issue. That's my view. #01:08:15#

MR. LIPTON: Well, clearly, it is a societal and political issue. It's interesting, though, how it plays out. The climate question has resonated in boardrooms, and there's hardly a company today that doesn't produce a sustainability report that it issues every year. And if it's an energy company, an oil and gas company, it's a beautiful document, runs 50 to 100 pages, and so on. Boards are feeling the pressure from the ultimate shareholder. The Chief Justice has written at least two articles making this point that the ultimate shareholder is the employee, the— #01:09:18#

MR. ATKINS: The human shareholder.

MR. LIPTON: Pardon?

MR. ATKINS: The human person.

MR. LIPTON: The human shareholder, yes. And that's true that the shares, most shares are ultimately being held for the benefit of a pensioner, a university and its endowment, and so on. And these are long – or holders who have other interests. They have an interest in wages, and they have an interest in the environment, and they have an interest in the community as a whole. So, originally, our corporate laws, including Delaware, and almost all the states' corporate laws, the fundamental role, and it was never called corporate governance in those days, the statutes were passed in a time when the shareholders were families, and people in a community and corporations existed in a community. They weren't these big national, international, global companies. And it made sense that the shareholders had the power to elect the board of directors, after all, they *were* the board of directors. And in those days, these companies all had, if not founders, the heirs of founders on the board and they had the investment banker who took the company public. They had the bank – the commercial banker who had the loans to the company and so on, and so, there wasn't a question of shareholders, it was a question – this is the community of the company, including all of these people. And of course, in those days, the focus was

on dividends and not on total shareholder return. So, there wasn't the same kind of pressure. #01:11:46#

Our corporate laws have basically remained the same insofar as shareholders are concerned. And so that there is a fundamental question today as to whether shareholder primacy is going to continue or not. And it's not a legal question as such; it's a political, social question. And there are those who – I personally think that we're headed in the direction of away from shareholder primacy and that boards will have a responsibility to stakeholders, not primarily to the shareholders. #01:12:43#

MR. HAMERMESH: Well, if we're at another inflection point now, and I think you're right about that, I want to go back to some other inflection points, back 30 years ago, and Art, you mentioned that when you talked about the Weinberger versus UOP case, that the notion of having independent directors play an important role in merger and acquisition activity was something that blossomed in the early 1980's. And we all know, empirically, how boards of directors, in fact, migrated from the model, Marty, you talked about as having community members and the company's bankers and so forth being on the board to a model where there is much more of a distance between a large majority of the board and the operating activities of the company. So, more independent directors. And

I have always thought the takeover movement and the decisions that came out of it drove that to a large extent. And the question is, was that a good thing? And are we better off or worse off for having had that kind of evolution in the boardroom and in the constitution of the board? #01:13:59#

MR. FLEISCHER: Well, I would say the answer is it's a necessary development. And I think it follows from the fact that the business judgment rule is the fundamental principle in evaluating whether to accept or reject a takeover. And obviously, it's applicable throughout the whole takeover process, and outside the takeover process, the business judgment rule governs what a company does and doesn't do. Now, the foundation – the foundation for the applicability of the business judgment rule is that a majority of the board are independent and disinterested. So, without that, you are not going to get the benefit of the business judgment rule. And this has flowed over to the fact that the self-regulatory agencies, the stock exchanges, and NASDAQ require that a majority of directors be independent. And then they have, in some cases, objective standards that will preclude you from designating a director as independent. #01:15:21#

I think the way the Delaware courts have dealt with this also has a real degree of subtlety to it. And it follows from the fact that what is – what constitutes an independent

director, and it's basically someone who makes a judgment on the merits and is not subject to extraneous influences. And there is extensive case law, as you all know, and in many cases, the initial finding is, do we have a board that is dominated by independent directors? Or do we have a board which is not independent and then, we are going to go through a careful examination of the facts. And to show that a director is not independent, you have to show that that director is beholden to the CEO or a controlling party, or so under the influence of the controller that the director's discretion would be sterilized. #01:16:29#

