Case: Omnicare
Interview of Myron T. Steele; Potter, Anderson & Corroon
Interviewed by: **Elissa Habbart,** Delaware Counsel Group
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MS. HABBART: Thank you for being here, and I know it's interesting being asked to put your mind back 16 years ago to try to think about where you were at the time.

MR. STEELE: At least I don't have to go back 35 years and think about where I was at the time.

MS. HABBART: That's true, that's true; it could be worse. But thinking back on this, when this controversy is put before you, do you recall your initial reaction to the dispute? 00:58#

MR. STEELE: My first reaction was I thought that Vice Chancellor Lamb had written an opinion that I liked, admired, and was more than willing to follow. And I, frankly, thought he went one step beyond what he needed to do to decide it the way he did. If you recall the way the system worked at that time, we used the military system when we discussed cases—

MS. HABBART: No, I didn't know that.

MR. STEELE: -- meaning the junior officer speaks first, and the senior officer speaks last. So, the Chief

Justice, then, and I assume until the change in 2013, speaking last always hoped it wasn't two-to-two when it got to him, right? Well, the biggest surprise I had was I stated my position, which was consistent with both what Chief Justice Veasey wrote and what I wrote in the dissent. And then, I was stunned when there were three different opinions right after me, and it went to the Chief Justice, and then, the Chief Justice basically accepted, in his own much more eloquent way, the position that I agreed with. Not because I had stated that position; but because he had the same view I had. But I was really surprised at the fiduciary out prescriptive requirement. I didn't have that concept in mind, didn't think about it. I was all focused on whether or not you put a Board of Directors, when you are scrutinizing their conduct, in a position that is implicating a prescriptive rule about what they must do across the board rather than focusing at the point in time when they have to make a decision. When, in this particular case, as I recall it, and I briefly read over the opinions earlier today, just to make sure that I remembered as much as I could fairly accurately, I had the impression, when I voiced my opinion, that these folks had worked very hard to achieve something for the minority stockholders. I remember that the two majority stockholders, who signed the voting

agreement, had their interest entirely aligned with the minority—

MS. HABBART: Correct ... agree ... #00:03:28#

MR. STEELE: There was no special deal for them, no side agreement, no perpetuation of them in authority. Nothing. And the circumstances where they had worked very hard to find a buyer, and they knew that treading in the deep woods in the background was Omnicare, trying to get what I considered to be a skeleton deal from the bond committee in a bankruptcy scenario to buy the company on the absolute cheap; it didn't strike me that there was any reasonable basis for them to believe that Omnicare was going to pony up. And they knew that the only deal they had prospectively, any reality that they could rely upon, would be the Genesis deal. And they worked and worked and worked to pump the Genesis deal up and the exchange they had to give for that; it seemed to me, perfectly reasonable. And that was, I'll sum it up on one word: certainty. And it was always my view – I have been accused, probably because I'm something of a dinosaur now, as a contractarian, and the truth of the matter is, I am a contractarian—

MS. HABBART: A deal is a deal. #00:04:43#

MR. STEELE: And I think that in business, certainty in contracting is extremely important. You can't plan without

some evaluation from a cost-benefit analysis of the certainty of the deal that you have negotiated and what you believe at the time, honestly, to be in the best interest of the stockholders and the company going forward. I also was very suspicious that, even at the very end, Omnicare still had a due diligence condition. And, based upon the history, as I understood it, of the relationship between Genesis and Omnicare, and Omnicare basically sitting back like a vulture waiting to pick the bones of NCS. I fully understood why I thought the directors did what they did. And I have never been a big fan of bright-line rules. I think everything is contextual. And I thought it's a terrible thing for us to be put in a position where we're shaming these people who were unconflicted and who worked very hard after facing the bondholders losing their money, stockholders getting nothing. They salvaged the debt substantially, and they got something for the stockholders under a scenario where it didn't look like they were going to get anything at the end of the day—

MS. HABBART: And it was a certainty— #00:06:15#

MR. STEELE: Absolutely.

