

**Case: Omnicare v. NCS Healthcare
Interview of Donald J. Wolfe, Jr.;
Pitter, Anderson & Corroon, LLP
Interviewed by: Ellisa Habbart;
The Delaware Counsel Group, LLC
August 13, 2019, Wilmington, DE**

#00:00:00# - #00:00:30#

1 MS. HABBART: Thank you so much for your time today.

2 MR. WOLFE: It's a pleasure to be here. I'm happy to
3 reminisce about a case that I didn't lose for a change.

4 MS. HABBART: There you go. That's the way to look
5 at it. Now, but you did lose for a-

6 MR. WOLFE: A long time.

7 MS. HABBART: -- large portion of the time.

8 MR. WOLFE: A very fair point.

9 MS. HABBART: So, tell me - and we will get into the
10 details of the case a bit more, but the Court of Chancery was-

11 MR. WOLFE: Not friendly to us.

12 MS. HABBART: Not favorable to anything your side
13 presented. So, at some point, did you have a discussion with
14 the client as to whether maybe we should just call this a day?
15 Or did you have to convince them to continue on because you
16 just knew there was an outcome that would be favorable?

17 #00:01:25#

1 MR. WOLFE: Well, no. I never had a discussion with
2 the client. That would have been the client's call, not the
3 lawyer's call. They might have factored into that decision,
4 what the lawyers thought of our prospects. But we weren't
5 ready to give up when it came time to seek an appeal. And if
6 you remember, by the time we did seek an appeal, there was
7 really only one issue that was going to be presented,
8 originally, at least. And that was the charter issue because
9 we had been rejected on a standing ground early on below. Our
10 charter argument had been a loser on summary judgment, so we
11 had an appeal as of right. The Supreme Court had declined to
12 take the shareholders' interlocutory appeal. So, we weren't -
13 it was a relatively straightforward appeal, at least in the
14 initial stages. And at that point, my view would have been
15 that it didn't make very much sense not to take a shot. And I
16 thought it was a pretty good argument, frankly, although it
17 never got ruled on by the Supreme Court, so... I don't think
18 there really was any serious thought about not taking our
19 chances in the Supreme Court.

20 MS. HABBART: Interesting. And so- #00:02:47#

21 MR. WOLFE: Maybe I should explain why - how it
22 became a different sort of appeal from just that one, narrow
23 legal issue. Do you want to wait?

1 MS. HABBART: Sure ... but one second, as you said,
2 it was the client's decision, a business decision, whether or
3 not to continue. I'm just trying to get a sense of whether
4 there was any dissent amongst the lawyers as to whether or not
5 to move this forward. #00:03:16#

6 MR. WOLFE: I don't recall any.

7 MS. HABBART: Okay.

8 MR. WOLFE: I don't recall any.

9 MS. HABBART: Good!

10 MR. WOLFE: I mean it was certainly not encouraging-

11 MS. HABBART: Nooo...

12 MR. WOLFE: -- the results we were securing below,
13 but not to the point where we were ready to throw in the
14 towel.

15 MS. HABBART: And your co-counsel, Morton Pierce?

16 MR. WOLFE: And litigators up there, Bob Myers, was
17 the lead litigator from-

18 MS. HABBART: It was interesting because I spoke
19 with Mort, and he focused a lot on the facts that the court
20 chose to focus on as opposed to facts that he stressed were
21 really at issue. But you don't get that sense in the opinions.
22 Do you have any idea why your set of facts didn't make it
23 through to the Vice Chancellor? #00:04:04#

1 MR. WOLFE: No. There is always two ways, at least
2 two ways to view any set of facts-

3 MS. HABBART: Right.

4 MR. WOLFE: And the Vice Chancellor found theirs
5 more persuasive than ours. I was a little surprised by that. I
6 thought the deposition record favored us really strongly in
7 terms of revealing the extent to which the directors
8 understood their obligations, or what we thought were their
9 obligations. But obviously, the Vice Chancellor felt that they
10 did a stellar job. He said as much, I think. So, you lose
11 some; you lose some-

12 MS. HABBART: He thought they were a perfect board
13 ... yep. #00:04:40#

14 MR. WOLFE: Yeah. Yeah, our facts were not - he
15 didn't find them persuasive. And we didn't choose, really, to
16 attack them on appeal. I mean, obviously, that's not a ground
17 on which you are likely to get a reversal.

18 MS. HABBART: No. #00:04:58#

19 MR. WOLFE: So, we concentrated, really, on Revlon,
20 Unocal, and the charter - we also argued that on appeal. But,
21 you know-

22 MS. HABBART: How did you like that charter
23 argument? #00:05:11#

1 MR. WOLFE: I liked it. I couldn't tell you what it
2 was right now. But I thought it had some - it was going to
3 have some purchase. I mean, you can understand that a charter
4 provision of that sort, when you're dealing with Class A and
5 Class B shares, and you've given a very small group a lot of
6 voting power, that you don't want that power to slip into
7 other hands without some sort of control. And we thought that
8 was the purpose of that charter provision. And we thought that
9 they had, in fact, transferred some large elements of control
10 over those shares. So, we thought we had a shot. It wasn't -
11 it was by no means viewed as a slam-dunk, but it was a pretty
12 good argument, I thought.

13 MS. HABBART: That an irrevocable proxy equals a
14 transfer. #00:06:00#

15 MR. WOLFE: Yeah, a transfer of voting power, yeah.

16 MS. HABBART: For one issue-

17 MR. WOLFE: For one issue.

18 MS. HABBART: Not-

19 MR. WOLFE: Yeah.

20 MS. HABBART: That's not a transfer. #00:06:09#

21 MR. WOLFE: Well, it's one issue that's going to end
22 the corporate existence.

1 MS. HABBART: True. But, a transfer is a transfer.
2 And transferring one piece of my rights to stock - that was my
3 reaction. But, obviously- #00:06:21#

4 MR. WOLFE: I was going to say; you could have been
5 - if you had been on the panel, I think I know how it would
6 have turned out.

7 MS. HABBART: No. No, no, no! Because then, the Vice
8 Chancellor, to your credit, when we spoke, he thought it was a
9 good argument. #00:06:36#

10 MR. WOLFE: Oh, he did? Oh, wow!

11 MS. HABBART: Yeah, he did.

12 MR. WOLFE: Good to know.

13 MS. HABBART: You know, he thought it was
14 interesting, okay? So, he didn't- #00:06:43#

15 MR. WOLFE: But losing.

16 MS. HABBART: But losing. But not at the end of the
17 day-

18 MR. WOLFE: Not crazy.

19 MS. HABBART: Okay.

20 MR. WOLFE: That's good to know.

21 MS. HABBART: So, before we get into your choice to
22 appeal and what ended up happening, really, with the appeal,
23 from what you initially thought it would be versus what it
24 turned out to be, I'd like your assessment of your opinion of

1 the parties when you stepped into the matter. And even before
2 that - at what point did you come into the matter? #00:07:13#

3 MR. WOLFE: Oh, well, we came into the matter after
4 the deal was announced. We weren't advising prior to that
5 time. I got a call from Mort and from Bob Myers, who - with
6 whom we had worked previously. And they were mildly outraged
7 by what had happened, and I am sure the client was as well.
8 And they were interested in filing a suit, but...even at that
9 point. And I recall we talked a little bit about whether
10 Omnicare owned any shares in the target, which turned out to
11 be a more pivotal issue than we anticipated when we lost
12 standing. And apparently, they didn't own any at that time.

