

**Case: Omnicare v. NCS Healthcare**  
**Interview of Mark Gordon; Wachtell Lipton Rosen & Katz**  
**Interviewed by: Elissa Habbart; Delaware Counsel Group**  
**December 12, 2018 - New York, NY**

#00:00:00#

1 MS. Habbart: Mark, I'm really glad to have you here  
2 with us today.

3 MR. GORDON: And I have been waiting 16 years to  
4 talk about this case.

5 MS. HABBART: Well, the nice part has been, to date,  
6 we have had all litigators. And my focus has been - my  
7 practice is transactional. So, I, throughout this process,  
8 have been asking questions and the people couldn't answer  
9 because they weren't there creating and putting the deal  
10 together. So, it's great to have you.

11 MR. GORDON: Good.

12 MS. HABBART: My first question to you is, just as  
13 when you are called for a new matter, right, what was your  
14 first impression in terms of the situation that they posed to  
15 you? You were brought in before - to put the transaction  
16 together, correct? #00:01:05#

17 MR. GORDON: Yeah, so we had been involved - our  
18 firm had been involved with the company for several years. I  
19 think they had, including helping them in their emergence from

1 bankruptcy a couple years before - Genesis. I got involved in  
2 the spring of 2002, several months before the transaction  
3 occurred when they decided that they wanted to potentially  
4 approach NCS and try and make the acquisition. And we do all  
5 the kind of things you normally do. We looked at our own  
6 clients and kind of figured out what kind of situation and  
7 what kind of condition they are to make an acquisition, what  
8 kind of consideration they can offer, and then you look at the  
9 target. You look at what their situation is, both from a  
10 business perspective, a financial perspective. And most  
11 importantly, from a legal perspective. And it was more  
12 complicated at that point because the view was that we'd be  
13 making an offer and they were potentially insolvent, and would  
14 we be dealing with the creditors and the creditors' committee?  
15 Or the stockholders and the board of directors, or both.

16 MS. HABBART: Interesting. #00:02:11#

17 MR. GORDON: So, you had to look at how you could  
18 get all the constituencies to the table.

19 MS. HABBART: So, but there had been some bad blood  
20 already between Genesis and Omnicare, had there not?

21 #00:02:27#

22 MR. GORDON: So, the industry dynamic was, and it -  
23 you know, Omnicare really, truly was the 800-pound gorilla  
24 bully of the industry. Everyone else in the industry was

1 afraid of them. They were very aggressive in their business  
2 practices. I think it came out in the briefing that, at one  
3 point, I think the year before, they had an aggressive  
4 business assault on NCS' business called the NCS Blitz where  
5 they were trying to, essentially, put NCS out of business  
6 through their pricing and business practices. And they had  
7 made multiple kind of low-ball offers to NCS, and then there  
8 had been a situation that you are describing where I think  
9 Genesis had been bidding for and was about to acquire another  
10 company in the industry. Again, I think this was nine months  
11 to twelve months before. And Omnicare kind of came along at  
12 the last minute - and they didn't want the company; they  
13 didn't want the target, they just didn't want it going to  
14 Genesis.

15 MS. HABBART: Okay. So, may I ask, when you were  
16 first brought into the matter, as you put it, you consider the  
17 target, you consider getting all the parties together. Was one  
18 of the parties you had to think about was a concern on your  
19 client's part that Omnicare would rear its ugly head again?

20 #00:03:42#

21 MR. GORDON: Well so, very initially, we were just  
22 focused on trying to figure out who we were really negotiating  
23 with. Was it the creditors' committee and the creditors? Or  
24 was it with NCS? And then, as things moved along and we kind

1 of realized the way to get this deal done was frankly, we had  
2 to be the savior who had a solution for everybody. And we then  
3 realized we were going to have to negotiate with both the  
4 creditors and the stockholders and - right, and the board of  
5 directors. And then, there came a point I think in June,  
6 during the negotiations, it was a combination of we were  
7 concerned about our then CFO, but who was functioning almost  
8 as a COO - or almost CEO, and who, in fact, to this day is the  
9 CEO of the kind of continuing company 16 years later, was very  
10 focused on this idea that if we are going to be in the  
11 situation and if we are going sign up a deal, and we're going  
12 to get the deal, and he did not want to invest the effort or  
13 the time if this wasn't going to be successful for him. Our  
14 company was in good shape, but not in such incredible shape  
15 that they could afford the cost, time, and attention and to  
16 be, to have this not work out. So, there was a lot of pressure  
17 from the client to try and come up with an approach that was  
18 going to be a guaranteed success. And when you're negotiating  
19 with creditors, you can do that because the creditors'  
20 committee can fundamentally bind or speak for the entire  
21 creditors' group and you can get lockups from the major - the  
22 largest noteholders. And, but for a variety of reasons, we  
23 came to realize our offer would be most competitive and best  
24 if ultimately we could make an offer that paid off the

1 creditors in full so that they didn't even have a seat at the  
2 table. And then, we would only have to deal with the board of  
3 directors and the stockholders.

