**Delaware State Bar Association Oral History Project**

**Excerpt of an interview with The Honorable Jack Jacobs**

**Interviewed by Lawrence A. Hamermesh**

**Recorded on October 26, 2018**

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**MR. HAMERMESH:** Let me return to your judicial work. Delaware corporate law has witnessed the evolution of doctrine governing freezeouts, transactions in which a controlling stockholder acquires the shares of the minority, and how the courts are supposed to evaluate those transactions. And relatively early in your career as a Vice Chancellor, you found yourself in the middle of that development in a case called Citron v. E.I. Du Pont de Nemours & Company. And I want to talk about that and get your recollections about your decision and how that came about and what you contributed to the development of that doctrine. I can ask more leading questions, but I prefer to let you take it from there.

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**MR. JACOBS:** Well, this was another case where, you know, the Supreme Court, actually in the same case, Weinberger, you know, had now — had pronounced new doctrine, new changes in the law governing not just appraisals, as we talked about before, but also how a court should evaluate, from a liability standpoint, as well as a damages standpoint, freezeout mergers, mergers with a controlling shareholder.

You know, I mean, there was case law all the way back to the fifties that dealt with that we called the "the entire fairness doctrine," but it was a doctrine that never had any real definition. That is, there weren't too – there were not any guidelines, you know, that established, that, you know, that gave more precise instructions as to what the court should do. And so, one of the concerns, we now know, of the Supreme Court, and I am sure it was fueled by the law review articles, was that entire fairness is like the Chancellor's foot; it all depends on, you know, who the, you know, the judge is and what time he got up in the morning and, you know, what he had for breakfast and all that.

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So, one of the contributions that was made by Weinberger was to try to put more content into the application of the entire fairness standard of review, which is what it is. So, that was the background.

The case that you're talking about actually involved one the cleanest deals that had ever come before the Delaware Courts; it was Du Pont deciding, for purely business reasons, that it wanted to acquire the remaining thirty percent of Remington Arms, a gun company that it had owned since time immemorial, maybe since the Civil War for all I... . And at that time, because it was a gunpowder company, it made sense to have a gun company. But, you know, over the – during most of the twenty – at least during the last fifty years of the twentieth century, it didn't – it did not play a major role—

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**MR. HAMERMESH:** Better living through armaments just doesn't roll off the tongue as a corporate slogan.

**MR. JACOBS:** No, because it was a specialty chemicals company, not a gunpowder company. So, they decided that you know, that owning seventy percent, they had the votes to do a cash – cash-out merger. They decided not to do a cash-out merger, that they were going to do a stock for stock merger so that all the shareholders of – the thirty percent public shareholders of the gun company would become shareholders of Du Pont.

So, what's remarkable about the case anyway, is that you know, Weinberger was not decided until after this transaction took place. And yet, you would believe that the lawyers for the company, which happened to be Covington & Burling, were clairvoyant because everything they advised the company, Du Pont, to do, is precisely what the Supreme Court said should be done to, basically, to pass the entire fairness standard, even as elaborated in that case.

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**MR. HAMERMESH:** That's the footnote in UOP that talks about achieving benefits of more deferential review through use of a special committee—

**MR. JACOBS:** Yeah.

**MR. HAMERMESH:** -- of directors.

**MR. JACOBS:** So, number one, Covington advised Du Pont to set up a special committee of non-Du Pont directors, so all the Du Pont directors recused themselves from any involvement at all in negotiating or approving the transaction – well, in negotiating the transaction. They, I believe, also recommended that the shareholder – that there be a majority of the minority shareholder vote of, so that Du Pont, you know, unless a majority of the, you know, well, unless a majority of the seventy percent agreed.

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**MR. HAMERMESH:** The thirty percent—

**MR. JACOBS:** The thirty percent—

**MR. HAMERMESH:** Right.

**MR. JACOBS:** Yeah, they would have a veto power, and Du Pont would not do the transaction. That was accepted.

The Supreme Court recommended that – or held that it would be, you know, they would look favorably if the special committee had its own independent counsel and own investment bank. That's what happened in that case. So, it was all done, you know, at arm's length. They had, I think, Morgan Stanley advised the committee, and they came up with the stock for stock exchange ratio. You know, there was no concern about – the only concern was just to get it done and to get it done right, you know, not to save – not to start pinching pennies or anything.

Anyway, so that was done, and then, a lawsuit is filed, a derivative action against the directors of Du Pont claiming that the price – the buyout price was unfair. And then, the case sat there for several years. I mean, it may have gone on at a glacial pace, but it wasn't until I got on the court that the defense side decided that they either wanted – that they were going to, you know, either get this case dismissed for lack of interest or force it to trial. And so, it got forced to trial, and we had a full trial, you know, where I heard testimony from every one of those independent directors, from the Chairman of Du Pont, from all the investment bankers, and it was clear, as I have told you, that, you know, but for trying to apply whatever the law was to the facts, the facts were not problematic. I don't think there were even any disputes about what the facts were.

But the problem was that, you know, what was the standard of review to be?

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**MR. HAMERMESH:** Right. Which Weinberger v. UOP really didn't quite answer.

**MR. JACOBS:** Not in – not quite. And it's turned out to be a subject that involved litigation over the next ten years. Or at least, I shouldn't say that -- four years, five years. The plaintiffs’ case rose or fell on the proposition that this – that entire fairness would be the standard of review, not business judgment. But, you know, the footnote in Weinberger and, really, you know, the what I considered to be the animating force behind Weinberger, which is that if you can replicate a real market transaction involving a third party's negotiating at arm's length, then it should fall under business judgment review because that's what happens when you have two completely disconnected companies that are negotiating a merger consolidation.