13 #00:07:57#

14 So, that's when we got involved and the litigation
15 really started. And our reaction to the summary of facts that
16 we received at that point from Omnicare's counsel was that
17 this was going to be a pretty interesting case and one that we
18 thought was appealing from a plaintiff's point-

19 MS. HABBART: Right, right. #00:08:25#

20 MR. WOLFE: Because you know, what we heard was that
21 it was completely locked up; that Omnicare had been around for
22 some time; that the target had failed to contact them. And
23 that the reason was that Genesis didn't want to get outbid,

1 which from the target's point of view, is sort of an ironic,
2 heh-heh, an ironic way to approach selling the company.

3 MS. HABBART: When you're trying to get the most
4 money. #00:08:53#

5 MR. WOLFE: Yeah. I mean Genesis, basically - I know
6 there is record evidence, I think, that Genesis had been
7 outbid by Omnicare previously. And in other circumstances, and
8 perhaps in a brutal way, I don't know, but I do know that they
9 were much more financially powerful than Genesis and showed
10 it.

11 MS. HABBART: But was there any behavior on the part
12 of Omnicare in the past that would have led NCS' board to be
13 like- #00:09:28#

14 MR. WOLFE: Not to my knowledge. Maybe someone, I
15 hope, you know, if there was, I am sure somebody has told you
16 that it was working on that side, but there was no lack of
17 ethics that I am aware of. It was a matter of negotiating
18 tactics and exercising the financial power that you had to win
19 an auction. But I am not sure how that would be relevant to me
20 if I were sitting on the target board anyway unless it were
21 some sort of ethical problem that would, you know, cause me to
22 question their credibility and their willingness to carry
23 through the transaction. Otherwise, you're selling the company

1 for money. Your involvement with that buyer after the deal is
2 done is terminated.

3 MS. HABBART: Unless, of course, if it's true that
4 Genesis held out the carrot that some people would continue
5 their employment—

6 MR. WOLFE: Right.

7 MS. HABBART: -- in the combined company.

8 #00:10:26#

9 MR. WOLFE: Right. Well, that changes everything,
10 doesn't it?

11 MS. HABBART: Was...and, how did you feel about that
12 fact? #00:10:34#

13 MR. WOLFE: I didn't know about that fact, frankly—

14 MS. HABBART: Interesting.

15 MR. WOLFE: -- we didn't' focus on that. I don't
16 believe we focused on that very much at all.

17 MS. HABBART: In the interest of those—

18 MR. WOLFE: Yeah—

19 MS. HABBART: -- shareholders.

20 MR. WOLFE: Yeah, we were focused on the process.
21 And really, that was the shareholder agreement. That was the
22 heart of this problem and interest on the part of the
23 shareholder is much less significant than interest on the part
24 of a director—

1 MS. HABBART: Yes.

2 MR. WOLFE: -- that controls the board, which they
3 didn't, I don't think.

4 MS. HABBART: Understood. So, they seemed perfectly
5 reasonable to you, and the facts seemed to show you had the
6 better of the argument--

7 MR. WOLFE: Mm-hmm.

8 MS. HABBART: -- and then, off we go and--

9 #00:11:23#

10 MR. WOLFE: I mean we had - I had never seen a
11 transaction in which there was no fiduciary out, much less one
12 combined with a force to vote provision and a majority voting
13 agreement that required you to vote in favor of that - never
14 seen it; haven't seen it since, and didn't see it before. So,
15 I thought we had a pretty good shot.

16 MS. HABBART: I thought it was ... I thought it was
17 quite tight the way they organized things--

18 MR. WOLFE: It was tight, it was--

19 MS. HABBART: I was impressed. I thought, oh, my
20 goodness, and they actually made it through the lower courts
21 on that because we understand, or at least what is conveyed in
22 the decisions - the lower court decision - was that NCS' board
23 had no choice. They were up against a wall. This was a
24 definitive offer, would go through. They wouldn't have to go

1 through bankruptcy. It seemed perfectly reasonable. So, okay,
2 in order for me to make sure that I get that, you want a few
3 things from me; I'm happy to give that to you. #00:12:30#

4 MR. WOLFE: Yeah, and you know, that was the central
5 controversy for most of the major corporate decisions
6 involving mergers for how long a period? The eighties to the
7 early two thousands. How much can the board of directors limit
8 the stockholders' ability to, in an unfettered way, approve or
9 disapprove the transaction as the statute empowers them to do.
10 And striking that balance has been a central focus, I think,
11 of the case law throughout that period. But one thing we
12 thought was clear, at the time we were being told about this
13 case, was that there is a limit. And absolutely locking up a
14 transaction when you know there is going to be a period of
15 time before the shareholders ultimately approve it was at the
16 far end of that balance. And so, we thought we had a pretty
17 good shot at making that argument.

18 MS. HABBART: Had they acted by written consent, the
19 outcome might have been different? #00:13:43#

20 MR. WOLFE: I think it absolutely would have been
21 different. And I think there is case law since. I am not sure
22 it was there then-

23 MS. HABBART: No, it wasn't-

1 MR. WOLFE: -- that suggested that you know, you can
2 sign a merger agreement, and you can push that consent across
3 the table, and the deal is done. Now, you can sue people for--

4 MS. HABBART: Well, of course.

5 MR. WOLFE: -- fiduciary responsibilities, and
6 maybe, but the problem really is, in my estimation anyway,
7 that executory period of the merger agreement between director
8 approval and shareholder approval, and the law has taught us
9 that during that period, the directors have a continuing
10 obligation to revisit their original recommendation. And if
11 they withdraw that recommendation, presumably, it should have
12 some effect. Heh-heh.

13 MS. HABBART: Right. #00:14:30#

14 MR. WOLFE: And it couldn't have any sort of effect.
15 And in fact, I think they did revoke their recommendation
16 there at the end--

17 MS. HABBART: They did.

18 MR. WOLFE: -- and their fairness opinion was
19 pulled. But demonstrating that it was a completely locked up
20 deal, it didn't make any difference.

21 MS. HABBART: Genesis was even gracious enough to
22 allow NCS to talk with Omnicare. #00:14:53#

23 MR. WOLFE: To what end? They were contractually
24 restricted from doing anything about it--

1 MS. HABBART: Right, so why not let them talk-

2 MR. WOLFE: So, that was ... yeah, right. And it was
3 late in the game too, wasn't it?

4 MS. HABBART: Yes, it was. But I think facially that
5 was the right move to Genesis-

6 MR. WOLFE: Oh, sure.

7 MS. HABBART: -- to say, oh, of course, we're going
8 to let them talk...we're good people, even though, meh! we did
9 a good job and we can't change the outcome-

10 MR. WOLFE: Yeah, we're not afraid ... we're not
11 afraid-

12 MS. HABBART: -- but we're still fair. Yeah, I got
13 to say, I thought that was a very tough position, and it
14 looked for a long time that - that position was going to be
15 the win-

16 MR. WOLFE: Right.

17 MS. HABBART: So, let's go back to that appeal
18 because as you said, what you thought the appeal was going to
19 be versus what the appeal ended up being was a bit different.

20 #00:15:44#

21 MR. WOLFE: Well, it was a unique experience for me,
22 and I suspect a lot of other people. After the preliminary
23 injunction had been denied on fiduciary duty grounds, and we
24 had lost the summary judgment opinion on the charter

1 provision, we had an appeal as of right. The shareholders had
2 an interlocutory appeal option, which they sought to pursue,
3 but which was refused. So, they didn't have an appeal; that
4 part of the case was over. #00:16:15#

5 So, we appeared in the Supreme Court little
6 courtroom down here in Wilmington, with the low ceilings. The
7 chairs were all full. People were interested in knowing how
8 the deal was going to come out. For the narrow argument about
9 the charter. And I was supposed to argue that, and I am
10 sitting in my chair, fidgeting. You know the worst part is
11 waiting for the court to start. And they're late. And they're
12 five minutes late. And they're ten minutes late. And they're
13 fifteen minutes late.—

14 MS. HABBART: Torture, torture— #00:16:50#

15 MR. WOLFE: -- And I'm trying to figure out what's
16 going on. So, Chief Justice Veasey, at that point, came
17 through the door behind the bench, without his robe on, by
18 himself. And sat down and said, you know, we just had a
19 meeting in the back, ha-ha, and we have decided that we are
20 going to reverse ourselves on the interlocutory appeal of the
21 shareholders' application, and we're going to hear that
22 appeal. And we'd prefer to hear these two together, so we're
23 not going to have an argument today, and we'll schedule
24 something after they get their briefs in.