Now, the subtlety in this, these deficiencies, these arrangements, if you will, have to be material. And material in this context, I think, and the courts have come out in the right place, is a subjective test. In other words, does the arrangement that this director have, is it likely to influence him in a particular way, taking into account his financial circumstances. So that if it was George Soros who was the independent director, it would take, obviously, a great temptation to say that that was material to Mr. Soros. So that I think there is a certain burden that flows from this. And I think the first issue you are confronted with is there has developed a pattern that boards will often fragment themselves. I mean they'll set up special committees of

independent directors. So, if even though there are eight independent directors, they may make four of them the committee to do this. And whether that's a desirable outcome, and then the committee needs to get its own counsel and its own investment banker. So, the lawyers have, and properly so, created a scene in those circumstances where a committee of independent directors is required. #01:18:07#

And then, as just a practical matter, you are going to have to make sure that the directors that you think are independent are, in fact, independent. So, if you come in, you're brought in as special counsel in a takeover situation, you think you'd be better off if all the directors were independent. And doesn't that make sense? I mean if none of the directors have a conflict, and you apply the test rigorously, aren't you going to be more comfortable with the decision they reach? And so, that's why I think the emphasis that the courts have put on independence is appropriate and similarly, the steps that the regulatory agencies have taken in requiring that a majority of the directors be independent also makes a lot of sense. #01:19:05#

MR. HAMERMESH: Peter, what's your take on independence? Good thing? Bad thing? Overdone? Underdone? #01:19:10#

MR. ATKINS: In a word, good. And more. But to expand it a little bit. You know, again, some of this is just sort of conceptual, but some of it sort of the product of experience in dealing with boards over time and clearly over the period I have been practicing law there has been a much greater influx of independent directors, meeting whatever standard of independence, putting aside what that means, but you know, real independent directors on boards, frequently a majority. And I don't think I have any question in my mind that the quality of decision-making, the understanding of the needs to be independent, the need to explore to get information, to really do the job, is improved. And I can't say that the other directors, the non-independent directors wouldn't be, these days, actually even more in tune with that because I think it affects everybody. You know, it's a virus that spreads. But in this case it's a good virus. And I think you know, what I have seen about – if you look at the duty of care and what we – you know, lawyers think about what that entails, the receptivity to it is actually, sometimes it's overwhelming. Sometimes it even goes too far; maybe it's because of the reputational issue out there. But independent directors, time and time again, are acting independent. And that means getting what they think they need to know. And some of these folks are very smart, very sophisticated, ask great

questions. I think people who are insider directors or relationship directors, they rely more on others – or they think they know the answers, and that's just human nature. That's not a condemnation; it's just human nature. You know, independent directors – the one thing that can be problematic, but I think it's overcome in most cases over time, is because they don't know the business. Mostly, independent directors are coming from outside. They don't have a current view. Some of them know the industry, but it's a very haphazard exercise. So, and then a good independent director is going to be a better independent director once they get a better understanding of the specifics of the company and the industry. But overall, I think it's a very important factor in improved corporate governance. #01:21:47#

MR. HAMERMESH: Well, Marty, what's your take on that?

MR. LIPTON: Well, I have a different view in several respects.

MR. ATKINS: Is that allowed?

MR. LIPTON: Well, you can ask the Chief Justice, he's there. First, some disadvantages to age, but there are some advantages to it. I started to carry the bag of a very successful corporate lawyer back in the late fifties and had exposure to a number of corporations, public companies that he

represented or was on the board of in those days. I think he was on the board of just about every client the firm had. And the boards, well there was sometimes an independent director, but rarely. I can't really think of whether there are more than one or two what you'd call independent directors on any of those boards. I think they all functioned very well. Directors really knew the business. They knew all of the employees, key employees, anyhow, but in many cases, they knew the people on the shop floor and so on in the companies. Some were well-run, some weren't. Not all had great management, but they weren't cooking the books or trying to figure out how to increase margins this quarter as against last quarter to avoid the drop in the price of the stock. Nobody really cared about the price of the stock in those days. All they cared about were dividends. And in most cases, they would not reduce employment or try to squeeze employees in order to meet the street expectations for earnings and so on. I don't think the street had any expectations for earnings in those days. The expectation was dividends. #01:24:26#