4 MS. HABBART: And you did that. #00:05:41#

5 MR. GORDON: And that's exactly what we did.

6 MS. HABBART: And at what point - tell me about this  
7 CFO acting like-

8 MR. GORDON: Yeah, George Hager.

9 MS. HABBART: Right. Because he ultimately made or  
10 told you to make an ultimatum that there was a 24-hour period  
11 to consider a set of terms. Can you tell me more about that?

12 #00:06:02#

13 MR. GORDON: Yeah...George is a very serious, high-  
14 integrity person, almost - I don't know if he served in the  
15 military, but almost kind of a military bearing. Very much in  
16 the camp of or the school of I say what I mean, and I mean  
17 what I say. And he's not a game player, and he says what he  
18 means, and he means why he says. If I make you a proposal,  
19 that's you know, that's what I mean. I'm not trying  
20 to...anything else. And he was very - and he was the one who  
21 was very concerned about, if we go down the path of putting  
22 our credibility, our money, time, effort, all of it on the  
23 line, then I want to get this deal. The other thing, and maybe  
24 I can't tell if I'm jumping ahead on your or not, but-

1 MS. HABBART: No, it's fine, go ahead.

2 MR. GORDON: -- you know, obviously one of the key  
3 moments in the whole story is the weekend of July 26 and 27,  
4 2002, when - so, on the night of the 26<sup>th</sup>, we extend our  
5 exclusivity - negotiating exclusivity with NCS for about five  
6 or six days. That afternoon, Omnicare comes in with -

7 MS. HABBART: A tender offer.

8 MR. GORDON: -- not yet with a tender offer, but  
9 they sent a letter saying that they would like to acquire-

10 MS. HABBART: That's right, yes.

11 MR. GORDON: -- but the letter has conditionality in  
12 it. And NCS is sort of, comes to us to say well, you know, we  
13 have this; we're not sure what to do, and they use that to  
14 negotiate a better transaction out of Genesis. So, Genesis  
15 increased its offer from the equivalent of a dollar per share  
16 to a dollar-seventy.

17 MS. HABBART: Almost twice as much. #00:07:42#

18 MR. GORDON: And also, that's I think when we did  
19 the last bit of paying off all the creditors and -

20 MS. HABBART: Right.

21 MR. GORDON: -- the 20 creditors. But the tradeoff  
22 for that was Hager said to them, you know, you have to accept  
23 this by Sunday night - Monday morning, or no deal. And he  
24 absolutely, one hundred percent meant it. Like there is no

1 doubt, there is not the slightest doubt in my mind, to this  
2 day - then, or to this day -- that he meant it and if they  
3 hadn't approved and we hadn't gotten the voting agreements, he  
4 would have walked and they would have been left in the mercy  
5 of Omnicare, and I don't think they ever would have gotten a  
6 deal with Omnicare because Omnicare had no real interest. You  
7 know, Omnicare was just trying to keep it out of our hands.

8 MS. HABBART: Yeah, and to date, then, it's-

9 #00:08:30#

10 MR. GORDON: And Omnicare still had - they still had  
11 a due diligence condition. They didn't have their financing  
12 lined up, as Vice Chancellor Lamb noted in his opinion. And  
13 they would have almost certainly negotiated.

14 MS. HABBART: And historically, the only thing they  
15 had been willing to do was take it out of - buy some assets  
16 out of bankruptcy...and not having any interest in the  
17 shareholders. #00:08:52#

18 MR. GORDON: And I remember - again, I remember when  
19 he made the ultimatum. I was trying to figure out like okay,  
20 are you serious about this or this a...like what are you going  
21 to do? Like are you prepared to lose this deal over it? And he  
22 said you know, absolutely. He's like I've given them my best  
23 offer. I've done everything they have asked. You know. And so-

1 MS. HABBART: And when I go from a dollar to a  
2 dollar-seventy, and a hundred percent of the creditors are  
3 paid off in full, I need to get something to make sure we get  
4 to the end zone.

5 MR. GORDON: [Inaudible] the deal.

6 MS. HABBART: So, the structure that you did in  
7 terms of the voting agreements, et cetera, had this been done  
8 - had you worked on a transaction where this kind of structure  
9 had been put in place before? #00:09:45#

10 MR. GORDON: So, I had done a couple of  
11 transactions. I had certainly done some in the - I definitely  
12 had done one with a company that was in or near bankruptcy,  
13 and we had done a lockup with the noteholders. And then, I had  
14 done one or two others where I think we had locked up like 40  
15 percent of the stock, and another where the acquiror owned 60  
16 percent, and so, once the special committee approved the  
17 transaction, it was a fait accompli. So, I had worked on  
18 similar -- never ones with this exact set of facts.

