

**Case: Omnicare**

**Interview of Stephen P. Lamb**

Paul, Weiss, Rifkind, Wharton & Garrison

Interviewer: **Elissa Habbart**, Delaware Counsel

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#00:00:00# - #00:00:22#

1 MS. HABBART: Steve, it's great that you're here  
2 today because now we're all going to have the opportunity to  
3 hear directly from the judge who had to look at this  
4 interesting case.

5 MR. LAMB: It's great to be here. It's 16 years  
6 later, so...

7 MS. HABBART: I know.

8 MR. LAMB: What I remember and what I don't  
9 remember, we'll find out.

10 MS. HABBART: Well, try the best of your  
11 recollection. What was your impression of things when this  
12 dispute came before you? There were so many pieces to it-

13 MR. LAMB: Yeah.

14 MS. HABBART: -- everything from standing issues to  
15 declarations as to voting rights to preliminary injunctions  
16 to- #00:01:00#

17 MR. LAMB: Well, that all did sort of unfold. I have  
18 a very vague recollection that there was a hearing, and I

1 could be wrong about this, and it would have been like on a  
2 motion-

3 MS. HABBART: To compel, maybe?

4 MR. LAMB: -- maybe a motion to compel, but the way  
5 I think of it, it's more a motion for expedited proceedings,  
6 but I can't find one in the docket sheet, so...

7 MS. HABBART: No...there were motions where they  
8 wanted you to - they wanted to get access to Omnicare's banks,  
9 financing opportunities. There was also one where Omnicare was  
10 trying to get NCS's Board Minutes and such...there was some  
11 early on-

12 MR. LAMB: Okay, well maybe that was it-

13 MS. HABBART: -- that there was some...dispute-  
14 #00:01:50#

15 MR. LAMB: I have a strong recollection, and I hope  
16 it was this case of Ted Mirvis being in court and making an  
17 argument-

18 MS. HABBART: Oh, he did. He did.

19 MR. LAMB: -- that... and the argument was, Your  
20 Honor, these people, these Omnicare people, they claim to have  
21 a tender offer, but it is a highly conditional tender offer.  
22 It is based on their need to obtain further information and  
23 conduct due diligence. And that the due diligence condition  
24 was in the offer they made to the NCS Board, and it's in their

1 tender offer. And they also, we don't think, have financing, I  
2 think he said. But the thing I remember him saying, and it  
3 sort of captured the essence of this, was that when they made  
4 their proposal in July, it had a - in competition with the  
5 proposal Genesis was making - it had a due diligence  
6 condition. And that was in the circumstances, that engaging  
7 with Omnicare at that point was - presented a risk to NCS of  
8 losing the Genesis transaction. And that very risk that they  
9 refused to take - they refused to go engage with Omnicare  
10 because they had this other proposal they had that they could  
11 act on and needed to be acted on. It is the very risk that  
12 Omnicare refused to undertake itself, that is by making an  
13 unconditional offer. So, someone had to bear this risk about  
14 not having enough information. And Omnicare wanted NCS to bear  
15 it. NCS determined in July it couldn't. And I remember Mr.  
16 Mirvis standing up and just saying, you know, these people,  
17 all they want to do is just transfer this risk ... .

18 MS. HABBART: It was in the transcripts- #00:03:43#

19 MR. LAMB: So, that's sort of my first recollection.  
20 I mean, when these cases come in, it's not as though, that a  
21 judge gets assigned to a case, the judge spends the next  
22 couple days reading all - whatever is there. I mean you wait  
23 for something to come to you. So, that's my first  
24 recollection.

1 MS. HABBART: Did the fact that there had been this  
2 extensive, extensive, careful work done by the Board - did  
3 that impression -- did you get that impression right away?

4 #00:04:14#

5 MR. LAMB: Well...no, no. I mean you don't get that  
6 impression right away. You get that eventually. I mean what  
7 you get right away is the idea that the board ran a process.  
8 It signed up in an exclusive agreement - an exclusive  
9 negotiating agreement -- with one of the bidders and then, you  
10 know, it found itself in the position where that bidder now  
11 said, okay, here is our proposal; take it, or we're out of  
12 here, without the Board having the opportunity to go explore  
13 other alternatives during that period of exclusivity. So, it  
14 turned out there were - when I saw the record, you know, but  
15 now we're talking November, that the Board had lavished  
16 attention on this proposal, and there was tremendous-

17 MS. HABBART: Two years...well, plus there was-

18 #00:04:58#

19 MR. LAMB: There was this huge gap, right.

20 MS. HABBART: So, once you started looking at things  
21 and getting the information, you saw they had a very, very  
22 careful Board, making a decision based on the best available  
23 information available to them at that time. Did you have any

1 concerns about any of the elements of the deal? Number one,  
2 the terms of the merger- #00:05:27#

3 MR. LAMB: Well...the merger agreement contained,  
4 which is why we're here talking today. I mean, it contained  
5 several different things, which in combination, made it  
6 unusual in that it contained essentially, a force the vote  
7 provision, which was a relatively new section in the DGCL that  
8 had been enacted, I don't remember exactly, but not too long  
9 before. And it was uncommon to see in a merger agreement. And  
10 that meant that, notwithstanding the fact that the Board could  
11 withdraw its recommendation and even, perhaps, recommend  
12 against the transaction, the Board nevertheless had to convene  
13 the shareholders' meeting in combination with a voting  
14 agreement between the bidder, the company's two largest  
15 shareholders, who were also directors, and the company. And  
16 who, and those two shareholders together owned a majority of  
17 the voting power. But-

18 MS. HABBART: What's wrong with that? #00:06:32#

19 MR. LAMB: -- so unusually, but they didn't have a  
20 majority of the equity. They had maybe 15 or 20-percent of the  
21 equity. But they had shares that had a greater vote, and so,  
22 they had the majority of the voting power. I mean it was  
23 certainly unusual to see a transaction that was that  
24 thoroughly locked up. Now, and as it first presents itself,

1 you don't have - you don't understand that this was a company  
2 that was essentially - it was insolvent, company that had been  
3 seeking a resolution of its insolvency problems for the  
4 benefit of its creditors for a year and a half. And you don't  
5 know any of that yet, but that all comes up later. So, what  
6 you are faced with is a completely locked up deal, which is  
7 unusual, and a competing bidder who is in there screaming that  
8 they were there all along and they wanted to buy the company  
9 and wanted to pay more, and they were being prevented from  
10 paying more-

11 MS. HABBART: Did the fact that prior to NCS's  
12 agreement with Genesis, the only offer that was being made by  
13 Omnicare was for a sale out of bankruptcy where the  
14 shareholders would get nothing? #00:07:39#