1 MS. HABBART: Right, right. #00:17:29#

2 MR. WOLFE: And my recollection is that they could
3 have closed the deal between then and the time that we would
4 have been heard, and the Chief Justice allowed as how he
5 didn't want to have to TRO anybody in order to make sure they
6 could hear the case. And, unsurprisingly, the other side
7 quickly agreed to wait and so, we scheduled another argument
8 for, you might say, a couple weeks, maybe later so that the
9 shareholder plaintiffs could brief their appeal. And that was
10 in front of three Justices. I think they have changed the
11 process now so that most corporate cases are heard en banc, in
12 the first instance. But this was heard only by three. And by
13 the time I got home from that argument, I had a phone call
14 that they wanted to do an en banc, you know, in a few days, so
15 we would have to come back and—

16 MS. HABBART: You're like ... #00:18:31#

17 MR. WOLFE: Yes.

18 MS. HABBART: I'm just not getting a break here—

19 MR. WOLFE: Well, we were still alive—

20 MS. HABBART: -- appeared once; then you had to
21 bring me back again, now - again.

22 MR. WOLFE: The good news was we hadn't lost yet.

23 MS. HABBART: This true. This was a high point. But
24 what did you think when the Chief Justice comes walking in

1 without his robe? I mean, I can't envision him doing that.

2 #00:18:53#

3 MR. WOLFE: I - I've never seen it before. I don't
4 expect ever to see it again.

5 MS. HABBART: What do you think was going on?

6 MR. WOLFE: Well, I think they did have a meeting.
7 And I think when they read the briefs, they got a little more
8 - even though it was on a different issue, they got a little
9 more context about what was - what had happened during the
10 course of the process, perhaps more than they got out of the
11 interlocutory appeal application. And they just changed their
12 minds. I don't think they had made up their minds. In fact,
13 I'm not sure - I can't tell you which three were on that
14 original panel, but I doubt very much that they all voted in
15 favor of us when the en banc came along. So, I don't think it
16 was an indication of how they felt about the merits. I think
17 they just found it a much more interesting case than perhaps
18 they had anticipated, and they wanted to hear it.

19 MS. HABBART: Well, maybe they were reading some of
20 the facts-

21 MR. WOLFE: Maybe.

22 MS. HABBART: -- a little differently than others.

23 #00:19:52#

1 MR. WOLFE: Mm-hmm. But I have to think, you know, I
2 don't think they get together regularly. I mean, I don't know
3 what the process is at the Supreme Court level, but obviously,
4 that - given the expedited schedule we were dealing with, that
5 was probably the first time they had all sat down and talked
6 about it one way or the other, and somebody decided that there
7 was enough merit to the shareholders' position here that it
8 ought to be heard. And why not? We're going to have an
9 argument anyway, so...

10 MS. HABBART: Great. So, off you go and say
11 "wonderful I'll be back in a few weeks." So, then what?
12 #00:20:28#

13 MR. WOLFE: So, then we had the argument in front of
14 a three-judge panel. And we were trying to figure out who was
15 for us and who was against us. And I wish-

16 MS. HABBART: Could you tell?

17 MR. WOLFE: -- I could remember who was on ... well,
18 you never can tell. You think you can tell, but I can't. I
19 can't remember who was on the original panel, but Veasey was
20 not. And I am not sure if Steele was.

21 MS. HABBART: Wow! That's kind of interesting-

22 MR. WOLFE: Yeah.

23 MS. HABBART: -- that they weren't there, and they
24 dissent-okay. Okay. #00:21:04#

1 MR. WOLFE: Anyway. So, then, as I said, their
2 argument was - they said we'll - we understand the exigencies
3 here. They knew that the transaction was awaiting closing, so
4 they didn't want to take too long. And that's when we got the
5 notice of the en banc; obviously, they couldn't agree
6 unanimously. So, one of those three, at a minimum, was voting
7 a different way.

8 MS. HABBART: Right. #00:21:31#

9 MR. WOLFE: And so, they brought back all five, and
10 in a couple of days, we were back arguing in Dover. And then,
11 we started counting noses again, but we really couldn't tell
12 who was going which way. It was really suspenseful. And we got
13 an order - pretty promptly after that - and a promise to issue
14 an opinion sometime thereafter, which went on a little longer
15 than I think all of us had anticipated.

16 MS. HABBART: Well, first off, you must have been
17 thrilled-

18 MR. WOLFE: Sure.

19 MS. HABBART: After all this.

20 MR. WOLFE: Yeah.

21 MS. HABBART: But then, was it curious to you that -
22 well, why can't they give me a written opinion? #00:22:11#

1 MR. WOLFE: No because we knew there was dissent.
2 There had been at the three-judge panel point. And we knew
3 that the Delaware Supreme Court values unanimity-

4 MS. HABBART: True.

5 MR. WOLFE: -- they liked to appear to take a common
6 position, and I have a feeling they were - they were searching
7 around for what that might be; trying to bring everybody on
8 board.

9 MS. HABBART: You said when it was the panel of
10 three, you could - you had a sense somebody was not looking at
11 you favorably--

12 MR. WOLFE: At least one, maybe two.

13 MS. HABBART: And what was it about your argument or
14 position did that Justice focus on? Do you remember what
15 struck that Justice's - I don't know what - these people are
16 wrong? #00:23:00#

17 MR. WOLFE: You mean why they might have - well, I
18 think the dissent probably expresses it best. There were
19 members of that court who are much more sympathetic - were
20 much more sympathetic to the situation the target directors
21 suggested they were in. That they were in a bad spot-

22 MS. HABBART: Right.

23 MR. WOLFE: -- that they were going bankrupt, that
24 they had to find - they had a willing buyer, they weren't sure

1 that they could get another, even if the prospects had been
2 dangled before them previously, and that we shouldn't
3 criticize that kind of decision when it's made in good faith
4 and-

5 MS. HABBART: Right, right- #00:23:46#

6 MR. WOLFE: -- in a difficult situation.

7 MS. HABBART: And that came clear to you had - when
8 you were in front of the three of them? #00:23:52#

9 MR. WOLFE: Well, they didn't speak their truth-

10 MS. HABBART: But from the questions, you could
11 tell-

12 MR. WOLFE: You can tell there was - you know, there
13 is always skepticism, and maybe they're just prompting you to
14 give them an answer. But I did not think it was unanimous
15 after we spoke to that three-judge panel. And interestingly,
16 or related to this at least, there was a rumor after the
17 opinion came out that there was an attempt by the majority to
18 bring the others on board so that they could say it was five
19 to nothing. And that the opinion was drafted with that in
20 mind. And for that reason, it doesn't really attack the board
21 of directors, which I think was a sore spot with the
22 dissenters. It doesn't-

23 MS. HABBART: No, it doesn't. #00:24:49#

1 MR. WOLFE: -- talk about breach of fiduciary duty.
2 I don't think that's in there anywhere. They focused on the
3 contract and the validity of the provisions in the contract.
4 And if that rumor is true, and I should say it did not come to
5 me through Myron Steele-

6 MS. HABBART: Right.

7 MR. WOLFE: -- he would never talk about this. If
8 the contract, you know, so they focused on the provisions of
9 the contract and whether it was permissible to do it under any
10 circumstance, not simply the one that the directors were faced
11 with.