MS. HABBART: Condition for [inaudible].

MR. STEELE: Absolutely. And should they have taken the chance for the so-called superior proposal, even though it was hedged with due diligence? Should they have taken the

chance? I didn't think so. But I understood what the majority was saying—

MS. HABBART: Explain it... #00:06:35#

MR. STEELE: Well, I think what they were trying to say is that it's a phrase that one of the members of the majority uses over and over -- unremitting fiduciary duties. So, you have to keep yourself open to the possibility that there would be a superior proposal. That's part of the duty that you owe. And you have imposed in this situation, under more *Unitrin* than *Unocal* analysis, in my view, a coercive and preclusive, draconian deal where the minority stockholders really don't have a voice; the majority stockholders have already locked up the deal. So, the thinking was that, part of the fiduciary duty, there should be an ability to accept, at all times, a superior proposal. You should be able to withdraw your recommendation of the merger agreement that you have already approved when it goes to the stockholders. That was the thinking. But I didn't think it worked here because of the context, and for the reasons I have already explained about, I think the—

MS. HABBART: The alignment— #00:07:45#

MR. STEELE: -- the two majority stockholders owned 80-percent of the stock. So, whatever they wanted to do was going to happen anyway. And they weren't doing something to

advantage themselves at the disadvantage of the minority stockholders; they had been working—

MS. HABBART: Well, no; they were aligned. #00:08:00#

MR. STEELE: They have been working for the minority stockholders.

MS. HABBART: Well, why would they agree to terms that would limit their ability to get more money unless they thought it was the real – it was a real deal and the best deal available? #00:08:13#

MR. STEELE: My view was, in their minds, it was, if you believe that enhanced scrutiny, as I always have, is, ultimately, however you phrase it, a reasonableness test, then you look at every context to see whether the people were conflicted or not, whether they did the job they should have done from the perspective of duty of care, and whether their rationale, at the end of the day, is reasonable under the circumstances. All of our cases, *Revlon*, and otherwise, talk about not a perfect process, but one that is reasonably going to obtain the objective that, on a cost-benefit analysis, is the best available at the time. So, my thinking was that's what this was. And I was a little perplexed about what I thought was an extension of more of a prescriptive rule that

you must, in every merger agreement, have a superior proposal fiduciary out.

MS. HABBART: But you know there was language in the merger agreement that, other than saying that the Board could terminate it, it did give it terms whereby the Board could, under certain circumstances, listen to other offers, etcetera, etcetera... #00:09:23#

MR. STEELE: Well, the six-million-dollar termination fee.

MS. HABBART: Right. So, you look at that, and then, I say, well, okay, well, that was almost a fiduciary out. That kind of language, I would read it as such. But and what happened in the voting agreement and with the irrevocable proxies? That's being done by shareholders, you know, they happen to also be directors, but they were acting in their capacity as shareholders. And again, you looked at the interest and said, their interest is aligned. There's nothing – they're not taking advantage of the other stockholders. #00:09:56#

MR. STEELE: And they’re 80-percent of the shares.

MS. HABBART: Right. So, why shouldn't their decision control the day? But, do you think since the merger did allow for a certain amount of you know, the Board to be open and have other discussions, do you think it was the

voting agreement and the irrevocable proxies that carried the day? Was that it? #00:10:18#

MR. STEELE: Yeah, that's what had to be considered by – I can't; I really shouldn't speak for the majority. My understanding of their position was, it was locked up. They resented the fact it was locked up, and they interpreted that as being both preclusive and coercive of the minority stockholders. And there was no discussion in there about appraisal rights, as if they had no other option. It was, I think, the turning point for the majority -- that the minority stockholders really were committed by the majority to this deal, and they really had no effective voice. Not that they would have anyway since they were only 20-percent of the shares.