15 MR. LAMB: Of course, eventually, that got into the  
16 briefs and got in front of me and was-

17 MS. HABBART: Changed things.

18 MR. LAMB: Of course. I mean that's, you have this  
19 bidder who never offered to pay even a hundred cents on the  
20 dollar to the creditors. And this was over a period of - now,  
21 we are sort of getting to the punchline here, but in the  
22 preliminary injunction proceeding, it became obvious that both  
23 the NCS Board had tried to negotiate over a long period of  
24 time with Omnicare, and also, the creditors, this sort

1 informal creditors committee of Omnicare, they tried to  
2 negotiate. I don't mean with Omnicare, I mean with the  
3 creditors' committee of NCS. They tried to negotiate a  
4 transaction with Omnicare at the end of the year before. And  
5 when they got to the point, and they thought they had a deal  
6 that they had negotiated with Mr. Gemunder, I think, and when  
7 the papers came from the lawyers, it wasn't the deal they  
8 thought they had. So, they were put off by Omnicare, and that  
9 was like January or February of 2002, but-

10 MS. HABBART: And then they went silent for a number  
11 of months. #00:08:58#

12 MR. LAMB: Then, I think that Omnicare went silent.  
13 It seemed that way, right?

14 MS. HABBART: Yes.

15 MR. LAMB: So, Omnicare wanted - they were a very  
16 fierce competitor of NCS as well. And they were trying, over a  
17 period of time, they tried to get access to more information  
18 about NCS. And they asked for information that NCS just  
19 ultimately wasn't able - willing and able -- to give them.  
20 Maybe it would have violated the law to give it to them; I  
21 don't know. But they couldn't even agree on the terms of a  
22 confidentiality agreement for a long time. I don't think that  
23 happened until after the litigation started, really, so...

1 MS. HABBART: That's right. And based on my  
2 recollection of the record of the litigation, in addition to  
3 not wanting to give up documents, they - Omnicare -- couldn't  
4 even agree, like you said, to the terms of the confidentiality  
5 agreement. But beyond that, then in the discovery thing.  
6 Discovery was due to finish July 31 or August 31, whatever it  
7 is-

8 MR. LAMB: I thought you were going say something  
9 slightly different. They wouldn't agree to a provision in the  
10 confidentiality order that restricted them from contacting  
11 NCS's customers other than in the ordinary course of business.

12 MS. HABBART: Customers ... course of business ...  
13 okay. That's absurd. #00:10:23#

14 MR. LAMB: They wouldn't even agree to that, right.  
15 That was pretty crazy.

16 MS. HABBART: So, but also, they, after arguing that  
17 they weren't going to give up information, okay, this is  
18 Omnicare, which is where I think Ted came into play. They  
19 missed the deadline, you know, they were continuing to argue  
20 ... a week later, after the production deadline, they hand  
21 Genesis and NCS's counsel 4100 documents. I mean there was a  
22 fight even to just get one another the necessary information  
23 that they are legally obligated to do. #00:11:03#

24 MR. LAMB: Well, this was in the litigation?



1 MS. HABBART: Yeah. I mean, Omnicare was not a nice  
2 player. #00:11:13#

3 MR. LAMB: Oh, well, they were you know, very tough  
4 negotiators. Difficult. Anyway. That-

5 MS. HABBART: Well, so you're saying that over time,  
6 you started to get the picture of what the history was, and  
7 the history mattered in your review of where the Board might  
8 have been or how it carried out its duties at the time it  
9 entered into the merger agreement. #00:11:40#

10 MR. LAMB: Well, sure. In the preliminary injunction  
11 proceeding, in particular, I mean the conduct of the Board is  
12 the main focus. And so, the conduct of the Board over the long  
13 period of time in how they arrived at this particular  
14 transaction was important.

15 MS. HABBART: Absolutely, and it had quite the  
16 record, and the Supreme Court adopted all the findings that-

17 MR. LAMB: The Supreme Court took all the findings  
18 from my opinion and incorporated them.

19 MS. HABBART: Yes, it did. #00:12:10#

20 MR. LAMB: Right. Anyway, on the basis of those  
21 findings, I mean, it would be - it was very difficult, or it  
22 was impossible to say that the Board had breached its duty of  
23 care. In my view, because they had lavished-

24 MS. HABBART: Attention.

1 MR. LAMB: -- not only lavished attention, but they  
2 were - they knew all of the important information about  
3 everything.

4 MS. HABBART: Mm-hmm. So, this was an active  
5 conscious Board that made a lot of effort. Now, you had some  
6 interesting things that came along the line before you had to  
7 determine that preliminary injunction. Now, Omnicare wanted to  
8 bring a claim, even though it didn't own any shares at the  
9 point in time that the merger agreement was signed. #00:12:57#

10 MR. LAMB: Right. They wanted to bring a fiduciary  
11 duty claim against the Board. And they also had a second part  
12 of their complaint, which related to the operation of the  
13 company's certificate of incorporation in conjunction with the  
14 voting agreement that the two officers had signed.

15 MS. HABBART: Well, am I correct that what it was,  
16 was number one, they wanted to have standing to bring a  
17 fiduciary duty claim. And the other part was they wanted a  
18 declaratory judgment to determine whether or not their stock  
19 that only had one vote per share actually had been converted  
20 into this super-voting-

21 MR. LAMB: No, it's the other way around.

22 MS. HABBART: Was it? #00:13:39#

23 MR. LAMB: Whether the super-voting by reason of the  
24 entry into the [overlapping]-

1 MS. HABBART: Right, converted back to the more  
2 limited-

3 MR. LAMB: Because of the entry into the voting  
4 agreement in connection with which they had given the two;  
5 Outcalt and Shaw had given proxies to Genesis. Whether that  
6 factual circumstance had caused the high-voting shares to  
7 convert into low-voting shares.

8 MS. HABBART: Right. Which, and you allowed that to  
9 move forward. #00:14:05#

10 MR. LAMB: I did. So, there was...there must have  
11 been a motion to dismiss that complaint on the basis of lack  
12 of standing and I granted that motion with respect to the  
13 fiduciary duty claim, and I denied it with respect to the  
14 declaratory judgement claim.

15 MS. HABBART: And what was your thinking? #00:14:26#

16 MR. LAMB: And really, on the fiduciary duty, they  
17 didn't-if you're not a stockholder at the time of an alleged  
18 wrong, you don't have any right to complain about the wrong.  
19 And the fact that you might go out and buy shares afterward  
20 doesn't give you the right to complain about things that  
21 happened before.

22 MS. HABBART: But it seemed logical to you that you  
23 would - that you should entertain or let them try to figure

1 out what value - what voting value their shares had?