19 MS. HABBART: But that experience from those  
20 transactions is what led you to decide to put together these  
21 pieces.

22 MR. GORDON: Yeah, although look, we were very  
23 conscious that this was an unusual situation and that we were

1 going to be asking NCS to do something that we thought was  
2 perfectly within their power to do, but I expected—

3 MS. HABBART: As did the Chancellor - the Vice  
4 Chancellor.

5 MR. GORDON: But I did expect them to push back. And  
6 so, in preparation for this, look, I had re-read every single  
7 major case that could apply. Like personally. I didn't rely on  
8 the litigators. Like I had just recently like re-read like you  
9 know, *Revlon*, *Unocal*, *Unitrin*, *Paramount-QVC*, *Society for*  
10 *Savings* - like you go, you name it. And also, I teach - you  
11 know, I used to teach at NYU. I now teach at Harvard.  
12 Actually, in preparation for this, I found my lecture notes  
13 from that spring where I talk about all these cases...like, I  
14 really thought through like what - like is there any reason  
15 that this should not be permitted? And I couldn't come up with  
16 one.

17 MS. HABBART: So, that really was kind of creative,  
18 putting all those pieces together - in one. #00:11:44#

19 MR. GORDON: You could say that. Although, I  
20 frankly, another way to think about it, I mean it was kind of  
21 just sitting there in front of us, right? We had these two  
22 shareholders, who were also directors, but who the ones who  
23 were both - they were the largest shareholders economically,  
24 though they did not, of course, have a majority, but

1 economically, they did have the largest economic stake, and  
2 they had, and they had the controlling vote. This company was  
3 in absolute extremis and, again, just from my experience in  
4 those other matters and then reading the cases, it was just  
5 like I couldn't figure out why we couldn't do this. And you  
6 know, you have business judgment on the part of the board, and  
7 then you have business judgment and shareholder action by the  
8 largest shareholders. And then, you think about other things.  
9 Well, what would someone look at this and say well, this is a  
10 problem? Well, you know, one of the things we looked at, for  
11 example, okay, could anybody say that the other stockholders  
12 didn't really understand that they weren't going to get a vote  
13 on something like this? Well, you know, the dual-class voting  
14 and the high vote structure had been carried over from a  
15 predecessor company. There wasn't a single investor - no  
16 person had ever bought a share of stock with NCS at a time -  
17 and without knowing that two people controlled the majority of  
18 the vote and could do whatever -

19 MS. HABBART: Right.

20 MR. GORDON: -- however they wanted. They were  
21 protected against those controlling shareholders selling their  
22 stock for more, but this was a transaction in which the  
23 selling stockholder - or the controlling stockholders had no  
24 conflict. They weren't getting different consideration or

1 better consideration. They weren't continuing with the  
2 combined... . There was like complete alignment of interest  
3 between them and the other stockholders. And so... .

4 MS. HABBART: You thought let's go with it. Now, did  
5 you, in advance, think that that transfer argument,  
6 that...Omnicare- #00:13:48#

7 MR. GORDON: Oh, the argument that...right, so the  
8 charter provided, right, that if the two holders of the high  
9 vote stock ever transferred it, it became low vote stock.

10 MS. HABBART: Correct.

11 MR. GORDON: Again, we looked at that very  
12 carefully, and that's obviously a pure technical argument.  
13 It's not a duty argument. And, again, we, looking at the - the  
14 way we looked at the voting agreement themselves, the charter,  
15 and then, case law around what it means to actually transfer a  
16 security, it did not - it did...again, I kind of understand  
17 why the plaintiffs, you know, why not throw that in or you  
18 might - I mean because it's like if you could win on that, it  
19 would be great, but we never thought that was - was never  
20 worried about it.

21 MS. HABBART: When first looking at that too, I was  
22 like, really? You'd go into court and make this argument? And  
23 I thought, but like you said, it's technical. So, you - when  
24 this began, you had a really good sense that they were trying

1 to do the right thing. Everybody was negotiating in good  
2 faith. You had management that was what you see is what you  
3 get. When I tell you things, I mean them. Omnicare, who in the  
4 past, never really came in with anything of any value -  
5 anything close to what Genesis was offering, suddenly, writes  
6 a letter and, as a result of that, your client agrees to pay  
7 more. I mean, and then you go ahead and approve the merger  
8 agreement, sign, and you're ready to go. I mean, did you  
9 expect this tender offer to follow? And did you - had you  
10 thought about - I mean that Omnicare reared its head then --  
11 what did you start thinking? #00:15:35#