12 MS. HABBART: Right. #00:25:24#

13 MR. WOLFE: And that's really how the case came out.
14 My understanding was that the opinion never really changed
15 because the others didn't come aboard and to the extent that
16 people feel that the opinion is unsatisfactory because it is
17 not sufficiently broad or pointed as it might have been; maybe
18 that's the reason.

19 MS. HABBART: Because they wanted to bring them
20 over- #00:25:48#

21 MR. WOLFE: Yeah.

22 MS. HABBART: Now, I heard commentary to the effect
23 that certain members of this - the dissent was being

1 protective of the Vice Chancellor. The Vice Chancellor never
2 struck me as someone who needed protection.

3 MR. WOLFE: I was just going to say that.

4 MS. HABBART: So, I thought that as a bit silly. But
5 did you feel ... #00:26:09#

6 MR. WOLFE: Well, I think there is a sort of an
7 institutional inclination to protect the lower court-

8 MS. HABBART: Sure.

9 MR. WOLFE: -- they don't get reversed that often,
10 but I don't - you know, I don't think there was any hesitancy,
11 but to the same effect that Vice Chancellor Lamb didn't need
12 protecting, I don't think there would have been any hesitancy
13 on the Supreme Court to disagree with him-

14 MS. HABBART: Of course.

15 MR. WOLFE: -- if, in fact, they felt differently as
16 a group. So, I don't put a lot of stock in that theory.

17 MS. HABBART: So much for the rumors.

18 MR. WOLFE: Including mine, maybe.

19 MS. HABBART: So, tell me what did you think of -
20 and I don't want to get too muddied up in the deal provisions,
21 but I did think that the fact that the NCS was a party to the
22 voting agreement was helpful to you. #00:27:03#

23 MR. WOLFE: It was helpful. It was helpful. I mean
24 it implicated the board in the approval of those agreements,

1 and it gave us another opportunity to bring the whole board
2 into those agreements as opposed to simply attacking the
3 stockholders' right to-

4 MS. HABBART: Right. #00:27:26#

5 MR. WOLFE: -- promise to vote any way they wanted.
6 So, it helped us, I think.

7 MS. HABBART: What do you think -- Had the NCS board
8 not been a party to that voting agreement, do you think that
9 might have turned the decision? #00:27:39#

10 MR. WOLFE: Well, it would have made the outcome
11 less obvious, perhaps, and less easy to reach. But I think
12 there was enough evidence in the record to suggest that
13 implicitly the board had adopted this transaction as a whole
14 and, therefore, had endorsed the idea that a majority would be
15 on board, even though there was going to be this open period
16 while we waited for the stockholders to vote, which was really
17 a wasted period of time. You know, what was going to happen
18 other than a lawsuit to break open the lockup? So, I think we
19 could have made a very strong argument even without that, but
20 it certainly made it simpler and eliminated an issue that we
21 would certainly have had to deal with.

22 MS. HABBART: The right to act as a stockholder in
23 your own interest.

24 MR. WOLFE: Mm-hmm.

1 MS. HABBART: And so, I take it, then, that you see
2 the validity, or always counsel for a fiduciary out on any of
3 these types of transactions—

4 MR. WOLFE: Yeah.

5 MS. HABBART: -- if you're brought in early enough
6 and can orchestrate things as you think put in their best
7 position. #00:29:00#

8 MR. WOLFE: Yeah ... and the argument was that, and
9 I think this is the view of our transactional people as well,
10 there is one circumstance in which you can get away with it,
11 and that is when you have consents in hand at the same time
12 you're signing the merger agreement, and that window is
13 closed.

14 MS. HABBART: But you see I think that's ridiculous.
15 #00:29:19#

16 MR. WOLFE: I think ... well, I understand you do—

17 MS. HABBART: That's form over substance. You either
18 are doing the right thing, or you're not, and ...

19 MR. WOLFE: Well, circumstances change sometimes—

20 MS. HABBART: True.

21 MR. WOLFE: -- and when you hold that merger
22 agreement open—

23 MS. HABBART: Yes, you're right.

1 MR. WOLFE: -- and you're supposedly waiting for the
2 shareholders to say yes or no-

3 MS. HABBART: The others come in. #00:29:38#

4 MR. WOLFE: Yeah, and the board has an ongoing duty
5 to evaluate what's to come. Now, that's not to say you can't
6 put contractual restrictions on how the board deals with those
7 jumping bids-

8 MS. HABBART: Right.

9 MR. WOLFE: -- but, there is a limit, as I say. And
10 to me, that's the most interesting thing about the decision
11 from a precedential point of view. It focused - it applied in
12 very clear terms the Unocal standard to defensive provisions
13 in a merger agreement. And to me, that was something of - I
14 mean it's not surprising, as I sit back and think about it
15 now, but typically, back in the day when Mr. Hamermesh and I
16 were cub lawyers, everything was - everything was measured
17 under Revlon. You were retarding the auction process if you
18 put in a provision in your agreement that, you know,
19 restricted the board's ability to look at another bid. And the
20 difference there is that Revlon is an exception to the
21 business judgment rule that applies in very limited
22 circumstances. I, for one, was never able to tell exactly what
23 those circumstances were. And I think, you know, as a
24 corporate bar, we were constantly debating it for at least a

1 decade. You know, was this a Revlon situation? Is that a
2 Revlon situation? But the point is, it was a limited
3 circumstance. Applying to Omnicare, I'm sorry, yes. Applying
4 Omnicare or Unocal more precisely as a test to look at the
5 provisions of a merger agreement, applies in a much broader
6 set of circumstances than Revlon because everybody has
7 something in the merger agreement-

8 MS. HABBART: Well, of course. #00:31:29#

9 MR. WOLFE: -- because the buyer wants it, because
10 the target board typically, that has worked very hard in order
11 to get this deal, is willing to-

12 MS. HABBART: Commit to-

13 MR. WOLFE: -- give up some discretion going
14 forward. So, that's - that's an even more emphatic statement
15 of the application of the higher standard of fiduciary duty
16 enhanced scrutiny than Revlon was, in my judgment. It made it
17 part of the duty of care, more or less, when you are
18 negotiating a merger. That's a lot of cases.

19 MS. HABBART: No, that is a lot of cases, and I
20 think it ties the hands of a board to do what it needs to do.
21 #00:32:21#

22 MR. WOLFE: To the advantage of the shareholders.

23 MS. HABBART: Yes.

1 MR. WOLFE: Because as someone on the Supreme Court
2 said in the Omnicare argument, this is the third rail. I mean
3 a target board is able to resist, even in circumstances in
4 which this board found itself, resist the entreaties of an
5 acquiror by saying, the law doesn't let me; I'd love to, but
6 the law doesn't let me do that. And so, you are going to have
7 to play on our field. And I suspect that was part of the
8 considerations when the policy was brought up when it
9 occurred.

10 MS. HABBART: Or breach their contractual
11 obligations—

12 MR. WOLFE: Right, yeah.

13 MS. HABBART: So, I suspect that you would counsel
14 to breach their contractual obligations versus their fiduciary
15 duty obligations? #00:33:11#

16 MR. WOLFE: Well, they're not entirely different.

17 MS. HABBART: That's fair, and that's true. So, you
18 went through the appeal, and that is - what did you think of
19 Genesis' behavior throughout the process? What was your
20 impression ...? #00:33:29#

21 MR. WOLFE: Well, you know, interesting, we talked a
22 little bit about how Omnicare played hardball, and
23 undoubtedly, they had been doing that previously. I mean
24 Genesis put all of the furniture in front of the door, right?

1 And it may have - I don't have any inside knowledge, but they
2 must have been surprised when every one of their demands, to
3 the point of locking the deal up completely, was adopted.