2 #00:14:59#

3 MR. LAMB: You know, I did because they had a tender  
4 offer pending. And the outcome of - the question of what  
5 voting power these shares had was ultimately - it was  
6 important to the success or failure of the tender offer  
7 because if it turned out that Outcalt and Shaw had their  
8 shares had converted into A-shares, the low-voting shares-

9 MS. HABBART: They couldn't control them-

10 MR. LAMB: -- and because they didn't have a  
11 majority of the economic power, and they didn't have a  
12 majority of the A, even on as converted basis. If that was the  
13 case, then the tender offer could succeed just by half the -  
14 you know, 50-percent plus one of the other shares being  
15 tendered into the tender offer. So, I thought that made sense.  
16 You know, standing in this context, I mean you confront the  
17 argument that the bidder is fully capable of mustering the  
18 resources to present the facts and the law to the court in a  
19 way that's intelligible, and that made sense to me on the  
20 second claim. I don't think a bidder who - and anyone who  
21 doesn't own shares -- can ever prosecute a fiduciary duty  
22 claim.

23 MS. HABBART: That must have been an interesting  
24 issue to have to dig into. #00:16:21#

1 MR. LAMB: It was. I mean bidder standing has been -  
2 it had been the subject of other decisions. And I think my  
3 decision was consistent with past precedent.

4 MS. HABBART: And the certificate provisions, the  
5 analysis of those, vis-à-vis language such as in connection  
6 with - #00:16:44#

7 MR. LAMB: Oh, when you get to the opinion.

8 MS. HABBART: Yes, yes.

9 MR. LAMB: Yeah, well that opinion, I thought,  
10 looking back on it, I would say it was -it presented  
11 interesting, slightly difficult issues and you're talking  
12 about the fact that the opinion turns in part on the use of  
13 the phrase "in connection with;"-

14 MS. HABBART: Yes.

15 MR. LAMB: -- that was in connection - whether or  
16 not the proxies given were in connection with a-

17 MS. HABBART: Tender.

18 MR. LAMB: -- Section 14 proxy contest governed by  
19 federal securities laws. And yeah, I took - I looked up in  
20 connection with, in Bryan Garner's book and knew its  
21 application in 10b-5 litigation, and it's a very broad, very  
22 non-specific sort of connector, so... And it was easy enough  
23 to say that the proxies given in the voting agreement, which  
24 were given in anticipation of the shareholders' meeting, at

1 which there would be a solicitation of proxies pursuant to the  
2 securities laws, was in connection with, right.

3 MS. HABBART: Right. But plus the fact did the  
4 proxies themselves really transfer any real interest in the  
5 shares themselves? It was very limited [overlapping]-

6 MR. LAMB: Yeah, I didn't think so.

7 MS. HABBART: Yeah.

8 MR. LAMB: I don't remember all the details of that  
9 opinion, but there was another issue about transferring an  
10 interest in the shares, and I did not think that that - well,  
11 again, it presented-

12 MS. HABBART: I thought that made sense. #00:18:06#

13 MR. LAMB: -- a litigable - it presented a litigable  
14 question, but I didn't go with it.

15 MS. HABBART: No, no. And what you came out with was  
16 that they were narrow in scope, in time-

17 MR. LAMB: Right.

18 MS. HABBART: You know, they-

19 MR. LAMB: It didn't give them the right to vote for  
20 anything other than this one issue in a way that Outcalt and  
21 Shaw had already agreed to vote on it, so...

22 MS. HABBART: They had no ownership attributes. They  
23 secured no ownership attributes [inaudible].

1 MR. LAMB: You know, I think it's true...You know, I  
2 think that's right. And I think, in fact, even without the  
3 vote—the proxies just made was a mechanism to enforce the  
4 voting agreement—

5 MS. HABBART: The voting agreement—

6 MR. LAMB: Because even without the proxies, I think  
7 Genesis could have come into court and gotten an order  
8 requiring them to vote their shares in a certain way.

9 MS. HABBART: And the voting agreement, when you  
10 considered it in light of the whole - once you had the history  
11 in front of you, and you understood the comings and goings of  
12 the parties—

13 MR. LAMB: At the time I decided that case, I  
14 probably didn't know everything. I certainly didn't know as  
15 much as I knew when I decided the preliminary injunction  
16 hearing, which was a few weeks later.

17 MS. HABBART: Right. And the voting agreement,  
18 though, once you had that background, wasn't problematical for  
19 you, was it? It made sense under the circumstances? #00:19:17#

20 MR. LAMB: Do you mean as a deal - in connection  
21 with the deal—

22 MS. HABBART: As a deal ... right—

23 MR. LAMB: Yeah, of course.

24 MS. HABBART: -- as the deal provision. #00:19:23#

1 MR. LAMB: It made perfect sense.

2 MS. HABBART: As did the irrevocable-

3 MR. LAMB: And it made sense both from the point of  
4 view of Genesis wanting it, and also, from the point of - and  
5 insisting upon it, and the point of view of the company and  
6 its Board and its majority voting shareholders in giving it  
7 because they did it in order to secure the Genesis  
8 transaction, which you know, was the first transaction in a  
9 year and a half that was going to - that had been proposed  
10 that would pay off all the creditors in full. It was going to  
11 be a merger, so even all the trade creditors would get paid.  
12 And there was a little bit of money for the stockholders.  
13 There was like 25-million-dollars for the stockholders. This  
14 was for a company which, at the time, was in default on its  
15 debt. It was - you know, it was insolvent.

16 MS. HABBART: Well, like you said, there was a  
17 creditors' committee trying to negotiate terms- #00:20:17#

18 MR. LAMB: The company was in default. They had not  
19 been paying their 325-million-dollars of the debt for a while,  
20 so, the creditors had - forebeared, foreborne from exercising  
21 their rights in default and they had agreements with the  
22 company to do that to extend the time, but it was clearly  
23 insolvent.



1 MS. HABBART: So, when you declined to issue a  
2 preliminary injunction, and it seemed that there was - you had  
3 a good Board who made a rational decision under the  
4 circumstances. And then, you looked at the Supreme Court  
5 decision, and did you feel there was a lot of focus in that  
6 decision on what happened after the fact? After the Board had  
7 to make a decision? As opposed to looking at where the Board  
8 sat? #00:21:25#

9 MR. LAMB: Sure. I mean the focus is on the  
10 opportunity for shareholders to get a better price. And, A,  
11 it's -- it came only after the fact because at the time the  
12 Board made its decision, Omnicare had never offered the  
13 shareholders - had never made an unconditional offer to pay  
14 the shareholders anything-

15 MS. HABBART: By their own admission- #00:21:46#

16 MR. LAMB: -- yeah, until the end of July, they had  
17 never made any kind of offer to pay the shareholders anything.  
18 The only thing they ever talked about was that Omnicare would  
19 buy NCS if NCS filed for bankruptcy and they sold them the  
20 assets in bankruptcy.