12 MR. GORDON: In a way, you're asking two different  
13 questions. So, in a sense, of course, we expect, anticipated  
14 the possibility, otherwise, we wouldn't have cared about - we  
15 wanted a locked-up deal so that we would be protected against  
16 exactly that. So, did we expect it? Did we anticipate it? Did  
17 we think about the possibility? Obviously. And, of course, and  
18 indeed, you know, a big part of that - the end of July of us  
19 going from -- I think we were paying the creditors of at like  
20 90 cents on the dollar or 98 cents, but it was something that  
21 was like really close but like it was still going to require  
22 their approval. And that was the moment we were, like, you  
23 know what? Let's just - we need to take them out of the

1 equation. Can we just agree that we're going to pay them off  
2 in full and-

3 MS. HABBART: Be done with it.

4 MR. GORDON: -- and that was a big - from a  
5 financial perspective, that was a big hurdle to get our client  
6 over. He was, like, I really don't want to do that. Like, I  
7 don't need to do that. To win this company, I shouldn't need  
8 to do that. We were, like, you know what? You don't want a  
9 second party here, or a third party here, whose approval you  
10 need. So, just take them out of the equation. So, that's how  
11 we came up with paying off all the creditors in full. So,  
12 then, and then - so, then how are we going to handle the board  
13 and the stockholders? It was, look, we're going to offer them  
14 even more. And we're going to offer them even more. And but  
15 then, you know, they got to make a decision, and so, you know,  
16 that's when George Hager put kind of the ultimatum to them.  
17 But the question of, like, did we actually think Omnicare was  
18 going to go through with it? I think-

19 MS. HABBART: I mean, at that time, did you expect  
20 them to come in? #00:17:29#

21 MR. GORDON: Right...so, I think... I think the  
22 opinions were mixed. And the reason I say that is that their  
23 offer really was conditional. And when we realized they didn't  
24 even have the financing lined up yet, I and others, it's 16

1 years ago, I can't remember who exactly, but I and others, I  
2 think, we thought that it was just purely -- they were playing  
3 games. They were trying to screw up our deal, but didn't  
4 really care--

5 MS. HABBART: Want it for themselves.

6 MR. GORDON: -- care one way or the other. I think  
7 others were of the view of, like, frankly, this is kind of  
8 chump change for them. And, if you remember, most of the value  
9 was in the debt, not in the equity. So, you could - if you  
10 were better financed than Genesis was, and Omnicare clearly  
11 was - it's five or seven times as big. You know, to go from a  
12 dollar-fifty a share to two-fifty a share to three-fifty a  
13 share, it's 20-million bucks, it's not that big a deal. If you  
14 are Genesis, who is a smaller player in the industry--

15 MS. HABBART: It is.

16 MR. GORDON: -- you know, it was just harder to do.  
17 And George Hager, who was also a very financially prudent  
18 person, and he just - there was a point he was not going to  
19 stretch beyond. It was not just a matter of pride, but it was  
20 a matter of, you know, he didn't think he could - there was  
21 only so much value that he could justify to his board, the  
22 Genesis Board. Whereas, I think, Omnicare, there was a feeling  
23 of, like, you know, their whole... that they throw more money  
24 around.

1 MS. HABBART: Yeah. They had - and they had a  
2 history of-

3 MR. GORDON: And by the way, the question you're  
4 getting at is what one of the interesting, at least I found  
5 interesting, in the situation is, you know, after - within the  
6 month after we signed with NCS, we allowed them to talk to  
7 Omnicare without making the determination that the offer-

8 MS. HABBART: It was a better offer. #00:19:37#

9 MR. GORDON: -- could become superior or not. And  
10 looking back, I think there were a couple of reasons we did  
11 that. But I think a big part of it was I didn't think they  
12 would ever - I didn't think they were ever going to take the  
13 conditionality out. I thought they were just going to leave  
14 this conditionality there and that was going to kind of screw  
15 up our deal in some way. And that was the reason NCS never  
16 wanted to declare it superior. And I think NCS - but NCS also  
17 felt like look, the director - look, there is someone here  
18 offering more money. Like, the directors - they want to be  
19 able to talk to Omnicare to figure out like are you guys real  
20 or are you not? And what's really going on here. And we didn't  
21 want to put NCS in the situation of having to declare that  
22 superior when it wasn't really because of the conditionality,  
23 and so, we allowed them to do it.

1 MS. HABBART: Ah, finally! An answer. Finally.  
2 That's what I've been so curious - and that makes perfect  
3 sense. #00:20:48#

4 MR. GORDON: And thinking back, I think we felt -  
5 and we, representing Genesis, we did feel that them declaring  
6 it superior might not play well in the litigation-

7 MS. HABBART: No, it would have played terrible.

8 MR. GORDON: So, I was-

9 MS. HABBART: Let him talk.

10 MR. GORDON: Right. Let him talk, let him-

11 MS. HABBART: Let him talk.

12 MR. GORDON: -- and the other thing is, look, we  
13 were very cogni- - everything we did, we felt was very out in  
14 the open. Like, there was nothing secret about these voting  
15 agreements. There was no secret side deal. Nothing. And, from  
16 a fiduciary duty perspective, you know, if they wanted to - if  
17 the NCS board wanted to do what they felt they had to do to  
18 fulfill their duty of candor, I didn't have a problem with it.