MS. HABBART: Well, that's it. And they went into it knowing that. It hadn't like there had been some recapitalization or something that took them out of their position. #00:11:08#

MR. STEELE: Yeah, there was no ... and there's no—

MS. HABBART: But what I also didn't understand was the fact that, again, the proxies and the voting agreements were the shareholders versus a third party. I didn't understand – well, maybe you have an idea as to why was the company, NCS, a party to the voting agreements? #00:11:35#

MR. STEELE: I guess to – I don't know why the company itself was when the—

MS. HABBART: Isn't that odd?

MR. STEELE: -- the voting agreements really were controlled by the two stockholders.

MS. HABBART: We can't figure that out.

MR. STEELE: Two majority stockholders. I don't have any recollection of that being discussed or thought about—

MS. HABBART: Maybe that made it tied in because we thought, at first, maybe it was a 203 issue, but they – the company, in their original certificate, opted out of that. So, we weren't sure – we can't figure out why they made the company a party to it. #00:12:02#

MR. STEELE: Well, the Board acts for the company in recommending or withdrawing a recommendation. So, I don't think – I never thought about that. I don't – I know it was – I say I know it was never discussed. I don't recall it ever being discussed.

MS. HABBART: Yeah, I just didn't see the need. That was our question because when you go through all of this, the history, you know, from at the Court of Chancery level and such, it was clear that they said in the voting agreement the only thing that the company did was made some representations to the effect that they were the number of shares those

shareholders own, what voting percentage that meant, and that it was mere reps – reps and warranties that they were giving. They could have signed the agreement, if at all, just as to those reps. I mean, I wondered if the fact that the company was the party, was that what the majority could look to, to say, that was how we – the Board locked it all up? #00:13:06#

MR. STEELE: I don't remember any discussion along those lines at all.

MS. HABBART: Isn't that something?

MR. STEELE: I really don't. That doesn't mean it didn't happen.

MS. HABBART: Right.

MR. STEELE: Because I was, as I mentioned, I was very surprised as I listened to the three people who spoke after me. And that they all went in another direction for reasons I really didn't fully appreciate.

MS. HABBART: Yeah, and the majority accepted the findings of facts from Vice Chancellor Lamb, and so, they had to have understood the interests were aligned, and the history of the negotiations were— #00:13:44#

MR. STEELE: That's why I refer to it as imposition of a brand-new prescriptive rule that thou shalt always have, in consistent with your fiduciary duties, a fiduciary out for a superior proposal, under any and all circumstances, at all

times. And, that's what has never made sense to me, having bright-line rules in a fiduciary duty, common law equity venue. It doesn't make sense to me because no situation is exactly the same. General principles can be applied—

MS. HABBART: Right. #00:14:22#

MR. STEELE: -- but they are always applied, as I understood it, consistently with the facts, and the facts would drive the way in which you apply those equitable principles.

MS. HABBART: Yes, I have heard you say that before, Your Honor, and that makes sense— #00:14:35#

MR. STEELE: Oh, it doesn't make any difference what I say any more, but that's just—

MS. HABBART: No ... but, at the time when it still ... okay, you always counseled it.

MR. STEELE: That's the way I've always thought of it.

MS. HABBART: -- that you have to look at, you know, is it a good story, is it a bad story? Are there bad facts and what are they, I need to know about them. #00:14:49#

MR. STEELE: One of the important things to me was, I had always been concerned that one of the best things the system can do is attract the best possible people to board service. And one of the things you do not want to do is chill

people's desire to be on a board because, as one University of Pennsylvania faculty member once coined the phrase, by shaming board members by criticizing what they have done as if they acted badly when, on the facts here, I could make no determination in my mind, at any rate, they had acted badly at all. They didn't presciently discover that there was a new prescriptive rule that all merger agreements had to have a fiduciary out for a superior proposal in any and all circumstances, even at the risk of costing you the only deal you had at the time and could reasonably expect to have. They could never have, I think, come to the conclusion that that was going to happen.