21 MS. HABBART: Why don't you think that wasn't  
22 enough? #00:22:04#

23 MR. LAMB: For whom?

24 MS. HABBART: The majority and the court-

1 MR. LAMB: Oh, for the Supreme Court?

2 MS. HABBART: Yes.

3 MR. LAMB: I don't know. I mean there was no focus  
4 in that, that I can recall, on the fact that the company was  
5 insolvent, that most of the efforts that had been expended  
6 over this long period of time had been to basically get - you  
7 know, pay off the creditors. And then, and any kind of a  
8 little payment to the stockholders-

9 MS. HABBART: Is a bonus. #00:22:30#

10 MR. LAMB: Yeah. Now, to do a merger, it's very hard  
11 to get a merger approved unless the stockholders are getting  
12 something, right? Because they have to vote for it.

13 MS. HABBART: Well, here, they had the people that  
14 had the most to lose or the most to gain agreeing to it as  
15 well-

16 MR. LAMB: Right... well, yeah, it's true-

17 MS. HABBART: -- isn't that-

18 MR. LAMB: I mean, that would have been like the  
19 ultimate self-sacrifice for Outcalt and Shaw to approve a  
20 merger transaction in which-

21 MS. HABBART: If they could make five times the  
22 money. #00:22:52#

23 MR. LAMB: -- in which they're not getting paid  
24 anything. I mean that would be a hard thing to do, but... So,

1 but if there is no merger, there's no one who wants to buy the  
2 stock; the Board's duty at the time, and I think it believed  
3 its duty was to do the best deal it could do for the  
4 creditors. And that deal got better and better to the point  
5 where finally, in its discussions with Genesis, Genesis said,  
6 all right, we'll pay the—we'll do a merger, and we'll give -  
7 you know, we'll exchange a little stock, and the creditors get  
8 paid in full. That was a hell—that was a great outcome.

9 MS. HABBART: The point you made about how the  
10 shareholders who issued the irrevocable proxies would have  
11 been crazy to do so if they thought there was a real chance  
12 there was more money on the table from somewhere. That must  
13 have been an important indicator to you, I would think.

14 #00:23:50#

15 MR. LAMB: Of course. Look, to me, none of this was  
16 really something that should be analyzed through - under the  
17 *Unocal* standard—

18 MS. HABBART: Right, right.

19 MR. LAMB: -- of defensive mechanisms because that  
20 was adopted to apply to actions taken unilaterally by a board  
21 of directors. And these actions were not taken unilaterally.  
22 Certainly, when you combine the voting agreement with the  
23 merger agreement because, in fact, you have a majority in

1 voting power of the shareholders who are acting with the Board  
2 to secure this transaction—

3 MS. HABBART: Whose interest is aligned with the  
4 duties of the Board. #00:24:36#

5 MR. LAMB: Their interests were aligned both to the  
6 creditors and to the other shareholders. And that's the point  
7 I think the Chief Justice makes - and Justice Steele make in  
8 their dissents. But I don't -- didn't understand the basis for  
9 the Supreme Court opinion.

10 MS. HABBART: So, you were surprised? #00:24:58#

11 MR. LAMB: Yeah, I was - well, you know there's  
12 always the thought that where there is more money available,  
13 there will be a way found to secure the more money for the  
14 people who are going to be giving up their shares. But, yeah,  
15 I was surprised.

16 MS. HABBART: Did it surprise you that Genesis  
17 waived the restrictions in the merger agreement and allowed  
18 NCS to speak with Omnicare? #00:25:29#

19 MR. LAMB: It did. I mean, I don't know - I can't  
20 remember when I learned that. I'm sure I didn't know it—

21 MS. HABBART: Wasn't 'til September—

22 MR. LAMB: I didn't know it in September. I don't  
23 think I knew that until November. And, yes, it did surprise me  
24 because Omnicare's position was that they couldn't really go

1 forward without due diligence. The merger agreement had a  
2 provision in it that governed whether or not NCS could provide  
3 information to Omnicare. I believe the Board of NCS met  
4 shortly after the merger agreement was signed - maybe the very  
5 beginning of August, and, at a meeting, concluded that because  
6 of the conditionality of the Omnicare offer-

7 MS. HABBART: You are correct.

8 MR. LAMB: -- it would not be able to exercise its  
9 right under the merger agreement to give them information. So,  
10 they were in this position where they had this conditional  
11 offer and no way to satisfy the condition. It's where Genesis  
12 meant them to be when this structure was insisted upon by  
13 Genesis. And it's where the Board understood things would be  
14 when they agreed to them, and where the shareholders  
15 understood it would be when they agreed to what they did. Why?  
16 I understand why Omnicare insisted - and I now understand why  
17 NCS asked because there was someone there who looked like they  
18 were willing to pay more money, so-

19 MS. HABBART: But Genesis, at that point  
20 [overlapping]-

21 MR. LAMB: Yeah, and NCS had to ask. But then,  
22 Genesis said, yes, and I don't know why. I have never - I  
23 didn't know why at the time and I don't know why now.

1 MS. HABBART: Yeah, I thought that was kind of odd,  
2 too. #00:27:13#

3 MR. LAMB: Other than that, they must have come to  
4 the conclusion that this was creating so much pressure and  
5 that maybe there was a chance Omnicare would go away. And,  
6 instead, it backfired.

7 MS. HABBART: Or, it thought that their deal was so  
8 tight. #00:27:28#

9 MR. LAMB: Yeah, possibly. Although clearly, when it  
10 got to the preliminary injunction, and then the appeal stage,  
11 Omnicare's case would have been much weaker if they did not  
12 have an actionable tender offer, or if they still had this  
13 highly conditional proposal. They, you know, then the Supreme  
14 Court would have been faced with the prospect of enjoining the  
15 deal that is certain and is going to have this insolvent  
16 company pay its creditors in full, and to enjoin that  
17 transaction in favor of a conditional, uncertain future.  
18 Actually, it was interesting. It would have put the court -  
19 me, and then, the Supreme Court in the same position that the  
20 Board of NCS was in in July when it approved the merger. And I  
21 don't think - I know I wouldn't have, and I don't think the  
22 Supreme Court either would have -- insisted or have been  
23 willing to force that risk on to the shareholders of NCS  
24 because the whole thing could blow up. I mean, once the deal

1 is enjoined, Genesis could walk away. Omnicare then drops back  
2 to bankruptcy [overlapping]-

3 MS. HABBART: Interesting. That might have been just  
4 what Genesis was thinking. #00:28:42#

5 MR. LAMB: Yeah, well, I don't know why Genesis  
6 would allow it, but they did-

7 MS. HABBART: But what you said makes good sense  
8 there. #00:28:48#

9 MR. LAMB: They would have - but that would have  
10 been - that's where they wanted to be. Originally, they wanted  
11 to be in that position of making it impossible for somebody to  
12 enjoin the transaction and you only stay there if you don't  
13 allow, or - but, Omnicare could have simply have dropped its  
14 condition.