19 MS. HABBART: Understood. And, you know, obviously,  
20 the Court of Chancery agreed with you that everybody played-

21 MR. GORDON: The Court of Chancery agreed with us  
22 and then-

23 MS. HABBART: -- right, well, at least at that  
24 level, they agreed that the board had acted the way it should.

1 It acted like a good board. And there was a reason to call  
2 them -- put them on a 24-hour decision-making process. And you  
3 made the voting agreements that they wouldn't enter into them  
4 until the board had approved the merger. I mean you put  
5 everything out there in the open.

6 MR. GORDON: Right.

7 MS. HABBART: Okay. So, now we understand why you  
8 let them talk to them, okay? And so, basically, at this point,  
9 you feel, you let them talk, let them see if there was  
10 something better. You've done tons of due diligence. You  
11 raised the price in response to this iffy or conditional  
12 potential offer. You've done everything right. Did you expect  
13 this lawsuit? What was your thinking at the time once  
14 everything was approved? #00:22:37#

15 MR. GORDON: I honestly don't remember. I don't  
16 think I did.

17 MS. HABBART: You had done everything you could--

18 MR. GORDON: Now, it's funny, now I can't remember.  
19 I certainly never thought -- never thought we would have a  
20 problem or lose. And I can't -- honestly, I can't remember -- I  
21 mean whether it's someone, you know, whether they take the  
22 shot. Maybe, maybe not. But again, you know, look, the other  
23 thing is, obviously, I was on the acquiror side. I had formed  
24 a pretty good rapport with the lead lawyer, Megan Mehalko,

1 Benesch, Friedlander, who was representing NCS, and we had  
2 talked a lot. And one of the things also I knew was that,  
3 again, is I think Vice Chancellor Lamb correctly intuited,  
4 like, that NCS had four directors. They worked really, really  
5 hard. They cared a lot. They felt like they were under  
6 enormous pressure to do the right thing. And you know, she  
7 sort of kept telling me how much, you know, how hard they were  
8 working at this. So, I felt very confident that we had a good  
9 record. I thought we were right on the law. So, I was never -  
10 I wasn't that worried about it. The only thing I remember is -  
11 and you know, from my perspective, there is nothing more fun,  
12 like I am glad I am a corporate lawyer and not a litigator,  
13 but there is nothing more fun than being the corporate lawyer  
14 on a litigation, like, because then you kind of, like, you get  
15 to, like, throw in your little thoughts and ideas, but you  
16 don't have to-

17 MS. HABBART: Go to court and argue, yes.

18 #00:24:21#

19 MR. GORDON: You know, you don't have to go to  
20 court. You also don't have to go the case - the case book.  
21 But, I remember we had long discussions about it before the  
22 hearing before Vice Chancellor Lamb and I remember - so,  
23 Lamb's opinion came out, and it was kind of exactly what we  
24 hoped for-

1 MS. HABBART: It was our story—

2 MR. GORDON: -- and predicted and both on the facts  
3 and on the law and I was sort of - but I remember, and,  
4 actually, I went back, and I found an email relating to this.  
5 And so, the first reaction, I sent an email out, you know,  
6 "Got the opinion; we won!" You know, second one, the Lamb  
7 opinion is, you know, follows our brief almost perfectly,  
8 except he does go through a *Unocal* analysis. And we kind of  
9 felt like *Unocal*, frankly, shouldn't apply at all as Chief  
10 Justice Veasey ultimately kind of put in his footnote. And, I  
11 said, that's the one thing that worries me is, like, if they,  
12 like, if they're going to go, at the Supreme Court, I can't  
13 see how they would possibly reverse this, but maybe *Unocal*  
14 might be their hook.

15 MS. HABBART: I agree. You look at the Court of  
16 Chancery opinion and it tells the story, almost a hundred  
17 percent, the way you would expect it to be because of the good  
18 history, the good record that you worked to help create, which  
19 you did. So, then, you start looking, where was the Supreme  
20 Court coming from? What were they thinking? And today, is  
21 something I wanted to share with you. You know, it was  
22 interesting, there were some - I have the transcript of the  
23 hearing. And it's really interesting. There's a couple of  
24 pages where one of the Justices is focused on the point that

1 the merger agreement and the voting agreement were  
2 inextricably tied together. Somehow seemed to think that the  
3 fact that the company had to approve those voting agreements,  
4 I think that's what started to get them on the road towards  
5 the decision they finally made, for some reason, as opposed to  
6 looking at the full story and all the circumstances that the  
7 board was faced with at that time, okay. They were focusing on  
8 this while they were linked. Well, yeah, but so? But, I just  
9 wonder, I don't know you could have avoided that. #00:27:13#