MS. HABBART: And also, your description of the vulture waiting in the wings, I mean, this kind of decision could dissuade a bidder from putting out their best offer to begin with because they have to know that somebody else may pop along, offer a little bit more, and that's the end of it. #00:16:11#

MR. STEELE: How many times in the facts did you see the Genesis people referring to the position they did not want to be a stalking horse? They didn't want to invest all this money and time in preparing an offer, researching the offer, putting their resources forward to make the offer, and then, entering in to a merger agreement only to find out at the end

of the day there was somebody sitting back in the wings who had been, in their view, acting deceptively up to that point. And who we know had been trying to cut a—

MS. HABBART: Based on the history ... absolutely. #00:16:44#

MR. STEELE: -- trying to cut a deal with the bond committee to get a fire sale in a bankruptcy venue rather than make a straightforward topping bid. That was the way I looked at it, anyway.

MS. HABBART: Yeah, I have to ask, and basically this is something for my own knowledge. The provision in the majority's opinion, as they described the merger agreement, that the merger agreement said the following: that "NCS would not enter into discussions with third parties concerning an alternative acquisition or provide non-public information to such parties unless, the first one was the third party provided an unsolicited, bona fide, written proposal documenting the terms. Two, the NCS Board believed, in good faith, that the proposal was or was likely to result in an acquisition on terms superior to those contemplated in the deal at issue. And, three, before providing non-public information, the third party would execute a confidentiality agreement, at least as restrictive as the one in place." I read that and said, that's a fiduciary out. #00:17:50#

MR. STEELE: Yeah, well, you're not the only one that did. It may not be totally unfettered—

MS. HABBART: Right.

MR. STEELE: But it, the spirit of it, as I remember it, was that Genesis was not saying under no circumstances—

MS. HABBART: Correct.

MR. STEELE: -- can you entertain even the thought of a topping bid during the process. It just has – we just have to be satisfied that two things would happen. It would be bona fide. It wouldn't be conditioned on things like due diligence. And it would have to be a good-faith decision on your part that it truly was superior.

MS. HABBART: And so, two things. Number one, that's why I kept saying I don't understand if there was what, arguably, is a form of fiduciary out, then it must have been the voting agreements and proxies that tied together with it. That's what gave the majority angst. But can I ask, you know, Your Honor, do you have any – did it surprise you that Genesis gave permission to NCS to talk to Omnicare in, was it, September or October? Even though the Board of Omnicare had not – the Board of NCS, excuse me, had not made a decision as to whether or not Omnicare was giving a better offer? #00:19:17#

MR. STEELE: I don't have any recollection of thinking about it, to be honest with you, at this stage. If you ask me retrospectively would it have surprised me? Probably so. But, no, I don't recall thinking about that.

MS. HABBART: And that wasn't part of the decisions either. #00:19:34#

MR. STEELE: Maybe I didn't hit the nail on the head in my dissent, or in my rationale or my thinking, but I was more focused on we're deciding to substitute our judgment for that of the Board here. And the mechanism for doing it is an imposition, for the very first time, at what I consider to be a prescriptive rule. And never having been a bright line, one-size fits all kind of guy, that, and the fact that these people who I was genuinely convinced from the Vice Chancellor's accepted findings of fact, had acted perfectly rationally, and in the best interest of the minority stockholders, following the dictates of unconflicted Board members who just happen to be 80-percent shareholders, who would control the ultimate vote. And even if they wanted to vote for a worse deal, they could have done it. But they all worked very hard to get the best deal they could—

MS. HABBART: I agree. #00:20:33#

MR. STEELE: -- under the circumstances. So, that's really where I was focused.

MS. HABBART: And they even went and even got a waiver from the restriction in the agreement against talking to another party. They even went that step. #00:20:46#

MR. STEELE: Yeah, I've always been wary of hindsight review unless somebody has clearly acted in their own interest while serving as a fiduciary at the expense of the beneficiary of the fiduciary relationship. If the facts are clear that that's what's happened, I wouldn't have any problem coming down hard on them and enforcing, as strictly as the facts demanded, whatever the consequences proximately caused by that breach of fiduciary duty. But it's very – I'm very – I was, at the time, and I think until the end, I was very self-conscious about knowing that I don't have the business intuitive experience or intellect of true business people. So, if I was going to substitute my judgement for theirs, I'd have to be very comfortable with what I was doing. And I wouldn't do it on some kind of, I think --

MS. HABBART: Monday morning quarter backing.