15 MS. HABBART: Yes, but it said they couldn't.  
16 #00:29:10#

17 MR. LAMB: You know, who knows.

18 MS. HABBART: But at least that's what they told the  
19 Board. They told NCS they just couldn't do it in exercising  
20 their fiduciary duty. I have it here somewhere.

21 MR. LAMB: Yes, they did. I mean because the records  
22 show that in July, when the NCS Board was in this series of  
23 meetings and Genesis had made its last proposal, or its maybe  
24 next to last, and Omnicare threw this thing over the transom,

1 threw the letter saying, you know, we're here, now we want to  
2 pay your shareholders three-dollars-and-fifty-cents a share in  
3 a merger and we'll pay everybody. When that happened, the NCS  
4 Board was subject to this exclusive arrangement with Genesis,  
5 so, they couldn't go back to Omnicare and speak to them. But  
6 Judy Mencher, who was the advisor to the creditors' committee,  
7 the informal creditors' committee, she got a copy of the  
8 Omnicare letter—

9 MS. HABBART: How did she get it? #00:30:19#

10 MR. LAMB: I don't know. Maybe Omnicare sent it to  
11 her. Maybe somebody in the company sent it to her; I don't  
12 know. But she went directly to Omnicare and said at the time;  
13 this is never going to work. I mean this is weak, and you  
14 can't expect them not to take the Genesis proposal when your  
15 proposal is subject to due diligence. And you've had a lot of  
16 due diligence about this company; you know what you need to  
17 know. The records show that, at that point, Mr. Gemunder  
18 called the meeting of his counsel and his Board, maybe, or his  
19 management, anyway, and they considered whether or not they  
20 could drop this condition. And they decided not to because  
21 they didn't want to take the risk. So, they didn't want to  
22 take the risk—

23 MS. HABBART: But they wanted ... yeah—



1           MR. LAMB: -- but it's exactly the risk ... it's the  
2 same risk they wanted NCS to take.

3           MS. HABBART: Back to the initial argument that you  
4 said rang true to you--

5           MR. LAMB: And it just really became, yeah, right,  
6 it was interesting when I first heard it; it certainly rang  
7 true to me later...

8           MS. HABBART: But what's interesting to me is, the  
9 merger agreement purportedly said that NCS wouldn't even enter  
10 into discussions with the third party unless there was an  
11 unsolicited bona fide written proposal documenting the terms  
12 and the NCS Board believed in good faith that the proposal was  
13 likely to result in better terms. And so, my question is, they  
14 went off and talked to them, and according to the record here,  
15 they hadn't made that determination. So, they got the waiver  
16 from Genesis to go ahead and talk with them. So, that's why I  
17 liked your theory-- #00:31:54#

18           MR. LAMB: Well, because they couldn't make that  
19 determination. They considered in the beginning of August  
20 whether the then proposal from Omnicare, which maybe they did  
21 that right after Omnicare began its tender offer. Whether that  
22 was something which met that standard, and they concluded it  
23 was not. So, they couldn't speak to them. That's why they then  
24 had to ask for a waiver of this provision.

1 MS. HABBART: And that's why I say I like your  
2 theory as to why Genesis would have given that waiver. But  
3 again, we're hypothecating but we'll try to get that from -  
4 #00:32:32#

5 MR. LAMB: I never knew.

6 MS. HABBART: You never knew.

7 MR. LAMB: You will have to ask somebody else.

8 MS. HABBART: But didn't you find that curious?

9 MR. LAMB: As I said, I didn't really learn about  
10 the waiver until much later. And probably, I probably learned  
11 about it in connection with the preliminary injunction  
12 proceeding. But I've told, I know I've discussed this with  
13 Larry and with you before, but I knew something was up the end  
14 of September because I was having a series of phone  
15 conferences with the parties about one thing or another. And  
16 up until that point, Mr. Welch, who was, I think he was NCS's  
17 counsel, or else he was representing Outcalt or Shaw, I'm not  
18 sure, but he was on the NCS side-

19 MS. HABBART: He was on the NCS- #00:33:19#

20 MR. LAMB: -- and he was very strong, as he always  
21 is; he's a great advocate. And his - he was very convinced and  
22 convincing about the position the NCS Board was taking. So,  
23 then, by the end of September, the beginning of August, I  
24 started noticing his tone of voice was different. And that's

1 when I guess they must have entered into discussions with  
2 Omnicare and made, you know, [unintelligible] maybe, I wasn't  
3 paying enough attention to tell you, but when Omnicare  
4 actually changed its tender offer and eliminated the  
5 conditionality-

6 MS. HABBART: October. #00:33:56#

7 MR. LAMB: October. So, maybe it was just before  
8 that that his tone of voice changed, and so...

9 MS. HABBART: What a predicament he would have been  
10 in given that you know, what do you do when, you know --

11 MR. LAMB: Well, he knew what the proper legal  
12 position was, but which was to defend what the Board had done.  
13 But-

14 MS. HABBART: Of course ... A deal is a deal.

15 MR. LAMB: -- and he also knew that you know, the  
16 shareholders and Mr. Outcalt and Mr. Shaw were going to get  
17 more money. Now, I mean, I guess in the end, there was a  
18 hundred and something million dollars came to the  
19 shareholders; the initial proposal was more in the sort of  
20 twenty-five-million-dollar range. But in terms of the value of  
21 the corporation, it was increasingly more, but it's still not  
22 significant.