4 MS. HABBART: Okay.

5 MR. WOLFE: Yeah. You know, at some point, it
6 becomes counterproductive because it exposes your deal to
7 invalidation, as was the case here. But you know, I can't
8 fault them. Clearly, the client had had enough of Omnicare,
9 Genesis, what I mean by that. They didn't want to be rolled
10 again, and so they were probably telling their client, or
11 their lawyers, look, we don't want any daylight here. We want
12 to lock this thing up. Omnicare has got to be out. What
13 surprised me a little bit was that from a target director's
14 standpoint, you're basically being told that you better not
15 talk to that other guy because he is going to outbid me.

16 MS. HABBART: Yeah. #00:34:47#

17 MR. WOLFE: Really? Doesn't that make me want to
18 talk to him?

19 MS. HABBART: Well, there is self-interest
20 somewhere, right?

21 MR. WOLFE: Well, I don't know. I don't remember
22 anything about that, frankly.

23 MS. HABBART: About the interest of the share-

24 MR. WOLFE: About the ... yeah.

1 MS. HABBART: Yeah.

2 MR. WOLFE: Yeah, I don't - I don't remember that
3 being central to the case at all.

4 MS. HABBART: So, why do you think the board would
5 agree to all of Genesis' demands? #00:35:14#

6 MR. WOLFE: Well, that is certainly an explanation
7 whether it was a part of the case - a big part of the case or
8 not - that Mr. - was it Outcalt or Shaw?

9 MS. HABBART: I don't remember. I'm bad with names.

10 MR. WOLFE: I think it was Outcalt was going to be
11 the combined companies-

12 MS. HABBART: Mm-hmm, CEO.

13 MR. WOLFE: CEO. That would certainly explain their
14 willingness to lock it up and the conflict that they had with
15 the rest of the stockholders who didn't have a vested interest
16 in this particular transaction, regardless of the prospects
17 for more consideration.

18 MS. HABBART: Well, the what - the one that was
19 going to have the opportunity, perhaps, to continue on as CEO,
20 I get. But the consulting agreement-

21 MR. WOLFE: Yeah.

22 MS. HABBART: -- that was neither here nor there.

23 #00:35:58#

1 MR. WOLFE: Well, look, my recollection is that this
2 deal - I can't - this deal was Genesis stock, because they
3 didn't have any money, was at like two dollars or less, I
4 think. We ended up paying five-fifty or something-

5 MS. HABBART: Yes...

6 MR. WOLFE: -- and it wasn't even close. It wasn't
7 because it ratcheted up a little at a time. Consistent with
8 Omnicare's reputation, it came in a bid two or three dollars
9 more right off the bat. So...

10 MS. HABBART: But-

11 MR. WOLFE: That would have offset any consulting
12 agreement-

13 MS. HABBART: Yeah, that would have. #00:36:32#

14 MR. WOLFE: Probably.

15 MS. HABBART: Probably. But then, you know, I am
16 still sensitive to the idea that a board could, in good faith,
17 think that Genesis is going to walk away and I need to - I
18 need to accede to their wishes. #00:36:49#

19 MR. WOLFE: They could. And-

20 MS. HABBART: But, but so then you're saying they
21 can't do that. They can't take what they believe is the only
22 option because they didn't take a fiduciary out.

23 MR. WOLFE: This goes back to the rumor about how
24 the - how the opinion was crafted. If it's a Revlon analysis,

1 and I frankly remain surprised at the Chancery Court's
2 analysis of the Revlon obligation, which he found didn't
3 apply. We can get into that later if you want. Under the
4 Revlon analysis, it's a strictly reasonable, proportional sort
5 of standard. And you might well reach the conclusion that this
6 was an exigent circumstance. There were facts that suggested
7 that maybe this had gone on awfully long and-

8 MS. HABBART: Right. #00:37:40#

9 MR. WOLFE: -- it was actually coming back. But,
10 regardless, you could come to the conclusion that this was -
11 and the dissenters did, in large part. If you apply Unocal to
12 the provisions of the agreement, Unocal has a limit on the
13 proportionality test. If you act in a way that's Draconian, if
14 it's preclusive or coercive, that's a limit on your-

15 MS. HABBART: Ability.

16 MR. WOLFE: -- ability to take those things into
17 account. You can't go that far. And so, to my mind, by
18 applying Unocal to the contract, rather than dealing with
19 Revlon with respect to the sales process, they probably - the
20 majority probably felt that it would be easier for those who
21 felt the directors had put - were in a bad situation to come
22 along and say, well, you know, I understand why they went
23 there, but they can't go there. It didn't work. But it was a,
24 you know, it strikes me as a reasonable effort.

1 MS. HABBART: Well, go on and share with us what you
2 thought of the Chancery Court's handling of the Revlon issue.
3 #00:38:52#

4 MR. WOLFE: Well, it was - the part that bothered me
5 a little bit, and I wish I had read it more recently than I
6 have-- I hope I am not misrepresenting what it says-- but my
7 recollection was that the Vice Chancellor found that the
8 company had been put up for sale. So, we're in that auction
9 aspect of the Revlon test, which is the one that everybody
10 understood.

11 MS. HABBART: Okay.

12 MR. WOLFE: The others were a little fuzzy. And
13 then, he said, but they abandoned that, and so, they're not in
14 Revlon anymore. And, you know, my reaction was--

15 MS. HABBART: But you're still selling--

16 MR. WOLFE: -- then, that - that standard doesn't
17 mean anything because, at some point along the way, you can
18 waltz off with one of the bidders, and have an exclusive--

19 MS. HABBART: But I'm all out of ... I'm out of
20 Revlon-- #00:39:42#

21 MR. WOLFE: -- and I'm out of Revlon. Well, then,
22 what's the point of being in it? The point of getting into
23 Revlon is that you can't do that. So, I found that to be a
24 little less than completely persuasive on the part of the

1 lower court. And that's why much of our argument on appeal
2 focused on—

3 MS. HABBART: Unocal—

4 MR. WOLFE: -- Revlon, and Revlon really never was
5 not at the center of the Supreme Court's—

6 MS. HABBART: No, it wasn't.

7 MR. WOLFE: -- decision.

8 MS. HABBART: And did you think Unocal was
9 rightfully applied to—

10 MR. WOLFE: Yeah.

11 MS. HABBART: -- irrevocable proxies and—

12 MR. WOLFE: Yeah ... I think it's a reasonable way
13 to go. I mean we're talk—you know, Unocal is all about
14 defensive devices. Typically, in the early days at least, it
15 was with regard to tactics that were pursued, not contractual
16 provisions, you know, tender offers or poison pills or self-
17 tenders, that kind of thing. But to apply it to provisions of
18 an agreement that had the same effect as those actions,
19 eh...it seems reasonable to me.

20 MS. HABBART: Yeah, but part of the preclusive
21 effect was exercised by shareholders in their capacity as
22 shareholders. #00:40:53#

23 MR. WOLFE: Mm-hmm. Yeah, but the court - but the
24 board ate it up - loved it. Signed the paper—

1 MS. HABBART: They didn't have to. Right, but they
2 didn't have to.

3 MR. WOLFE: No, they didn't have to.

4 MS. HABBART: Okay, they could have segregated
5 themselves from the voting agreements in the proxies.

6 MR. WOLFE: Well, as I say; I mean, that's a -
7 that's a subtle point and it might have - I can understand a
8 court who was otherwise convinced that something had to be
9 done here not getting hung up on the fact that the company
10 didn't sign the merger-the voting agreement, but instead that
11 they approved the whole deal, which included the voting
12 agreements ...

13 MS. HABBART: They were aware of them-

14 MR. WOLFE: Sure.

15 MS. HABBART: -- so... #00:41:32#

16 MR. WOLFE: So, they knew what they were doing when
17 they agreed to no fiduciary out and a 251(c) provision that
18 was going to render it done. Over. So...yeah.