MR. STEELE: -- morality view rather than business acumen analysis.

MS. HABBART: Do you think the fact that the order was issued in December and the detailed opinion was not written, or at least published until April, had any impact? Meaning, if they had had to produce a written opinion before –

that explained their order might have made a difference? #00:22:19#

MR. STEELE: No, I don't think so. I think the majority was understandably quite sensitive to the timing of everything. And all the parties were urging action because what did they want? They wanted clarity; they wanted certainty about what was going to happen going forward. Time costs people -- business people -- money. I have always liked to think that one of the reasons Delaware is an attractive place to litigate is because the Delaware Courts are conscious that time costs people money. And if they can come here and get a reasoned judgement as quickly as possible, that's an attractive factor that Delaware offers in the marketplace. So, and no, I'm not surprised by that. I can remember two or three other cases where orders were issued from the bench the same day as the oral argument. I can remember going back in with the court when I was with people the most period of time – I don't know how to characterize it. The court, after Veasey and before Strine, I could remember going back, and we'd discuss what the results should be, and then we'd painstakingly, almost like you were negotiating a treaty with four foreign countries, agree on the language that ought to be there. And then, go back on the bench, and read it to the parties, and then say, a fulsome explanatory opinion will be forthcoming.

MS. HABBART: But you understood what their position was at the time your opinion was issued. #00:23:45#

MR. STEELE: Oh, I knew – right after the oral argument. Well, there was no—

MS. HABBART: Yeah, you knew where they were coming from—

MR. STEELE: -- there was – no, what I would colloquially refer to as a waffle period, and it didn't exist. It was pretty clear from the first discussion that we had a three to two case. And nobody really was genuinely inclined to move away from the position they had taken. Although, as my entire – however many years it was on the court, I don't know; 13, whatever; it was a very respectful exchange of opinions. And it was just we just couldn't come together on it, even though an effort was made to try to talk people into the majority view, and even talked me out of writing a dissent at all. But I was pretty fired up.

MS. HABBART: You just couldn't .... yeah, you couldn't— #00:24:44#

MR. STEELE: I don't think I wrote a dissent – a separate dissent any other time in my 13 years.

MS. HABBART: Interesting. That sounds – how strongly you felt—

MR. STEELE: I've joined to somebody else in a dissent or wrote one that someone joined me. That's the only time I think I ever dissented independently, with somebody else also dissenting.

MS. HABBART: So, for you not to be able to be part of the consensus-building effort, it made quite an impression— #00:25:14#

MR. STEELE: Yeah, well, I was also the junior officer, too. So, I'm listening to people that have more experience on that court than I have, so... had at the time.

MS. HABBART: Going back to that point in time when you were the junior officer, I mean that was quite brave to take such a strong dissent. #00:25:38#

MR. STEELE: I was fired up. There is no question about it. I could have just signed on to Chief Justice Veasey's and not written at all, but I just had to – I just believed it was important to express myself. Because Chief Justice Veasey was very eloquent and very well-founded in the law. Mine was more focused on how can this be happening? It just doesn't seem right to me that these people should be criticized like this, because I don't think they have done anything wrong. I don't think they have breached their fiduciary duty. Now, admittedly, breaching your fiduciary duty isn't committing manslaughter, and I understand that. But

again, I think it's the kind of professional criticism that should only occur when it's mandated, when there is really bad action.

MS. HABBART: Not when there is a record such as there was here – or worked on by the Board. #00:26:33#

MR. STEELE: Not under these circumstances. You could make the case that reasonable people could have handled it differently, but the way they handled it under the circumstances, as I saw it, was very reasonable.

MS. HABBART: So, this is still law.

MR. STEELE: Oh, yeah. It was – I think Chief Justice Veasey was very wise when he referred to it as sui generis that there will never be a fact situation anywhere close to this again, and that people would conform to what this new rule requires. But the real question was whether there needed to be a new rule and whether that conformity should have been mandated by the Delaware Supreme Court and the risk it put into the system because of its lack of certainty.