10 MR. GORDON: Well, so I - that's all right, we can  
11 talk about it in a second. I, actually, have a kind of a  
12 different theory about where that hearing and the opinion went  
13 off and ended up in the wrong place. But, you know, the  
14 question - what - I do remember, now that you ask this, that  
15 there was - we got asked a lot -- well why, you know, why did  
16 NCS have to be a party to the agreement? I never really  
17 understood that as a criticism for a couple of reasons. First  
18 of all, the practice now is mixed, but back then it was fairly  
19 typical, if not standard, that the voting agreements were  
20 among the acquiror, the target, and the - acquiror,  
21 stockholder, and it just - that's just how-

22 MS. HABBART: You're saying it was customary at that  
23 time.

1 MR. GORDON: -- that's just how people did it. But,  
2 more importantly, I can't figure out what possibly would have  
3 turned on it. And in fact, I remember - one thing I do  
4 remember us talking about is that if the company hadn't been a  
5 party, you could easily imagine this opinion taking us to task  
6 for that. Oh, you know, like there was some-

7 MS. HABBART: Secret agreement. #00:28:15#

8 MR. GORDON: You know, like, they cut the board out  
9 of the negotiation or the decision-making around that and  
10 present it to the board as this fait accompli and the added  
11 extra - like you could easily - you could much more imagine,  
12 frankly, a sinister story with them not a party than with them  
13 being a party. And it doesn't have any other legal  
14 implication. Now, what I think you might be right about is,  
15 again, you know, ultimately, and you have had more  
16 distinguished litigators and judges already talk about this  
17 case, more distinguished than myself on this, but, you know,  
18 this majority opinion, I think, and Veasey and Steele agreed,  
19 like simply got the *Unocal* analysis just wrong and, you know,  
20 they misinterpreted their own case. And but they were very -  
21 they had a lot at stake in characterizing the situation, which  
22 was board action plus stockholder action, but characterizing  
23 it as a single board action that was a takeover defense. It  
24 was neither of those things, but their whole - the - to find

1 against situation - to reverse, they had to get there. And so,  
2 either that Justice already had that in mind and was trying to  
3 establish the link so he or she could write it that way. Or,  
4 was genuinely confused as to would it matter. But, when you  
5 step back, away from the technicality, I just don't see how it  
6 matters. They were, in any honest sense of the word, they were  
7 interlinked. We weren't going to sign the merger agreement  
8 without the voting agreement, so-

9 MS. HABBART: Yeah, they were tied. #00:30:02#

10 MR. GORDON: Yeah, they were tied.

11 MS. HABBART: But I guess what-

12 MR. GORDON: But there wasn't going to be a voting  
13 agreement if the stockholders - the majority stockholders  
14 didn't want it.

15 MS. HABBART: But I think what he was talking about  
16 was the fact that the company was a party to that. That just  
17 tied it even tighter together. But should that have made the  
18 difference? I don't think so-

19 MR. GORDON: I just can't-

20 MS. HABBART: -- if that's how customarily you did  
21 that and the shareholders are perfectly allowed to act in  
22 their interest as shareholders, separate and apart from the  
23 fact they are also directors-

1 MR. GORDON: I can't believe that if you had said to  
2 any of the three justices who were in the majority, the day  
3 after this opinion was issued, and say, okay, so, it's okay  
4 for us to do this exact same deal as long as the target does  
5 not-

6 MS. HABBART: Wasn't a party-

7 MR. GORDON: -- doesn't have a signature line in the  
8 voting - it couldn't possibly be. So...

9 MS. HABBART: I just note the unusual focus there. I  
10 thought the voting agreement said there was a commitment to  
11 vote for the merger as contemplated by the agreement. I mean  
12 there was just a lot of focus on that, and- #00:31:10#

13 MR. GORDON: Well, there was one thing I, you know-

14 MS. HABBART: But that's the way it was done-

15 MR. GORDON: -- and the other thing is, like, I  
16 think, if I'm recalling right, that Justice may have had a  
17 concern around this idea that Genesis could have increased its  
18 bid, but not to - could have changed its bid and the two  
19 majority stockholders would have continued to be bound to vote  
20 for that. And that's not actually the case. If there were any  
21 changes to the merger agreement or the consideration, then the  
22 stockholders signing the voting agreement would not be  
23 obligated unless that change had been approved by-

24 MS. HABBART: The board.

1 MR. GORDON: -- by NCS' board. So, that just--

2 MS. HABBART: Right, they were just - they were  
3 bound to those exact terms as agreed upon in that merger  
4 agreement. And so, I don't disagree with anything you're  
5 saying. I think it went off on a different tangent and maybe -  
6 you know, now people will say that you can do this by written  
7 consent and avoid the whole problem. I find that form over  
8 substance. I don't think that's the right analysis needed to  
9 resolve these issues.