19 MS. HABBART: But you have to admit that that does
20 change the analysis a little bit that part of the preclusive-

21 MR. WOLFE: A little bit.

22 MS. HABBART: -- effect is exercised by shareholders
23 in their capacity as shareholders.

24 MR. WOLFE: Right.

1 MS. HABBART: And if you didn't want them to be able
2 to do that, you could have agreed to that-

3 MR. WOLFE: Who could have?

4 MS. HABBART: In their charters and such-

5 MR. WOLFE: Oh, sure-

6 MS. HABBART: -- they could have done something
7 about it. But that wasn't the deal. #00:42:10#

8 MR. WOLFE: Well, and of course, as we have
9 discussed, the fact that the shareholders couldn't act by
10 consent because they weren't consents, right? Those voting
11 agreements effectively constituted a vote sufficient to
12 approve the deal. The fact that they couldn't make those
13 effective right away, but had to have a meeting instead, was
14 what was at the center of their problem because that's when we
15 showed up - in that interim. And that's what put pressure on
16 the board to justify recommending a deal at two dollars when
17 they're looking at a deal at five dollars, or whatever the
18 competing offer was.

19 MS. HABBART: They had to have not believed that you
20 would really come through with that bid. #00:42:56#

21 MR. WOLFE: We didn't have a reputation for that, I
22 don't think. We had an opposite reputation, right? We had the
23 reputation that we came in and paid too much for stuff.

24 MS. HABBART: Or bought it out of bankruptcy.

1 MR. WOLFE: Well, whatever. We paid more than we
2 needed to pay. It wasn't that we reneged on our offer.

3 MS. HABBART: No.

4 MR. WOLFE: So, I don't think people didn't think we
5 were real.

6 MS. HABBART: Well, before that, though, your offers
7 had been made in connection with a bankruptcy related
8 negotiation, so -- which typically is not going to get you what
9 a third-party deal is going to get you. #00:43:31#

10 MR. WOLFE: Right. I was not around when that
11 happened--

12 MS. HABBART: I understand--

13 MR. WOLFE: -- but I did understand from our - Mort
14 Pierce, for one, I thought, that the reason that they ended up
15 talking to the bankruptcy committee was that they couldn't get
16 the company to talk to them. And so, they were looking to get
17 in - it wasn't that they were looking to avoid a process. They
18 were trying to get into a process, and they hoped the
19 creditors would put some pressure on the board to talk.

20 MS. HABBART: And you know, that point just doesn't
21 come out... #00:44:02#

22 MR. WOLFE: No, it doesn't.

23 MS. HABBART: in the opinions.

24 MR. WOLFE: It doesn't.

1 MS. HABBART: And I think that is a big difference.
2 And perhaps the majority did focus on that.

3 MR. WOLFE: You know, to credit the Vice
4 Chancellor's analysis, it is undeniable that we, at one point
5 said, well, we're not interested in anything but a bankruptcy
6 deal. That didn't - you know, once - once things ensued, we
7 changed that tune-

8 MS. HABBART: That hurt ... yeah.

9 MR. WOLFE: -- but, you know, and that was certainly
10 a reason, I am sure, why the board was not anxious to come
11 back to us. But once they had something in hand from Genesis
12 that talked about equity, they must have been able to convince
13 somebody that it wasn't a waste of money and, in retrospect,
14 they might have been wise to try to convince us of that.

15 MS. HABBART: Yeah, but the only reason their equity
16 was going to be worth anything was because they gave up all
17 these options to come to an agreement.

18 MR. WOLFE: Mm-hmm.

19 MS. HABBART: So... #00:45:12#

20 MR. WOLFE: I don't know.

21 MS. HABBART: Right? I mean I have to give up my
22 option to take this agreement and let someone else beat it,
23 and the only way I am going to get it is by doing this. And

1 it's only by doing this that there is any value to the equity.
2 So, you're kind of circular there.

3 MR. WOLFE: I'd be interested to know, just from a
4 strategic standpoint on the part of the target board here, if
5 there have been any cases where because the target drove too
6 hard a bargain, or because they opened the process to a
7 greater number of bidders, they got sued, and when the deal
8 went away. As opposed to this circumstance where you don't let
9 people in, and you end up settling for a lesser amount. My
10 suspicion is that the bigger risk is not letting otherwise
11 legitimate bidders into the process as opposed to you know,
12 operating under an exclusivity agreement that didn't just stop
13 at the end of negotiations, but was extended more to prevent a
14 signing of the merger agreement.

15 MS. HABBART: Right.

16 MR. WOLFE: Extraordinary.

17 MS. HABBART: But then you get into the whole
18 stalking horse argument --

19 MR. WOLFE: Maybe. Maybe.

20 MS. HABBART: -- you know, why should Genesis say,
21 okay, it's only because we've come this far, now they are
22 going to pop their--

23 MR. WOLFE: Well, Genesis, obviously, didn't like
24 it--

1 MS. HABBART: No.

2 MR. WOLFE: -- but an auction is a stalking horse
3 situation, right, by definition; that's what it is. I mean
4 people - you know, you can do what - oh, was it Revlon where
5 they had a sealed bid sort of auction at some point? I guess
6 you can do that. But, you know-

7 MS. HABBART: But it's not fair to force one into
8 this stalking horse situation.

9 MR. WOLFE: No.

10 MS. HABBART: And that's why and what they were
11 compensated for, for all their time and such didn't offset the
12 cost and aggravation of- #00:47:11#

13 MR. WOLFE: I guess my question would be, not fair
14 to whom? It may not be fair to one of the bidders--

15 MS. HABBART: It's not.

16 MR. WOLFE: -- but that's not your focus as a target
17 board director. Your focus is how do I get money, and I have
18 to set these people against one another.

19 MS. HABBART: I know, but these people seemed pretty
20 certain to me, and I am going to get some value for my equity
21 that I haven't had an opportunity - such an opportunity
22 presented to me before. So, I am going to give them what they
23 want.

24 MR. WOLFE: It's not crazy.

1 MS. HABBART: No. #00:47:39#

2 MR. WOLFE: It just violates Unocal.

3 MS. HABBART: I understand that. I understand that,
4 but you see—

5 MR. WOLFE: Maybe not Revlon, but Unocal.

6 MS. HABBART: I would have probably been a little
7 more sympathetic towards Omnicare if there had been something
8 of a real limited, conditional offer on the table—

9 MR. WOLFE: You're talking about due diligence?

10 MS. HABBART: Mm-hmm.

11 MR. WOLFE: Yeah, I mean, I think that was certainly
12 a problem. That was a weak point. And you can see both sides
13 of the situation. For the target board for Omnicare to say I
14 want to do due diligence, I'm sure made them nervous. What if
15 they - what if we abandoned Genesis and Omnicare pulls out?

16 MS. HABBART: Right, right.

17 MR. WOLFE: On the other hand, Omnicare had been
18 precluded from doing any due diligence—

19 MS. HABBART: True.

20 MR. WOLFE: -- by reason of the exclusivity
21 agreement. Didn't know that they needed to do it. So, it's
22 hardly fair to say that they should have bought a pig in a
23 poke and given up their right to find out what was lurking. On
24 the other hand, they had been around. They had made an offer

1 to the creditors' committee, so they must have had some level
2 of confidence that they knew what they were buying. And I
3 certainly would have liked to see them, from a litigation
4 point of view, drop that condition when they came forward with
5 that jumping bid. But, they pulled it, ultimately, anyway. And
6 that's when the board pulled their recommendation, I think,
7 and that's when the fairness opinion collapsed. So, in the
8 end, it wasn't really a factor. It had to do with the signing
9 process, as I say before, but it didn't really relate to the
10 lockup provisions in the merger agreement.

