Delaware General Corporate Law Section 203
Interview of Charles F. Richards, Jr.;
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Interviewed by: Edward M. McNally; Morris James
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MR. MCNALLY: Today, I am here with Charles Richards, who was one of the top – very top – corporate lawyers in the State of Delaware in the eighties to nineties, and maybe even after that. We are going to talk about the things that happened in the nineteen-eighties, for which, you know, my memory is admittedly deficient. But I want to start with the hostile tender offers of takeovers, rather, and two-tier tender offer phenomena in the nineteen-eighties. Was that a prominent concern of the corporate bar as you recall it in that period of time?

MR. RICHARDS: Well, I think it was a prominent concern with the corporate bar, and of course, it was particularly a concern of those of us who participated in takeovers, which was really a fraction of the corporate bar. I mean many of the members of the corporate bar were doing what they had always done. But especially among the major firms, a significant portion of our time was spent on working on one side or another of takeovers, some hostile, some friendly.

MR. MCNALLY: And why was there some concern about these kinds of hostile takeovers, or two-tier tender offers? #00:01:24#

MR. RICHARDS: Well, it was a revolutionary period in the law, and so, people were coming up with new devices, and new defenses and both the lawyers and the clients weren't really sure which devices, either defensive or offensive would work. So, there was a certain amount of uncertainty. And then, there were a series of decisions that came down, which had a major effect, two of which had occurred not long before the adoption of Section 203, which was the Unocal case, which I had the privilege of arguing, and also, the Household case, or the poison pill rights. And both of these cases had a major effect on how takeovers were to take place.

MR. MCNALLY: And what was that major effect? #00:02:21#

MR. RICHARDS: Well, the Unocal case justified a management from adopting what would, of course, I thought, was a Draconian defense, but anyhow, it was a severe defense which absolutely defeated Mesa or Boone Pickens' offer. And so, it said the companies could consider the interests of their shareholders and could, in effect, take steps to, in effect, block the takeovers. The Household case was a sort of a horse of a little bit of a different color. It said that you could

adopt a rights plan, which the court said still, the board would have the obligation to consider whether or not it had to redeem the rights in the event of a particular takeover, but it gave the defendant companies more time to search out either alternative bidders or alternative transactions or negotiate with the would-be acquiror. So, both of these cases had the effect of really altering the landscape significantly.

MR. MCNALLY: Okay, now we know that prior to 1987 or so, there had been a version of 203 that had been basically ruled unconstitutional. In 1987, there was the U.S. Supreme Court case in the CT matter, which, I gather had permitted at least some state laws to have an impact on takeovers. Was there a growth of state legislation in the late nineteen-eighties that certainly influenced your thinking about whether or not such legislation was good for Delaware? #00:04:12#

MR. RICHARDS: Yes. As you have referred to, I think that was an Indiana case, and I believe by that time, there were 27 so-called state anti-takeover statutes. And of course, the constituency for anti-takeover statutes, that is corporate managements, and others who felt that takeovers were not necessarily a good phenomenon began to lobby after the Supreme Court case that Delaware should adopt something of that kind. And so, I guess, it proceeded slowly with inquiries and people calling and suggesting to various Delaware Lawyers that they

ought to consider amending the Delaware Corporate law to provide similar protections. And of course, this created some psychological pressure on those leaders of the bar that were working on the corporate counsel because the thought, of course, was if you don't adopt a proper anti-takeover statute, why these companies – or some of these companies may move to their home state or a state with more favorable treatment. So, that caused the corporate counsel to begin to consider the question.

MR. MCNALLY: And in that period of time, you were all in the corporate counsel, correct? #00:05:39#

MR. RICHARDS: Yes, I have been on the corporate counsel, I think, for maybe 20 years, maybe even longer—

MR. MCNALLY: I was going to say forever, I'm sure.

MR. RICHARDS: Yeah, more or less forever, yes.