In any event, we're not going back to that, and I'm not thinking that we will go back to it. But I'm not sure the sort of the development of the law, say from 1960 to date, with this emphasis on independence – remember, all of this came about in response to scandals, stock exchange first in

the, I guess it was the late sixties, was the first time you had to have independent directors. You had to have an independent director on the audit committee, and then, eventually, the audit committee got to be all independent and so on. This, and the SEC started to focus on it. And then another set of scandals in the, well, 2000, the millennium, Enron, WorldCom, we ended up with SarbOx, and then 2008 produced Dodd-Frank in 2010, and all of this has moved in a way, and then, the courts, faced with these difficult problems that arose from takeovers and controller transactions and so on began to focus on the board of directors as a safety valve to the point where, today, the typical major corporation has a CEO who is on the board, and 10 or 11, whatever it is, totally independent directors. Maybe one of them has some experience in the industry. Great people. Very successful CEOs in their own right, and so on. And now, balanced in accordance with all of the efforts to assure diversity and so on. But the financial regulators, here in the US, and in Western Europe, in response to the fiscal crisis, changed the rules and said we don't care whether they're independent or not, but you have to have directors who understand banking. #01:27:23#

And this overall question, and I don't want to labor or not go back to, I think this is part of that overall question as to what the role of the business corporation is in

society and how we will respond to state corporatism in what promises to be the dominant economy in the world. China is state corporatism. And as the way they are going, and we are going at the moment, it won't be long before they are the dominant economy in the world, and will our system of corporate governance work in a global economy that is dominated by state corporatism? #01:28:23#

MR. HAMERMESH: Well, one of the – I keep returning to little topics after you talk about these wonderfully large topics—

MR. LIPTON: Well, I don't know the whole topic, so I have to learn to stick with the—

MR. ATKINS: Can I get to a little point on the—

MR. HAMERMESH: Yeah, sure. Carry on. #01:28:37#

MR. ATKINS: So, I think that the principal sort of application of the question was – it was the application was, is the emphasis on independent directors in the context of takeovers a good thing or a bad thing, right?

MR. HAMERMESH: Sure. Although it spills over into other areas, of course. #01:28:54#

MR. ATKINS: It spills – it absolutely, but just and you could make some distinguishing comments about the other stuff. But in the M&A area, the takeover area, a) I think it's been a good thing; and b) it's been applied in a number of

different ways that seem to be efficacious. One is the evolution to, in the Revlon context, to where you can have an independent – well not, this is – I'm sorry, to in the control company acquisition, I guess it was, it didn't [unintelligible] along but the control company acquisition is a mechanism which has been established by the courts to permit that kind of transaction to go forward using the business judgment rule, but to get there, one of the tools is a committee of independent directors who are set up at the beginning, have all the freedom of action, but it's a necessary condition. I think that was a very smart, useful, judicial efficiency act using the independent directors to get there. Similarly, independent directors, even if you don't get to the business judgment rule, can, if they are acting appropriately, can shift the burden of proof in those transactions. So, the concept has been taken and applied in very specific ways, in a way, which to me, makes sense. It's protective of the shareholders, but also it assists judicial efficiency and maybe mitigating litigation. #01:30:38#

MR. HAMERMESH: Okay, fair enough. Marty, I want to come back to you on a subject that you've alluded to a number of times. And I know there are a number of people in the room, probably a large number who haven't met you or heard you before, but what they know about you is he's the guy who

invented the poison pill. So, I know the answer to the question I'm about to ask you, but I'll ask it anyhow. The poison pill, in the M&A context – a good thing or a bad thing? #01:31:07#