10 MR. GORDON: Yeah, I have found that also, and it  
11 appears to be true. There had been deals done post-*Omnicare*  
12 where people you'd deliver written consents on the day of  
13 signing, and that's okay. And it's good - I mean I'm glad that  
14 wasn't dragged down, like, you know, into the wrong decision  
15 of the final *Omnicare* ...

16 MS. HABBART: But there is like an intellectual  
17 dishonesty there, I think.

18 MR. GORDON: It doesn't make any - it doesn't make  
19 any sense.

20 MS. HABBART: It makes no sense. It's form over  
21 substance. So, now we have the written consent right now and  
22 do it. They did it, what? It was a day apart between they  
23 signed the voting agreement- #00:33:05#

1 MR. GORDON: No, they signed the voting agreements  
2 on the day that we signed the merger agreement, then signed  
3 the voting-

4 MS. HABBART: Was it the same date?

5 MR. GORDON: It was the same day. But, you can do  
6 that I mean, now people - I'm sorry, they sign the written  
7 consents an hour later.

8 MS. HABBART: Correct.

9 MR. GORDON: Or the next, you know.

10 MS. HABBART: Or send them in advance and have them  
11 held until there is authorized data delivery.

12 MR. GORDON: Exactly.

13 MS. HABBART: But you see, that's the silly - the  
14 stuff - silly, I don't mean silly, but it's that kind of  
15 technicality, just like are you a party or aren't you when  
16 it's a signature line, that's troublesome to me when you are  
17 putting transactions together. I don't like having it turn on  
18 such a thing. #00:33:40#

19 MR. GORDON: Well, look, this was one of the really  
20 unfortunate things, I think, about the majority opinion here,  
21 which is we had talked with our client - our client was a  
22 Pennsylvania company. Pennsylvania incorporated. We actually -  
23 I'm going to sound like I am making this up for this  
24 conversation -- but we had conversations with them. They were

1 asking us, you know, like well what's so great or what's so  
2 special about Delaware? This was on the eve of the trial with  
3 Vice Chancellor Lamb. And I literally said to them, "you are  
4 about to see because what's really great about Delaware is you  
5 get - is that they - you have this developed body of law and  
6 this unbelievably deep respect for, frankly, business  
7 judgment. Like, that the idea of directors exercising their  
8 business judgment under really difficult circumstances, and as  
9 long as they are not conflicted, self-interested, entrenching  
10 themselves, this is what Delaware is about is - seen through  
11 that and respecting it."

12 MS. HABBART: And we have a great record to support  
13 that. #00:34:41#

14 MR. GORDON: And it was just interesting to see -  
15 you know, for them to - for the court to kind of not - to  
16 choose this situation, not to - oh, and then to go on a - to  
17 set some kind of weird precedent and to say you know, it just  
18 didn't make any sense. Look, one of the things I have always  
19 thought about is, you know, the - I mean look, the most  
20 charitable, I guess, explanation I have for the way the  
21 Supreme Court opinion came out, and it's there. Actually,  
22 there's a couple of quotes that reveal it pretty clearly, is  
23 that they looked at the situation, and you know, well, let me  
24 step back. One way of looking at this situation is you had

1 NCS, which was in deep trouble. It had problems with its  
2 creditors. It looked like there was going to be no value for  
3 its stockholders. And it was desperate. And we came along -  
4 we, Genesis, came along, and solved all their problems. Now,  
5 maybe it wasn't perfectly, you know. Would they have liked 10  
6 dollars a share? Of course. But like - but did we solve their  
7 problems? And not only did we solve them, not only pay off the  
8 creditors, leave something for the equity, but the company was  
9 - like all the employees, the customers, you know - this  
10 business was going to-

11 MS. HABBART: Everything was turning out well.

12 MR. GORDON: -- continue as a going concern. It  
13 wasn't - and we had solved all these problems and, but we did  
14 - there was a moment over that weekend where we, you know,  
15 there was an ultimatum put to them. There's no two ways about  
16 it. An ultimatum: sign within 48 hours, or we're gone. And I  
17 think, and I do think that - and I - and NCS' directors and  
18 their stockholders, like, they had been living this for three  
19 years. They didn't need, you know, and they understood the  
20 situation they were in, and they made a decision as to - they  
21 took the bird in the hand. I think a charitable way to look at  
22 this is that the Justices simply - they didn't believe - two  
23 ways. Either they didn't believe the ultimatum, and they are  
24 second-guessing NCS for believing the ultimatum. Or, you could

1 say they looked at the situation, and they just said, boy,  
2 wouldn't it have been better if Genesis couldn't have made  
3 this demand. What if we just took this out of the arsenal  
4 altogether? I'd bet - and I think they are - now, they are  
5 substituting their judgment. I think they were saying, "I bet  
6 that if the rules of the game had been that you couldn't lock  
7 up this deal, I bet Genesis would have done the deal anyway."  
8 I think they were dead wrong, and I think if this decision had  
9 been in place in the spring of 2002, NCS would have gone  
10 bankrupt. But I think - you know, that's the only way I can  
11 understand how they came out from a larger picture point of  
12 view is that they just saw - what they saw was - they saw us -  
13 they saw Genesis as bullying a desperate company and wanted to  
14 stop it as opposed to realizing that we were the lifeline and  
15 we just weren't doing it for free.