11 MS. HABBART: Yeah-

12 MR. WOLFE: Because they could always ...

13 MS. HABBART: It's awful nice to look, you know,
14 what do they call it - Monday morning quarterback? I'm so not
15 athletic, but- #00:49:38#

16 MR. WOLFE: That's what courts are, right?

17 MS. HABBART: Right. But you know, looking back on
18 it and saying, well, the board should have known that this
19 five dollar offer could come up, but they didn't at the time.

20 MR. WOLFE: You mean the board?

21 MS. HABBART: The board - NCS' board. They didn't
22 know that was an option.

1 MR. WOLFE: No, and you never know. You just have to
2 hold yourself open to that prospect. That's pretty much the
3 law-

4 MS. HABBART: But you know, the idea of it, I am
5 going to make a deal with you, and then, I think I have a
6 deal, and someone else can come in and disrupt that. That's
7 just ridiculous. #00:50:08#

8 MR. WOLFE: I don't - I'm not going to - I'm not
9 going to say that there aren't other ways that the law could
10 be structured. I am going to say that the law is pretty
11 clearly not structured that way--

12 MS. HABBART: No, you are absolutely right; it is
13 not. I don't question that.

14 MR. WOLFE: It requires you to hold things open.
15 There was an old case that my partner, Charlie Crompton, was
16 involved in, God, probably in the sixties. And I think it was
17 Wilmington Trust v. Coulter, or some such name. Larry is
18 shaking his head, so maybe I'm close. And what it held, as I
19 remember, was that you could be held in breach of contract if
20 you leapt out of a merger agreement in order to get a higher
21 bid. I'm not sure it had a higher bid-

22 MS. HABBART: Yes, that's right. #00:50:54#

23 MR. WOLFE: So, that was a different-

24 MS. HABBART: Breach of contract.

1 MR. WOLFE: -- that was a different approach to
2 merger negotiations and the law that surrounds it than we have
3 now.

4 MS. HABBART: Correct.

5 MR. WOLFE: And if Wilmington Trust v. Coulter,
6 assuming that's the name, were in effect, then we'd be having
7 a much different conversation right now--

8 MS. HABBART: That is correct.

9 MR. WOLFE: But it isn't, and it hasn't been for a
10 long time.

11 MS. HABBART: No, I understand. And you do have to
12 protect the minority, and you do - I understand all that, but
13 it does make - it's an anathema to typical business
14 negotiations--

15 MR. WOLFE: Yeah, it's a special--

16 MS. HABBART: -- okay? And it makes it hard--

17 MR. WOLFE: -- it's a special area, but that's why
18 people like Mort Pierce can be so successful and affluent
19 because it's not your typical I want to buy a hundred widgets
20 kind of deal. There are a lot more interests involved at that
21 level, and there are fiduciary responsibilities, not just
22 commercial ones. And we have chosen, as a jurisdiction that
23 has a lot of influence elsewhere, to follow a different path.
24 And so, maybe it is anathema, but we are going to have to

1 change a lot of precedent if we're going to go in a different
2 direction-

3 MS. HABBART: And that's not going to happen. That's
4 not going to happen because you do have to have protections in
5 place. but, I say that, when the topping bid comes in at the
6 last minute, like you know, that's why you negotiate
7 provisions as to what constitutes an ulterior bid. #00:52:31#

8 MR. WOLFE: Right, a superior bid.

9 MS. HABBART: Yeah.

10 MR. WOLFE: And there's limits on that as well, like
11 any other-

12 MS. HABBART: Right.

13 MR. WOLFE: Even under Revlon, there were limits.
14 But, you know, the fact that they came in at the last minute
15 was a result of not knowing that there was a process going on.
16 And so, that was sort of a self-inflicted wound.

17 MS. HABBART: Well, they were out of Revlon - they
18 had taken themselves out of Revlon-

19 MR. WOLFE: Oh, I forgot.

20 MS. HABBART: -- there was no proxy.

21 MR. WOLFE: I forgot. I forgot.

22 MS. HABBART: So, tell me what your reaction. So,
23 obviously, you were all thrilled with this. Did you expect the

1 Supreme Court, or you really had - were you surprised, or?

2 #00:53:07#

3 MR. WOLFE: Yeah, the Court of Chancery doesn't get
4 reversed very often. He made some strong factual findings that
5 were-

6 MS. HABBART: Were accepted by the Court.

7 MR. WOLFE: -- were accepted by the Court and were
8 central to the outcome. And so, it wouldn't have surprised me
9 if we had lost. Yeah, we were thrilled. But you know, in
10 retrospect, my concern and, I think, the concern of most
11 litigators and transactional people at the Delaware Bar, is
12 that the law remain stable and predictable-

13 MS. HABBART: Oh, absolutely.

14 MR. WOLFE: -- and I felt that this was - this was
15 in keeping with a long line of precedent that I had understood
16 to operate. And so, I was pleased to see that we weren't going
17 to deviate in a substantial way by finding that lockups are
18 okay. Complete lockups.

19 MS. HABBART: Wasn't Justice Veasey involved in the
20 Unocal case? #00:54:13#

21 MR. WOLFE: I don't - I don't know if he was,
22 frankly, but he was involved in the Paramount case, which,
23 again, if you read the decision and you have in mind the fact
24 that perhaps they were trying to bring Veasey on board and

1 Steele, you see Paramount cited all over this case as if to
2 say-

3 MS. HABBART: We understand-

4 MR. WOLFE: -- yeah, this is not so far from what
5 you decided previously; why don't you hop on? He was not
6 tempted, apparently.

7 MS. HABBART: No, not at all. And Justice Steele?

8 MR. WOLFE: Justice Steele - my partner.

9 MS. HABBART: Well, he wasn't at the time.

10 #00:54:56#

11 MR. WOLFE: No, he was not.

12 MS. HABBART: And, well, I think it's in keeping
13 with his other writings about default fiduciary duties and
14 alternative entities and all. It was consistent with his
15 approach.

16 MR. WOLFE: Right. And he is very contractually
17 oriented-

18 MS. HABBART: Yes.

19 MR. WOLFE: -- on the policy side, and maybe that
20 was by focusing on the contract rather than the process-

21 MS. HABBART: Consistent.

22 MR. WOLFE: -- again, in an effort to pull him
23 along. But he is a very conservative guy - well, it depends on
24 your point of view, I suppose. He is very - he is someone who

1 believes strongly in the business judgment rule. And is
2 disinclined to second-guess people that are not conflicted in
3 his view, and who are simply trying-

4 MS. HABBART: To do the best deal-

5 MR. WOLFE: -- to do the right thing and they - and
6 it turns out to be the wrong thing. And I think he is
7 absolutely right about that.

8 MS. HABBART: But that wasn't what was happening--
9 #00:55:50#

10 MR. WOLFE: No, because this is not that standard.
11 That standard doesn't apply here. We have chosen, as a body of
12 law, not to treat - what did Chief Justice Strine call it?
13 Ownership decisions instead of enterprise decisions, they are
14 scrutinized for whatever reason. And you get second-guessed in
15 that circumstance.

16 MS. HABBART: Well, what do you think the lessons
17 were from this case besides an affirmation of prior decisions
18 and keeping order and reliability in our law? #00:56:35#

19 MR. WOLFE: Well, I suppose one lesson is that an
20 opinion can develop a bad reputation even before it's issued.
21 [laughs] Because this one certainly did. I don't know how
22 often Omnicare has been cited since it was decided, but it
23 became almost a meme, like a mantra. The word Omnicare, people

1 said, oh, well, that's just a crazy decision. I remember being
2 at, as I said, Tulane - did I mention that RobKindler --

3 MS. HABBART: ... yeah.

4 MR. WOLFE: Now, I think it's, you know, Rob Kindler
5 came out with a bag over his head because he had been
6 criticized about railing against the outcome before the
7 opinion had even been rendered. But I think it stuck. I think
8 people, you know, for one reason or another, think it's a one-
9 off aberration. In a sense, it is because I don't think you
10 are going to see a situation where you have an open period
11 between director approval and stockholder approval that's
12 absolutely locked up. If you have those agreements, you're
13 going to consent to them right after the time the merger
14 agreement is signed, and the deal is going to be over. You're
15 not going to have the period where the board has to reexamine
16 its recommendation to sign that document. So, that's going to
17 be a very odd - and this was a very odd situation, very odd.