MR. MCNALLY: I know that in October 1987, the counsel again took up this Section of 203. They had talked about it in the summer, but their real discussions began in the fall of 1987. And there was a series of meetings in which these kind of things were discussed. And what were the principal subjects of the debate in the fall of 1987 that you can recall now? #00:06:14#

MR. RICHARDS: Well, I think we had to start with the principals. I think most of the members of the corporate

counsel started out with the same general idea. And the difference was how to achieve that idea. I mean the general idea was, I think that we were all agreed that Delaware should adopt, if it was going to adopt anything, a moderate proposal, which perhaps it would strengthen the hand of incumbent management, to some extent, to use against the most abusive kinds of takeovers. But at the same time, I don't think anybody in the corporate counsel really thought that takeover activity was bad or not in the best interest of the shareholders. And they didn't want to adopt something that would be so severe as to prevent takeovers from being considered. And behind this, whatever your policy position was, there was concern that if you didn't do anything, maybe some companies would leave Delaware, which was very important to Delaware's revenue. And if you did too much, there was talk from Congress, as there has always been, you know, why does Delaware make the nation's corporate law? And if we had done something to prevent, or nearly prevent takeovers, there were people in Congress that said well, we can't let Delaware do that. We'll have a federal law on the subject, or maybe we will preempt the whole [period] and have federal corporation law. So, as Delaware, lawyers, we didn't want that to happen either. So, I think everybody started out with a similar idea of what we needed was a reasonable statute that would satisfy

those people of pushing for us to do something, but not so strong as to really choke off takeovers. And so, I think the debate then became to be well, okay, what does that mean? What would the various triggers and votes and so forth be?

MR. MCNALLY: Now, you talked about a concern about what Congress or the federal government might do. I know that in December 1987, you wrote what I think was a very influential memo that's now I put before you on the table there that kind of summarized all these different concerns, particularly I think you refer to an SEC fellow by the name of Grundfest. And do you recall what his position was with respect, generally speaking, with respect to this kind of legislation? #00:09:12#

MR. RICHARDS: Well, he was cautious about Delaware adopting something which would discourage takeovers entirely. And so, I think some of the members of the corporate counsel were not involved in takeover battles on an every day because it was a broad representation of the corporate bar. And it was my perception from the beginning that there were more people on the corporate counsel who were willing to, let's say, close the window more tightly than I thought was in the best interest. And there were philosophical differences among some people; some people thought that the hostile takeovers really weren't a very good thing, and other people thought they were

beneficial. I had thought that they were beneficial, and quite apart from the effect of individual takeovers, the fact that takeovers were taking place, and could take place, really was a wakeup call, in my judgement, for corporate managements across the country. So that many companies who were never subject to a takeover said, oh, look what's going on here. And maybe we need to give a higher interest to the interest of the shareholders than we are on old bureaucratic concerns or you know, just acquiring other companies mindlessly or things of that kind. So, as the meetings went, and the informal discussions in between, and I realized that there was a sort of a majority of the counsel pushing for something stronger than we ended up with, I sort of felt it was my obligation, or consistent with my views to push back and try to open these windows. And at this point of the – my memo of December 31, I was fairly pleased with the existence of the statute at that time. But, and I think some of the compromises that had been made were really, I don't want to give myself too much credit, but there was an interest in the corporate counsel to have a unanimous conclusion. And so, there was, aside from whatever the merits of the arguments that I was advancing, they also wanted to get me on board, so to say it was unanimous. So here, I looked back, and I see I'm a little bit playing the

role of the dog in the manger because I think the vote at this time was 14 to 1, or something like that—

MR. MCNALLY: And you were the one. #00:12:21#

MR. RICHARDS: And I was the one. And, but I felt that consistent with the position I had been taking all along of pushing, I thought I needed to keep pushing so that all of the people, Mr. Grundfest and *The Wall Street Journal* and Mr. Samuelson, and so forth and so on, so that there would be somebody holding the door open. And there were two modest changes that I was holding out for. One, to drop the percentage to be acquired from 85-percent to 80, which as I point out in this memo, if you disregard the five percent that everybody agreed were sort of lost or non-responsive shareholders, that was 84 and some fraction percentage. And the other was the out that once nobody had acquired the company, whether they had to have two-thirds vote of the disinterested shareholders, or not. And my position was well, look, in order to control the board, you have 51-percent of 50-percent in one vote. And if you get just a majority of the disinterested shareholders, you've gotten to 75-percent. And that's enough. And so, that was the position I put forward at this time recognizing that really, there was probably only a slim possibility that there would be a further compromise, but in order to hold the door open for the Grundfests and the

other people of that nature who were saying this statute is just a little too tight, I thought I should maintain my position to say look, this could be a little better.