16 MS. HABBART: Correct. And you know, when you talked  
17 about the defensive nature, you know, I know the Supreme Court  
18 decision, again, they talked the stockholder voting agreements  
19 were inextricably entwined with the defensive aspects of the  
20 merger agreement. Again, I think I like your sense where,  
21 yeah, they did look at it as defensive mechanisms as opposed  
22 to the story, that was true. #00:38:25#

23 MR. GORDON: So, again, this was a piece of it that  
24 drove me a little nuts because you know, if you - so, they're

1 clearly, they are trying to tie into *Unocal - Unitrin*, which  
2 says you can't be coercive or preclusive -- a defensive  
3 measure can't be coercive or preclusive. But it's - what it  
4 can't be is-

5 MS. HABBART: And I think that's why the Justice was  
6 asking those questions-

7 MR. GORDON: -- what it can't be is - it can't be -  
8 you can't coerce stockholders, and you can't preclude  
9 stockholders from - and the voting agreements were stockholder  
10 action. No stockholder was coerced to vote for something by a  
11 not - for a non-economic reason. And nor were they precluded  
12 from having the opportunity to express their view. It just so  
13 happened that the people expressing their view were two guys  
14 who owned a majority of the stock - of the voting stock.

15 MS. HABBART: That the other shareholders bought  
16 into a company knowing that was the case. #00:39:13#

17 MR. GORDON: So, you know-

18 MS. HABBART: I hear you.

19 MR. GORDON: I just never - that was the-

20 MS. HABBART: So, when the Supreme Court decision  
21 came out, tell me you know, while I could imagine when you saw  
22 the decision, you weren't that happy with it. But how did the  
23 company react-

1 MR. GORDON: Well, I seem to remember we didn't get  
2 an opinion-

3 MS. HABBART: True.

4 MR. GORDON: -- or, until four months later. So, the  
5 decision comes - we hear the order, we were actually on the  
6 train coming back from Delaware and, you know, that's an awful  
7 phone call to make-

8 MS. HABBART: Yes, it is.

9 MR. GORDON: -- to a client.

10 MS. HABBART: And you didn't have the analysis at  
11 that time.

12 MR. GORDON: And we didn't have the anal...we  
13 didn't, we just - we didn't know anything. We just knew it had  
14 been reversed. And that it could - there was no - of course,  
15 the client, the first thing, oh, okay, is there a further  
16 appeal? Does it go...like no. So, I think, if I recall  
17 correctly, at that point, Hager - our client, Genesis, went  
18 back and said, well, look, this is now six months - five or  
19 six months have passed. Our fortunes have improved. The  
20 prospects of NCS have improved. And so, we concluded we could  
21 actually pay more, so we upped the bid - we upped by the  
22 equivalent of about \$40 million, but to three-fifty a share.  
23 And, if I recall correctly, Neighbor Care - and so then,

1 Neighbor Care either matched - maybe they were at three-fifty,  
2 we matched them-

3 MS. HABBART: You did.

4 MR. GORDON: We matched them, and then they went to  
5 five-fifty. And we had some lever, I can't remember what it  
6 was, but, at that point, we realized we would be out, and  
7 Hager negotiated a breakup fee-

8 MS. HABBART: Which was very impressive, the 30  
9 million. I was very impressed-

10 MR. GORDON: I think it was 20.

11 MS. HABBART: No, I thought it was 30.

12 MR. GORDON: I think it wasn't 30. I think it was  
13 20, but-

14 MS. HABBART: Yeah, it was good. It was very good.

15 MR. GORDON: But it was another one where he was,  
16 like, I was like, how are you going to do that? And he said,  
17 he's like - I can't remember what hook we had, but it was the  
18 same thing. He's like I'm going to go in and tell them that's  
19 what we deserved and that's what we want to move out of the  
20 way, and they were like, we did it.

21 MS. HABBART: And, the final note is, 20 million, 30  
22 million, it's still not enough for all the time, aggravation,  
23 focus, and distraction from regular business a company has to

1 take. Thank you, Mark, I know I wish we had more time because  
2 there is so much more to talk about.

3 MR. GORDON: This was great. Thank you very much.

4 MS. HABBART: Thank you so much for being here.

5 MR. GORDON: Thanks.

6 #00:41:51#

7 ###

8

9