18 MS. HABBART: But if the board - if you exercise the
19 consents, right, and you make it happen right away, there is
20 no delay, but the board hadn't really considered other options
21 before it signed; you're in the same place. #00:58:15#

22 MR. WOLFE: You're absolutely right. So, that's a
23 process problem. That's not the Unocal problem that this
24 decision went off on-

1 MS. HABBART: True.

2 MR. WOLFE: -- the provisions of the merger
3 agreement didn't prevent anything because it happened. But
4 you're right. Unless you have looked very closely, and this
5 is, I think, we have given this advice previously, if you're
6 going to do that - and it's been done-

7 MS. HABBART: You can have a good record-

8 MR. WOLFE: You better have a record that you have
9 done a thorough market check, and you have some confidence
10 that when you close the deal, you have seen everything there
11 is out there.

12 MS. HABBART: So, under those circumstances, you
13 don't need a fiduciary out. #00:58:52#

14 MR. WOLFE: No. We used to recommend that you put
15 one in there anyway, but it doesn't have any function except
16 eyewash, right? Because it's open and closed, I mean-

17 MS. HABBART:... silly. And I think a court would
18 look through that.

19 MR. WOLFE: Oh, sure-

20 MS. HABBART: That's ...

21 MR. WOLFE: -- but I don't think they would find
22 that it was triggered because the period during which it
23 operates is - come and gone. Instantly.

1 MS. HABBART: Correct. And assuming the record is
2 clear that they did what they were supposed to do.

3 MR. WOLFE: Right...right.

4 MS. HABBART: And the delay until the opinion came
5 out - were you anxious- #00:59:35#

6 MR. WOLFE: Yes.

7 MS. HABBART: -- you know, wondering to see on what
8 grounds-

9 MR. WOLFE: Sure.

10 MS. HABBART: -- and what analysis they were going
11 to use?

12 MR. WOLFE: Yeah. Certainly it gave us some hope in
13 the sense that it didn't meet with an immediate affirmance or
14 reflecting sort of the attitude that Vice Chancellor Lamb had-

15 MS. HABBART: Right, right, right, right-

16 MR. WOLFE: -- and the reaction that he had. But it
17 certainly didn't suggest how they were going to come out. It
18 more clearly suggested a conflict, I think-

19 MS. HABBART: Right.

20 MR. WOLFE: -- on the court and, as I say, we tried
21 to count noses, and there was debate about whether, for
22 example, Justice Walsh was with us or against us. We found it
23 hard to tell from the argument. So-

1 MS. HABBART: You must have purred through those
2 transcripts—

3 MR. WOLFE: Yeah.

4 #01:00:25#

5 MR. WOLFE: Yeah, but I would have been reluctant to
6 make a prediction anyway because I am often wrong. It's better
7 to shut up—

8 MS. HABBART: And wait and see. Are there any other
9 facts or any other issues that you'd want to share with us
10 that you'd thought weren't really focused on in the opinion -
11 and I'm telling you, it's not until you talk to you, and you
12 talk to Mort, that you see another side to the story because
13 that's not conveyed in the opinion. So, there must be more.
14 Tell me. #01:01:03#

15 MR. WOLFE: I don't think there is more. I think we
16 - you know, as I say, I think the primary importance of the
17 case is a function, I suppose, of the politics on the court,
18 if I am right that they were trying to write an opinion that
19 everybody could agree to. The focus on the nature of the
20 contract and the limitations on your ability to include
21 certain provisions, in combination or singly, is the most
22 important aspect - lingering aspect of the precedent. You
23 know, the factual situation as we have discussed is debatable,
24 and it's unusual, is probably not going to come up very often.

1 The lasting import of the case, I think, is that merger
2 agreements are going to be subject to limitations on the
3 shareholders' ability to say yes or no without being penalized
4 in some way. And that is not surprising to me, because I
5 thought that was the implication of the precedent previously,
6 but it's a very clear declaration of that. And as I say, it
7 comes as a function of not so much pure judge law, or
8 evaluation of the case before them as it was an attempt to
9 make it less upsetting to certain members of the court. And
10 so, we end up, really, with a sort of new doctrine, in a sense
11 as a result more of the negotiations on the court than of some
12 effort to declare *Corwin* to be the law suddenly-

13 MS. HABBART: How - so, have you gotten beat up a
14 lot over the years for this decision? #01:02:58#

15 MR. WOLFE: Yes, I have-

16 MS. HABBART: Tell me.

17 MR. WOLFE: I have been - well, I was on a panel at
18 ILE that was peopled with the Vice Chancellor, then Chancellor
19 Strine, I think. Ed Welch, Dave McBride-

20 MS. HABBART: Oh, the whole gang.

21 MR. WOLFE: -- the guy from the Cleveland firm that
22 advised-

23 MS. HABBART: Really?

1 MR. WOLFE: -- the company, and me. Happily, Mort
2 was in the audience, and he would occasionally scream
3 something out to sort of rescue me.

4 MS. HABBART: ... right?

5 MR. WOLFE: But you know, there are worse things as
6 a litigator than being accused of having convinced a court-

7 MS. HABBART: Of the right thing.

8 MR. WOLFE: -- that ... you know, that of a result
9 that your client didn't deserve. So, I can live with that -
10 with that criticism.

11 MS. HABBART: Okay. Now, speaking of what the client
12 didn't deserve, Wachtell is not stupid. They had to know they
13 were pushing the envelope- #01:03:53#

14 MR. WOLFE: Yes.

15 MS. HABBART: And they had to know you were out
16 there-

17 MR. WOLFE: Yes.

18 MS. HABBART: Okay. And they had to know that this
19 could become a problem, that's why they negotiated such hard
20 terms. Why do you think they didn't leave an opening?

21 MR. WOLFE: I, you know, that's a question I have
22 asked myself because I have no doubt that Wachtell is as
23 accomplished an advisor in this area as there is. I have to
24 think - of course, maybe they had a different view of the law

1 than I do and so, they were just operating on another plane
2 altogether. But I have to think that it was Genesis driving
3 this. And if they - if Genesis were told, well, this presents
4 some risk that will have a litigation defeat, later on,
5 Genesis was willing to accept that in order not to find itself
6 in the same-

7 MS. HABBART: Position.

8 MR. WOLFE: -- negotiating position with Omnicare as
9 it had before. My guess is they told Wachtell we want this
10 deal-

11 MS. HABBART: Lock it up.

12 MR. WOLFE: -- locked up tight.

13 MS. HABBART: And they did.

14 MR. WOLFE: And you know, Wachtell may or may not
15 have said, boy, that's risky. But ultimately, the client calls
16 the shots and I have no doubt, you know, that they made a big
17 deal about the fact that Omnicare had pushed them around
18 before, and so it makes sense.

19 MS. HABBART: Great. Any thoughts you want to share
20 with us after being involved in this-

21 MR. WOLFE: I think I've imposed long enough.

22 MS. HABBART: Thank you-

23 MR. WOLFE: But thank you very much. It was-

24 MS. HABBART: My pleasure!

1 MR. WOLFE: -- I enjoyed-

2 MS. HABBART: Thanks for having - giving us your
3 time.

4

5 #01:05:29#

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