23 MS. HABBART: What was interesting that after --  
24 what went on after your decision, in terms of how - between

1 Genesis and NCS, and their bidding the agreement, they came  
2 out with was Omnicare paid Genesis 25-million [overlapping]-

3 MR. LAMB: I went back and looked at it, I think  
4 it's 22.

5 MS. HABBART: Twenty-two, is it? #00:35:04#

6 MR. LAMB: Yeah. They paid 22, yeah, but they still  
7 got their six-million dollars-

8 MS. HABBART: Twenty-two, you are absolutely right.  
9 I'm sorry; so, yes.

10 MR. LAMB: And I went back and looked at that-

11 MS. HABBART: They paid 22-million and - do you  
12 think? I mean, you were privy to all the ins and outs; well,  
13 privy-

14 MR. LAMB: I don't know what the claim was-

15 MS. HABBART: -- does 25-million cover even their  
16 costs? #00:35:26#

17 MR. LAMB: Omnicare and Genesis had, after the  
18 Supreme Court acted and sent it back to me, at which point I  
19 had to enter an order enjoining the Genesis transaction. Then,  
20 over a period of a weekend or something was sort of an auction  
21 where Omnicare bid, Genesis outbid them, Omnicare outbid them,  
22 and the price - this was mostly just in terms of the  
23 shareholder price. And the price got to wherever it got to,  
24 five-fifty a share, or something. But there must have been

1 claims that Genesis was at least talking about because they  
2 got, at the end of the deal, even though Omnicare won, they  
3 agreed to pay Genesis this sum of money to - for -- in  
4 exchange for a release. I don't know what the claim was, but-

5 MS. HABBART: I'm thinking about 2002, okay, trying  
6 to put us back there and the value of 22-million then, but  
7 given just what legal fees, time, and attention, et cetera,  
8 that Genesis had to put in for this transaction; 22-million  
9 doesn't seem like much to me. #00:36:42#

10 MR. LAMB: I think the breakup fee in the  
11 transaction was six-million-dollars, so-

12 MS. HABBART: Yeah, it was.

13 MR. LAMB: -- that wasn't much, but 28, when you add  
14 the two together, it's certainly a lot better. And I don't -  
15 it struck me that they had done, for losing the deal, and I am  
16 sure that the 22 didn't compensate them for losing this deal-

17 MS. HABBART: That's what I'm saying-

18 MR. LAMB: -- I shouldn't say I'm sure, I don't  
19 know. I don't know how their business worked out, but-

20 MS. HABBART: But I'm saying, just ... forget about  
21 the business; I'm just talking about the time and attention  
22 away from business that people had to take to do depositions,  
23 attend court hearings, et cetera, the legal fees. #00:37:18#

1           MR. LAMB: Sure, there were lots of legal—yeah, I  
2 really can't—I don't know.

3           MS. HABBART: You know, I just sit there going, I  
4 really want to understand—

5           MR. LAMB: I think what came to my attention in  
6 connection with - speaking of legal fees, the application  
7 filed by the plaintiffs' lawyers—

8           MS. HABBART: Yes ... yes. How did that - what did  
9 you think of that? #00:37:32#

10          MR. LAMB: -- about which I had no recollection  
11 until I went back and looked at it. The plaintiffs' lawyers,  
12 who, because I had knocked Omnicare out of the box on the  
13 fiduciary duty claim, the plaintiffs' lawyers had to step up  
14 and make - present the arguments. And I think Omnicare  
15 continued working with them—

16          MS. HABBART: Yes.

17          MR. LAMB: -- but the plaintiffs were the ones who  
18 were submitting the briefs and making the arguments. And they,  
19 of course, I mean, quite properly, made a claim afterward for  
20 a fee. And since there was no settlement, it was sort of in  
21 the mootness, the *Sugarland* kind of case.

22          MS. HABBART: Yes, that's exactly what you cited to.  
23 #00:38:21#

1 MR. LAMB: Yeah. Anyway, there was an application; I  
2 awarded a fee. I probably didn't give as much as they wanted,  
3 but, as I remember, I gave them 10-million-dollars—

4 MS. HABBART: Yeah. And they asked for thirteen-  
5 five, so—

6 MR. LAMB: Yeah, they did it all right.

7 MS. HABBART: Yeah, they did just fine there. And  
8 so, in the end, I suppose if you look at the Supreme Court's  
9 decision, the majority opinion, is it essentially saying then  
10 that if you don't have the fiduciary out, a real fiduciary  
11 out, that deal can't work? #00:39:02#

12 MR. LAMB: It seems to be what it said. Of course,  
13 there's no such thing as a real fiduciary out. I mean, I don't  
14 know how it would interact with a force the vote provision.

15 MS. HABBART: I don't know either.

16 MR. LAMB: I mean you could have a force the vote  
17 provision, which goes away because there is a fiduciary out. I  
18 guess. I don't know.

19 MS. HABBART: And is that essentially saying that  
20 there can't be any circumstances in which a board is faced  
21 with such a potential loss if it doesn't accept something that  
22 they can't lock it up? #00:39:36#

23 MR. LAMB: Look, I think people that have tried to  
24 use a number of ways to deal with the problem. I don't know

1 that any - it must have been the case in the NCS charter that  
2 they didn't have the right to act by written consent. Because,  
3 mostly, after this decision, most of the cases that came along  
4 were ones where the shareholders had the right to act by  
5 written consent. And so, since the merger agreement made a  
6 provision that we need, you know, this deal is off the table  
7 unless we deliver consents by a majority of the voting power  
8 in 24 hours, or something like that.

9 MS. HABBART: I have the certificate, and it doesn't  
10 exclude the ability to act by written consent. Of course,  
11 their certificate is from 1995 to I don't recall when 228 was  
12 adopted. But, nevertheless-

13 MR. LAMB: Way before that. I mean back in the '68  
14 amendments.

15 MS. HABBART: Okay, so, they didn't foreclose that,  
16 so- #00:40:54#

17 MR. LAMB: So, I don't know why they didn't do it.

18 MS. HABBART: No. That's another issue. That's  
19 another transactional issue that I would like to get the  
20 bottom of it.

21 MR. LAMB: I don't know what it is.

22 MS. HABBART: I need the transaction lawyers to  
23 understand what they were thinking there. But the fact is that  
24 if - even if you accept the premise that you act by written



1 consent and avoid some of these issues, that's form over  
2 substance, is it not? #00:41:21#

3 MR. LAMB: It seems that way, but it's - I mean the  
4 Supreme Court opinion spoke about the duty of the board to  
5 protect the minority shareholders. And that's a line of  
6 thought that comes into play where there is a majority - and  
7 here, there was a majority. But a majority that's acting with  
8 a self-interest. And it was certainly a major focus of mine to  
9 understand in this case whether Mr. Outcalt and Mr. Shaw had  
10 any kind of dissent - dis-and a certain disabling self-  
11 interest in this deal. I mean, if they did, it would have been  
12 a very different kind - a very different deal.