MR. LIPTON: I thought it was a good thing. I don't want to bore you with stories, but the – I think it was a good thing and I think the reason why it was a good thing it was the only thing that really put a damper on a period of time in which junk bond financing and the overall market made companies vulnerable to being busted up, taken over. It was a period that I thought threatened the economy of the country. And that unless there was some way of dampening this activity, which was increasing rapidly - there was a very rapid increase in hostile takeover activity from 1974 through 1985, and even going on. It wasn't until '87 that there was a tail-off. And then, of course, the pill was most effective with a staggered board. And by '81, it was impossible, '81, '82, to get the shareholder vote to adopt a staggered board. Most companies that were fully public companies could no longer get the shareholder vote to adopt it. And the, I think that activity, that of hostile takeovers, was not good for the country, not good for the economy and that I think it led to you know, the series of events, the collapse of the junk bond market and the collapse of the S&L's in '90. And it – the worst thing about

it was it led to the financialization of the economy and what we're suffering with today is our economy is financialized. It is no longer based on manufacturing and service business; it's all based on finance. And it's finance that determines how corporations are managed today. There is hardly a company that isn't focused on quarterly earnings and quarterly total shareholder return. And there is this constant pressure to increase margins, which means reducing employment and it's resulted in a situation where wages have remained static for the last 30 years. Yet, stock prices have increased enormously. So, we have shifted the benefits of work to a relatively smaller number of people, and that leads to social unrest. #01:35:28#

MR. HAMERMESH: I'm not sure in light of that, that the poison pill maybe accomplished what it was intended to accomplish, but it certainly accomplished something, as you pointed out. #01:35:35#

MR. LIPTON: It accomplished something. It has a basic no – no real import today. I mean, when three shareholders have between 12 and 20% of just about every major company, you're dealing in a different world. And so, the three indexers have essential control over all of the major companies that have single-class securities. And so, the poison pill doesn't really mean anything. There isn't a board

today that I am aware of, that isn't totally responsive to what the top 10 shareholders want. So, I am not aware of any company. Every now and then, you get one, but no company stands up to the top 10 shareholders saying that's a deal we want you to do. #01:36:45#

MR. HAMERMESH: Peter, back 30 years ago when the poison pill really seemed to be something people thought was worth fighting about, your firm was, at least initially, on the other side. And I have seen interviews with some of your partners who stoutly maintain that the pill should have been invalidated from inception and never allowed to go forward, whether it's relevant or not now or not. But where do you stand, looking back on it now? A good thing? Bad thing? Or maybe irrelevant? #01:37:24#

MR. ATKINS: Well, you know, with apologies to my partners, whoever they were who thought that. I mean I actually think it's a mechanism that is very consistent with what Delaware law was and certainly the realities of that period. I mean...I think Marty is right that there was no other tool available. There were partial tools available. But even the Delaware's business combination statute 203, that didn't prevent somebody from buying a lot of stock; it only prevented the combination, so you access the assets in cash. And so, there was still a real dynamic of accumulation by

people who really didn't want to make an acquisition. That was easy enough to do. And you know, we saw in Airgas that you know, it was very effective, even in a completely all cash, all shares takeover, not coercive, lots of information around. All the shareholders wanted it, but the board felt that it was simply priced inadequate, and you know, Chancellor Chandler said my hands are tied; that's Delaware law, they have the prerogative to make that decision. They did it in an informed way, and they were acting in good faith. And I can't get in the way of that. Even when there was a staggered board because a staggered board in and of itself didn't prevent a takeover – or prevent a change in a board, it just might take a while. Actually, they succeeded in getting three directors initially who jumped ship and went to the other side, right. It was a very fascinating exercise. But, so it was – I thought it was – it has been an effective tool. You know, times do change, and its value today is probably a lot less. But I don't think it was, I mean you know, I think to sustain as a tool in the toolkit, applying Unocal to its application, was a perfectly rational outcome and I don't – you know, I'm not offended by it, no. #01:39:51#

MR. HAMERMESH: And Art, I always thought of you and your firm as sort of a neutral...an agnostic.

MR. FLEISCHER: A medium...I would say it's the single most important development in the takeover field. And served the basic functions that it was designed to; one, increasing the negotiating power of a target board, preventing the taking of control in the marketplace. I mean, when you think about it, it is truly an extraordinary invention that still has vitality and will continue to have vitality.

MR. HAMERMESH: I want to thank you three gentlemen for your contributions.

Applause

End Panel #01:40:42#

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