MR. MCNALLY: Well, the fact is that the respect that people had for you and the fact that you took those positions, did result in changes from the original legislation with respect to the two matters that you just spoke about, right? I mean, originally, there wasn't, I don't think it was originally 85-percent that was required. It was higher than that, wasn't it? #00:14:29#

MR. RICHARDS: Yes, it was 90. Yeah.

MR. MCNALLY: Yeah. And so, as a consequence of your position, or your taking that position, it generally was lowered. Now, there was a considerable amount of debate about whether or not there was any real academic evidence for the correct percentage. I noticed that Grundfest, for example, weighed in for a lower percentage, and Gil Sparks argued that there wasn't any real record about what was the correct percentage. Do you recall whether there – any more about those particular debates? About why 85 was right, or 80 was wrong, and so forth? #00:15:06#

MR. RICHARDS: Well, I just – you know, I guess, over this period of time, I don’t know how many takeover battles I have been involved in, but I would think you know,

more than 30, probably. And so, I had the experience of talking to lots of investment bankers, both investment bankers on either side. And by the way, my experience, I think at this time, I was characterized by some people as being only interested in the position of acquirors, but that really wasn't the case. I had represented many target companies, like Pennzoil and Time Warner and Getty and so on. And so, I had really seen both sides, and there wasn't any chart or anything that you could prove it. But by talking to investment bankers, and providing investment bankers' testimony and cross-examining them, you had sort of a feel. And my feel was that in this area, it was the proper area. Now, whether it should have been 80-percent or 85-percent, my bias was in the favor of facilitating such takeovers would continue to be made. But I wouldn't – really, couldn't say whether 80 or 85-percent, or 75-percent was – I did feel that 90-percent was preclusive, and I was worried about 85-percent. We didn't talk about it, but another important change that had been worked out by the counsel before this, was changing the definition of who was disinterested. And that was very important to I think a number of people to take out the substantial stock that in many companies is held by the management, directors—

MR. MCNALLY: Or the ESOPs. #00:16:58#

MR. RICHARDS: -- and, or the ESOPs. And so, that lowered the practical percentage, you know, for the post-takeover vote.

MR. MCNALLY: Now, you were well-known then, I think, for your representation of the person you just mentioned a few moments ago – T. Boone Pickens.

MR. RICHARDS: Yes.

MR. MCNALLY: And I recognize that you are not going to talk about what you and he talked about—

MR. RICHARDS: Right.

MR. MCNALLY: -- but that gave you a perspective that perhaps other people didn't have of someone who was actively involved in the process of trying to take over companies. Is that fair? #00:17:33#

MR. RICHARDS: That is fair and at the time, and I think there were some, I don't know if charges is the right word, but I think aspersions is certainly accurate, sort of cast on really, what we were doing in this. Were we just carrying water for Pickens or carrying water for the takeover people? And that really wasn't the case. I mean the firm made the decision that we would not represent Mesa or Pickens in this matter, and so, we didn't. While we talked to Pickens about what was going on, and his people, we didn't you know, record any time, or send anybody any bills and we agreed that

we were not representing anybody. That insofar as I was on the counsel, I regarded my obligation as helping bring about the best statute for Delaware which we could, which I thought was a moderate statute which would not jeopardize the position of the Delaware Corporation Law either way; it wouldn't cause people to leave the state, and it wouldn't cause – it wouldn't preclude tender offers, which after all, were going to the shareholders, which was the ultimate constituency of Delaware corporations.

MR. MCNALLY: Well, I think it's fair to say, you left your client at the door, right, when you walked into those counsel meetings? #00:18:59#

MR. RICHARDS: Oh, yes.

MR. MCNALLY: I know you did, I know you did.

MR. RICHARDS: And you know, he – I believe I had forgotten, but in looking at the documents that you provided to me, I think he did testify before the Senate, but we did not – I didn't meet with him before he went down there. We didn't work with him on what he was going to say or these other people. I mean his – he had his own rule about this, and his own ideas and I don't – I think, really, that insofar as I can remember, he wasn't too upset as long as we had a moderate – Delaware adopted a moderate statute that wasn't preclusive, I don't think he was too concerned about what 203 said anyhow.