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But Weinberger didn't really say that.It was – it suggested it, but it didn't say it. And that was an unanswered question. So, one of the major issues that I had to decide was, you know, is this a business judgment case? In which case, you know, it would be an easy opinion to write. Or would it be an entire fairness case, in which circumstance, there would be a much more textured kind of analysis and having to grapple, you know, with Weinberger because there had never been a fully developed post-trial case where the Weinberger apparatus had to be applied.

My inclination was to apply business judgment, to hold that it was business judgment. There was a decision by my then colleague, Bill Allen, Chancellor Allen, in the TWA case, in which he had done exactly that. But, unfortunately, one of my hotshot law clerks discovered a 1985 Delaware Supreme Court case called Rosenblatt v. Getty Oil, which involved, you know, although different, you know, a different kind of transaction, the same paradigm facts, the same master facts. And, in that case, the Supreme Court said, no, the – well, it didn't really – it just said, and I don't even know to what extent it was litigated, that the standard of review, even though this was the cleanest deal that they had had, would still be entire fairness, but the burden of proving unfairness would shift to the plaintiff. In classic entire fairness, the directors, the controller always had the burden of proof. So, this – that was a change.

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So, I, you know, there was nothing in the TWA opinion that addressed that precedent. It wasn't cited. And nothing in the Rosenblatt opinion that explained why business judgment wouldn't be the standard. So, what did I do? I went into my colleague's office and said, you know, Bill, I got a problem, and told him about Rosenblatt, and he said, and I said, look, I find that I am in the position where I may have to go in a direction completely opposite from where you went, and it would be very public. And he said, well, if you have to, you have to, because nobody cited Rosenblatt to me, and when I decided TWA. I said, okay. I'm relieved to hear that. And now, here’s my other problem. Rosenblatt doesn't really give any rationale for why, you know, it would be – why there would continue to be entire fairness review rather than just shifting standards to business judgment. And they didn't. And so, you know, because I was now going to have to apply this, and I didn't want to do it just by saying well, the Supreme Court said—

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**MR. HAMERMESH:** They said so.

**MR. JACOBS:** Said so, and so that's – that's it. To try to come up with some rationale that would make sense. And so, literally, Bill Allen and I, in his office, forged a rationale, which was that even if you have, you know, all of the safeguards in place, that is the procedural safeguards, that the shareholders would, you know, there is a risk that the shareholders would approve the deal out of concern that if they didn't, then the controller, frustrated over having its deal voted down, would take some kind of retaliatory step later on, such as cutting dividends, trying to delist, or whatever. And that became the rationale. That was not a rationale that was warmly accepted on Wall Street, or by the corporate community, I recall, after writing the opinion in Citron, where, you know, I upheld the deal. But based on the modified entire fairness paradigm that, you know, one major Wall Street firm said this is the stupidest thing that they had ever heard of and that the rule should be that what happened at TWA – and they had a point. I thought they were right, but I, you know, I was bound by Supreme Court precedent.

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And so, the issue – there were two issues that ended up getting litigated for a number of years. One was, all right, when, under what circumstances, you know, does the – you get modified or entire fairness light, you know, where the burden shifts to the plaintiff? And can there ever be a circumstance, under Weinberger, where you don't apply that mode of analysis but, actually, go back to entire fairness?

The bottom line was that, in 1994, the Delaware Supreme Court clarified, you know, that they – I mean, we still had TWA and Citron as polar opposite cases, and they resolved that opposition in favor of Citron, to my dismay. I was hoping they wouldn't. But then in—

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**MR. HAMERMESH:** Quoting you at great length.

**MR. JACOBS:** Yeah, unfortunately, yeah. And well, what Bill and I had come up with at great length—

**MR. HAMERMESH:** Right.

**MR. JACOBS:** And, then, several years later, I forget what year it was, in the MFW case, basically went back to the roots of Weinberger and said, yes, there are circumstances where you can have business judgment review, even if a case that has – a merger that has been controlled or, you know, where there has been a controlling stockholder. So, it took five or six years to resolve, you know, what I called the lower-order issue, but probably twenty to resolve the higher order; it was 1983 to what? Two thousand and?

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**MR. HAMERMESH:** Well, the Delaware Supreme Court M&F Worldwide opinion was 2014, which was, ironically, or sweetly—

**MR. JACOBS:** Yes.

**MR. HAMERMESH:** -- your last year on the bench.

**MR. JACOBS:** That's right. That's right.

**MR. HAMERMESH:** So, you sort of presided over the entire evolution of this body of doctrine from—

**MR. JACOBS:** If I can just inject one—

**MR. HAMERMESH:** Please...

**MR. JACOBS:** -- one editorial comment. The Chancery – the Chancery judges and, you know, I think, should be commended. They did their best to try to faithfully implement and apply, you know, whatever higher court doctrine they are bound by, but to do it in a way that makes sense from a business law standpoint. And sometimes they get it right, and sometimes they don't. But it’s also true of the Delaware Supreme Court, I think, you know, when the, you know, some of their prior case law is called to their attention as not making sense, or not making sense, you know, in the particular circumstances, and you know, should merit a reassessment from a higher-level point of view, they have done that, and I think that's what an appellate court ought to do, and I think Delaware has –it may take time to get it done, but it generally ends up doing it.

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**MR. HAMERMESH:** Right. And M&F Worldwide in 2014 was one of those opinions that—

**MR. JACOBS:** I think so.

**MR. HAMERMESH:** -- recast the doctrine effectively.

**MR. JACOBS:** Right.

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