13 MS. HABBART: Agree.

14 MR. LAMB: But, they didn't. I mean, they really  
15 just didn't have any conflicting interest. It was interesting  
16 that at some - at one point along the way, as I remember the  
17 record, the Board created a committee to pursue the sale. So,  
18 when they decided they were going to sell the business, they  
19 appointed as a committee, the two non-officer, non-majority  
20 voting guys-

21 MS. HABBART: Directors. #00:42:33#

22 MR. LAMB: Right, so Outcalt and Shaw were not -  
23 they remained on the Board, and the Board had ultimate power  
24 over the transaction, but the committee was two outsiders. And

1 so, when you look at that, you say, oh, well, is that because  
2 they thought Outcalt and Shaw, as a result of their majority  
3 ownership, were in a conflicted situation? And the answer was  
4 no. It was because the conflict was between that they saw, and  
5 they were trying to deal with was between the shareholders on  
6 the one hand, and the creditors on the other hand. And so,  
7 they set up this committee-

8 MS. HABBART: That doesn't come through so much.  
9 Please, go on- #00:43:12#

10 MR. LAMB: Well, certainly, in my opinion. But so,  
11 in my looking at whether these two guys had a conflict, I mean  
12 that was a question. Why was this committee set up? And that  
13 was the answer. It was because all the shareholders had a  
14 conflict with the creditors. And the Board, at the time  
15 because of the company's insolvency, owed its duties to the  
16 entity as a whole, which included its creditors. And so, the  
17 Board really couldn't act in the interest of the shareholders  
18 to the detriment of the creditors. So... So, I looked at that,  
19 you looked at did they have other kinds of agreements that  
20 they got as a result of this? And there were just ordinary  
21 kinds of employment agreements that were not paying-

22 MS. HABBART: A hundred-seventy-five or something-  
23 #00:44:02#

1           MR. LAMB: It was just always clear that their  
2 interest as a shareholder in being paid more money as a  
3 shareholder was far and away their greatest interest. And that  
4 was totally aligned with the other shareholders. So... And  
5 their interest in getting money for the shareholders was  
6 aligned with the other shareholders. And look, and as the  
7 Board considered the merger agreement in July, the creditors  
8 were being paid - if the merger ended up being performed, the  
9 creditors were getting paid in full. So, the Board at that  
10 point, had done its job for the creditors and if you can get  
11 more money for the shareholders -- great. So, Outcalt and Shaw  
12 had no conflicted interest in that, so... When you then focus  
13 - so, the decision in the Supreme Court, the focus on the  
14 duties to the minority shareholders, I didn't really  
15 understand.

16           MS. HABBART: Do you think, perhaps, that was  
17 something that - do you think there was some impact on the  
18 fact that there was an order put out in December, but the  
19 Supreme Court's opinion didn't come out until April.

20 #00:45:13#

21           MR. LAMB: Yeah, I mean it's an understandable  
22 practice in that it was a situation in which the Supreme Court  
23 had to act quickly because of a tender offer, and you don't  
24 want, in that circumstance, to take a month to write your

1 opinion before you issue an order because the world might  
2 change in that intervening period of time and the transaction  
3 might go away. I understand that. But it is true that when  
4 instead of writing an opinion, in the Court of Chancery, we  
5 write our opinions, we can write them overnight, or in a day  
6 or two. It's obviously different on a panel -- when you're  
7 dealing with five Justices; you can't just go write the  
8 opinion by yourself. So, it's an institutional issue too, that  
9 creates some problems. I think, when you issue an order that  
10 isn't - you know, it's thought through, but the terms of the  
11 order haven't the benefit of the kind of analysis you have to  
12 do when you write an opinion. So, you know, you know, you  
13 don't really know exactly where you're going to land when you  
14 write the opinion. I think in this case, the opinion pretty  
15 much tracked the order, so, it wasn't that much different.

16 MS. HABBART: Were you surprised at the facts, as  
17 you described them and as they proved your finding of fact  
18 that the two directors that entered into the voting and gave  
19 the proxies, their interests were aligned. There was no  
20 disabling-

21 MR. LAMB: They were totally aligned with the other  
22 shareholders. So, the idea of the Board having to protect the  
23 interests of the minority after a majority of the voting power  
24 of the shareholders, and those whose interests were completely

1 aligned with all the other shareholders, had already acted in  
2 a way that was going to make the deal a foregone conclusion. I  
3 don't you know, I don't get it, so... I don't get it. I didn't  
4 get it at the time. But the case has never been overturned.  
5 Justice Steele notably had the Tulane conference that  
6 followed. I'm pretty sure he was quoted as saying that the  
7 opinion had the half-life of a fruit fly, but it hasn't proven  
8 to be true. It's still here.

9 MS. HABBART: Well, when you look at it in terms of  
10 from a transactional viewpoint, you look at the merger  
11 agreement, the voting agreement, the proxies, you see how they  
12 really tighten things up and now you have to have this  
13 fiduciary out and worry about the minority no matter what the  
14 dynamics are between the majority shareholders and the other  
15 shareholders. And you know, it puts anybody who wants to be  
16 the first at the table to make an offer in a terrible position  
17 because their deal just may not happen. #00:48:13#

18 MR. LAMB: Yeah, I think it creates - it may reduce  
19 prices, and I don't know. I'd have to ask some economists to  
20 look at that, but it certainly reduces the incentives for  
21 people to put their best deal on the table in order to get  
22 security and to get-

23 MS. HABBART: It works against it.

24 MR. LAMB: Right.

1 MS. HABBART: Why would I ever do that if I thought  
2 that somebody is going to come along and offer a little bit  
3 more money and- #00:48:38#

4 MR. LAMB: Well, look, in most cases, you don't have  
5 the ability to lock up the vote, so, in most public company  
6 M&A, this never happens because it can't happen, so-

7 MS. HABBART: But there's lots of companies with  
8 two-tier stocks and all that now. #00:48:52#

9 MR. LAMB: There are more, certainly, more than  
10 there used to be. And a lot certainly in sort of the  
11 entertainment and technology areas.

12 MS. HABBART: Right. So, it could happen. #00:49:01#

13 MR. LAMB: It clearly could happen. Now, it has  
14 happened after this in, and I won't - you'll have to ask a  
15 corporate lawyer, but as we were discussing before, it's  
16 happened in the context of actions by written consent. Well,  
17 there is-

18 MS. HABBART: I don't mean to pooh pooh that, I'm  
19 just still saying you have a bad set of facts, the facts that  
20 you used the written consent as opposed to a voting agreement  
21 or something I don't think should save the day. #00:49:29#

22 MR. LAMB: Well, it changes one dynamic in the sense  
23 that it all happens like that [snapping his fingers]...

24 MS. HABBART: Well, true.

1 MR. LAMB: -- and so, the merger agreement is filed,  
2 people get paid, then no one is - somebody who is trying to  
3 complain about it is you know, a day late and a dollar short,  
4 as they used to say, anyway. Maybe the dollar short doesn't  
5 apply, but a day late anyway.