Because after all, he had already been knocked on the head pretty good by the Supreme Court in the Unocal case, without any assistance from an anti-takeover statute.

MR. MCNALLY: He was part of, or he had formed this group called the United Shareholders Association, which I guess was a group of folks that shared, more or less, his views on this thing. Do you recall, what role, if any, that association played in the course of the debate, particularly for the General Assembly? Did they do anything? #00:20:17#

MR. RICHARDS: I don't recall. I am sure they did something, yeah, I mean it was a young fellow that worked for him. I don't know when the United Shareholders Association started – you'd have to tell me the year. But the executive director was a young guy that had worked for Pickens. So, Pickens – there's no question that in the beginning, Pickens helped set that up. Now, it became a much more, in the years after this, a much more respected and independent organization and took a lot of positions on proxy contests and so forth, and went on, I believe it still exists today, although I don't know, and has taken on institutional sort of qualities, at least in some people's eyes. But he was responsible for setting it up. So, I would be confident that they took a position in favor of the weakest possible statute, but I really don't know what they did, and I didn't talk to them.

MR. MCNALLY: All right, now, did you go to the legislature, if you recall at all—

MR. RICHARDS: I did.

MR. MCNALLY: Okay—

MR. RICHARDS: No, I never went to it. And I thought after, I think my final act was this memo, and well, I guess I went to the Section meeting, which was a few days later, but I didn't do anything more than that.

MR. MCNALLY: And it's a long tradition, I think, at least among Delaware lawyers, and it's just not in the case of 203, it's also been the case of other statutes to not necessarily testify against the counsel's recommendation to the General Assembly— #00:21:47#

MR. RICHARDS: Oh, yeah. I never would have done that.

MR. MCNALLY: That's right, that's what I'm trying to point out. All right. Now, obviously, I am told, from looking at some minutes that the legislature eventually, rather abruptly, took a vote on this statute. But you weren't there, so I guess we can't really talk about what happened in that regard. After the enactment of 203, and as really an expert in this area, do you think it worked? #00:22:20#

MR. RICHARDS: I really don't think that 203 – I think it became a non-event. I don't think it really had much, if any, effect.

MR. MCNALLY: Why do you say that? Proxy contests or something like that, is that?

MR. RICHARDS: Well, no, I think the other – you know, I think there was a period in the evolution of the law where there were all these innovative devices and new cases, but basically, and I don't know whether it was as early as eighty-seven, but shortly thereafter, the contests became economic rather than legal, and the battles were fought out with competing offers and competing alternatives for value. And they really weren't fought out in court the way they were before because Unocal and the rights plan and so forth, and how those things were – and there were some other cases as how the rights plan should be worked but set the rules. And the rules required management not to slough off offers; they had to consider what their plan was and what the alternatives were. And in effect, prevented you know, bust-up, two-tier takeovers. And so, the contests became satisfied largely, and not that people didn't still sue, but largely economically. The best deal, the best offer won. And so, people were not relying so much on new defenses or new attacks or statutes. I don't recall an instance in which Section 203 stopped anybody.

MR. MCNALLY: Okay. Well, how about the concept of the two-tier tender offer where the backend was to be funded by junk bonds and things like that? I gather that also went away. #00:24:27#

MR. RICHARDS: Well, it did. I think people still tried to do it, but I don't think Unocal was the last such offer. But management could still respond with – and everybody didn't respond with a discriminatory self-tender, which by the way, the SEC outlawed a few weeks later. As former counsel for Unocal, I was always quite surprised that the Delaware Supreme Court would say that wasn't Draconian in view of the fact that the Securities and Exchange Commission said it was illegal shortly thereafter. But, management still could do other things, and so, I don’t think two-tier, front-end loaded tender offers succeeded. I think people made them, but management was able to block them or come up with another alternative. I can't really testify that no such offer ever succeeded, but I don't recall one succeeding.

MR. MCNALLY: Thank you, Mr. Richards, for doing this interview. I do appreciate it.

MR. RICHARDS: I enjoyed it.

MR. MCNALLY: Thank you.

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