MS. HABBART: It makes everybody a stalking horse who comes to the table first and gets a deal. #00:27:33#

MR. STEELE: Well, the fact that a situation has never occurred again that gave rise to reexamining Omnicare pretty much says it all about the marketplace's ability – and

the bar's ability -- to work through, what might have been considered at the time, something of a surprise change in the law.

MS. HABBART: So, given these circumstances, do you see anything inappropriate with a merger agreement with this type of provision in it? And combined with the majority stockholders whose interests are aligned entering into voting agreements and giving proxies? #00:28:16#

MR. STEELE: The cases – or, sorry, the opinions talk about the old, as someone referred to it recently, who will remain unnamed, the old saw, *Schnell*, that just because it's legally possible to do it, doesn't mean, under the circumstances, the equity will allow you to do it because it may be inconsistent with your fiduciary duty of loyalty and care. I do agree that this case is truly unique, and that it's hard to imagine that a similar set of facts would occur again. I don't know what the future may bring, but it is quite remarkable that there has never even been a discussion in a case of which I am aware about whether *Omnicare* should be revisited.

MS. HABBART: No, no. And I suppose my question is -- maybe this is too technical -- but if NCS had not been a party to the voting agreement, and what went on between the majority shareholders and Genesis, the Board was not privy to

or didn't have to approve anything or become a party to, do you think the result would have changed? #00:29:41#

MR. STEELE: There are so many little comments in the majority opinion that made me scratch my head. Like the Board didn't read the entire merger agreement. They relied upon a synopsis of it, or a summary – I think summary was the word used. Well, does a board read an entire merger agreement? Or do they rely on counsel to explain and to answer any question they might have after they read it? But I thought that was meant to be somewhat damning. But it didn't rise to the level of a lack – a breach of the duty of care. It wasn't as if they didn't understand the import of it and what the consequences would be down the road. After all, these people have just engaged in, what I viewed, at the time, and still do, as a major salvage operation, as much as anything else, and could have relieved themselves by knowing that they had taken a disaster and made the best of it under the circumstances. That was the way I was looking at the way they had conducted themselves, not whether they admitted that they relied on a summary of the merger agreement as opposed to reading the therefore clause and hereinafters and the but fors and all the rest of that. That didn't seem to be important to me. But, what do I know?

MS. HABBART: Again, they're businessmen. #00:31:15#

MR. STEELE: You can't rely too much on the quality of your view when you're a dissenter. You're dissenting, and the law is not what you think it should be and has never been what you thought it should be from that day forward, so, it's pretty hard to put great reliance on your own view.

MS. HABBART: Wow! That must have been hard. Because still, you know, and then you move on to being Chief Justice ... you respect the institution; it's hard. #00:31:42#

MR. STEELE: Well, trust me. It wasn't like I was at the crosswalk checking out everyone who walked across the street to see if this was my chance to reverse – to change *Omnicare*. What's the word? There's a magic word for it. Help me out here, Larry – what's the magic—

Larry: Overruled.

MR. STEELE: Overruled, that's the word I'm groping for, yes.

MS. HABBART: I understand. Is there something else you want to share with us that your thoughtful dissent and your comments today, beyond what we see in the record, that you'd like to share with us? I, for one, enjoyed the way in which you discussed how the Justices meet to try to come to some consensus or the junior officers starting to the senior—

MR. STEELE: I'm not sure that's still the case, but that's the way we did it when Chief Justice Veasey was

presiding. It was carried on through November 2013. I can't speak to how it's done now.

MS. HABBART: Is there anything you'd like to leave us with that's— #00:32:48#

MR. STEELE: No, I just want to thank you for giving me the opportunity to have to indulge in an Alka-Seltzer this early in the year.

MS. HABBART: I'm so sorry, Your Honor. Notice, I'm still calling you Your Honor – habits are hard to break, but thank you.

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