6 MS. HABBART: Right. Think about that, if it happens  
7 right away and it's a day late, and the merger has already  
8 happened, and the money is given, but somebody like Omnicare  
9 objects or exercises appraisal rights. I don't know.

10 #00:50:14#

11 MR. LAMB: Yeah, I mean like it's - there are  
12 probably are for public companies, the securities laws  
13 probably make it impossible to actually close the transaction  
14 for at least 20 days after you give notice. But for non-public  
15 companies, that's not true, so.

16 MS. HABBART: But for non-public companies, I would  
17 suggest many are structured like this today, and this very  
18 thing could come up, and I think if you are representing a  
19 buyer, you have to tell them to keep some in the background  
20 because you may have to pop back up to defend your position.  
21 That's an- #00:50:53#

22 MR. LAMB: Well, for non-public companies, you ought  
23 to be able to get the thing locked up.

24 MS. HABBART: One would think, right?

1 MR. LAMB: Right.

2 MS. HABBART: One would think. But then,  
3 technically, just because it's not a public company, you know,  
4 some of these same arguments might apply, would they not?

5 #00:51:09#

6 MR. LAMB: They do, yeah.

7 MS. HABBART: So, it's a disincentive-

8 MR. LAMB: I'm just saying people have learned to  
9 deal with it using written consents and in most public M&A, it  
10 doesn't really matter because you don't have the situation.

11 MS. HABBART: Well, that's true ... but even in the  
12 situation where it's private, and you use the written  
13 consents, you know, I still think that it's not a nice story-

14 MR. LAMB: So, I did have a case maybe a decade  
15 later - no, it couldn't have been a decade, but five years  
16 later, I had a case that I think was in a written consent --  
17 using it -- that raised these issues. So, I mean in terms of  
18 whether this ever occurred again, I can remember one case,  
19 when I was a judge, where the issue was pretty squarely  
20 presented, although it may have been in the context of a  
21 written consent, and I don't remember the context exactly,  
22 although it was clearly raising these issues. And I was aware  
23 that, while I was considering the motion for a preliminary  
24 injunction, the Supreme Court Justices, or at least some of



1 them, were already reading the briefs and were prepared to  
2 take this matter up and overturn this decision.

3 MS. HABBART: Really?

4 MR. LAMB: Yeah. At least some of them were. And I  
5 issued my decision and cited this case as precedent requiring  
6 me to act as I did. And then, the loser didn't appeal.

7 MS. HABBART: So you set it up, I mean you  
8 [inaudible]- #00:52:40#

9 MR. LAMB: Oh, it was set up - you know, it was teed  
10 up.

11 MS. HABBART: But then it didn't-

12 MR. LAMB: They didn't appeal.

13 MS. HABBART: -- go the distance.

14 MR. LAMB: Right. It just shows the limits of the  
15 power of judges. I mean you can't do anything unless the case  
16 is in front of you. You know, maybe the Supreme Court could  
17 have reached down and issued a writ of certiorari requiring  
18 review. But I think that, at that part, the party that was  
19 advocating for the change in the law didn't want to pay for  
20 any more, so, that's the way it went.

21 MS. HABBART: That's too bad, but maybe the lawyers-

22 MR. LAMB: That's the way it went.

1 MS. HABBART: -- gotten some help from the other  
2 lawyers in town to say, come on, let's get rid of this  
3 decision. You could cover these costs--

4 MR. LAMB: Yeah ... they could have ... all they had  
5 to do is write a brief, I mean, they just write a brief and be  
6 done with it.

7 MS. HABBART: And let them - well, the brief and the  
8 hearing and - it's a- #00:53:22#

9 MR. LAMB: But it would have been fun.

10 MS. HABBART: So, when you walked away from all  
11 this, and it was behind you, I take it that it's still a  
12 little puzzling to you? The decision? The Supreme Court's  
13 decision. #00:53:40#

14 MR. LAMB: Yes, of course. Yeah, I don't agree with  
15 it. And it strikes me as - I agree with the Chief Justice's  
16 opinion by and large, and with - I mean more than by and  
17 large, entirely and with Justice Steele's opinion. There are  
18 two opinions dissenting, I thought ... to mind were a better  
19 statement of the law, but it's only two out of five.

20 MS. HABBART: It's very frightening when you think  
21 about how you even had a role in citing this case as  
22 precedent, but nevertheless, you deal with what's in front of  
23 you--

24 MR. LAMB: Right ... yes, you do.

1 MS. HABBART: -- and you deal with, you have to pay  
2 respect to the precedent-

3 MR. LAMB: Of course.

4 MS. HABBART: So, is there anything else you want to  
5 leave us with that we wouldn't necessarily pick up from  
6 reading all the filings? #00:54:32#

7 MR. LAMB: Let me just say that some years later,  
8 and I think this was after I no longer was serving as a judge;  
9 there was a program put on at the University of Pennsylvania  
10 to discuss the case. And either Mr. Outcalt or Mr. Shaw or  
11 both were there-

12 MS. HABBART: Interesting.

13 MR. LAMB: -- and I remember them coming - one of  
14 them at least, and because I think only one was there, coming  
15 up to me and telling me he thought I had done the right thing.

16 MS. HABBART: Aw, well, that's always nice. That's  
17 always a nice way to end it.

18 MR. LAMB: Exactly, right. Even though he made lots  
19 more money with the way the deal came out, so...

20 MS. HABBART: But you were right. Anything else,  
21 Steve? #00:55:20#

22 MR. LAMB: No, no. Thanks very much.

23 MS. HABBART: Well, this was a - it's a complex  
24 history here and a complex case and then getting that-

1 MR. LAMB: It was beautifully prepared by the party  
2 - by the counsel for the parties and well-argued, and you  
3 know, it was a pleasure to read it all and make the decision,  
4 so...

5 MS. HABBART: Can you recall any argument that you  
6 didn't like? Or that you thought why are you raising this?

7 #00:55:46#

8 MR. LAMB: No.

9 MS. HABBART: No?

10 MR. LAMB: And the losing arguments, I didn't agree  
11 with - I didn't have any problem with-

12 MS. HABBART: No, that's what I'm saying. And you  
13 had mentioned that you really liked the point that Mirvis made  
14 about one side, you know-

15 MR. LAMB: Trying to-

16 MS. HABBART: Yeah, trying to impose on somebody  
17 else a standard they wouldn't impose on themselves.

18 MR. LAMB: Right ... dealing with this issue of  
19 uncertainty and basically who is going to bear the risk.  
20 That's really what this case was all about.

21 MS. HABBART: That's interesting because that's  
22 exactly what Ed Welch said. He saw it as an analysis of risk,  
23 viewed it in the prism at the time that the Board had to make  
24 the decision.

