**Case: Omnicare**

**Interview of Stephen P. Lamb**

Paul, Weiss, Rifkind, Wharton & Garrison

Interviewer: **Elissa Habbart,** Delaware Counsel

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

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

MS. HABBART: I know.

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

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

MR. LAMB: Yeah.

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

MR. LAMB: Well, that all did sort of unfold. I have a very vague recollection that there was a hearing, and I could be wrong about this, and it would have been like on a motion—

MS. HABBART: To compel, maybe?

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

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

MR. LAMB: Okay, well maybe that was it—

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

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

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

MR. LAMB: -- that... and the argument was, Your Honor, these people, these Omnicare people, they claim to have a tender offer, but it is a highly conditional tender offer. It is based on their need to obtain further information and conduct due diligence. And that the due diligence condition was in the offer they made to the NCS Board, and it's in their tender offer. And they also, we don't think, have financing, I think he said. But the thing I remember him saying, and it sort of captured the essence of this, was that when they made their proposal in July, it had a – in competition with the proposal Genesis was making – it had a due diligence condition. And that was in the circumstances, that engaging with Omnicare at that point was – presented a risk to NCS of losing the Genesis transaction. And that very risk that they refused to take – they refused to go engage with Omnicare because they had this other proposal they had that they could act on and needed to be acted on. It is the very risk that Omnicare refused to undertake itself, that is by making an unconditional offer. So, someone had to bear this risk about not having enough information. And Omnicare wanted NCS to bear it. NCS determined in July it couldn't. And I remember Mr. Mirvis standing up and just saying, you know, these people, all they want to do is just transfer this risk ... .

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

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

MS. HABBART: Did the fact that there had been this extensive, extensive, careful work done by the Board – did that impression -- did you get that impression right away? #00:04:14#

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

MS. HABBART: Two years...well, plus there was— #00:04:58#

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

MS. HABBART: So, once you started looking at things and getting the information, you saw they had a very, very careful Board, making a decision based on the best available information available to them at that time. Did you have any concerns about any of the elements of the deal? Number one, the terms of the merger— #00:05:27#

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

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

MR. LAMB: -- so unusually, but they didn't have a majority of the equity. They had maybe 15 or 20-percent of the equity. But they had shares that had a greater vote, and so, they had the majority of the voting power. I mean it was certainly unusual to see a transaction that was that thoroughly locked up. Now, and as it first presents itself, you don't have – you don't understand that this was a company that was essentially – it was insolvent, company that had been seeking a resolution of its insolvency problems for the benefit of its creditors for a year and a half. And you don't know any of that yet, but that all comes up later. So, what you are faced with is a completely locked up deal, which is unusual, and a competing bidder who is in there screaming that they were there all along and they wanted to buy the company and wanted to pay more, and they were being prevented from paying more—

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

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

MS. HABBART: Changed things.

MR. LAMB: Of course. I mean that's, you have this bidder who never offered to pay even a hundred cents on the dollar to the creditors. And this was over a period of – now, we are sort of getting to the punchline here, but in the preliminary injunction proceeding, it became obvious that both the NCS Board had tried to negotiate over a long period of time with Omnicare, and also, the creditors, this sort informal creditors committee of Omnicare, they tried to negotiate. I don't mean with Omnicare, I mean with the creditors' committee of NCS. They tried to negotiate a transaction with Omnicare at the end of the year before. And when they got to the point, and they thought they had a deal that they had negotiated with Mr. Gemunder, I think, and when the papers came from the lawyers, it wasn't the deal they thought they had. So, they were put off by Omnicare, and that was like January or February of 2002, but—

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

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

MS. HABBART: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. HABBART: Attention.

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

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

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

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

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

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

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

MS. HABBART: Right, converted back to the more limited—

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

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

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

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

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

MS. HABBART: But it seemed logical to you that you would – that you should entertain or let them try to figure out what value – what voting value their shares had? #00:14:59#

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

MS. HABBART: They couldn't control them—

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

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

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

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

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

MS. HABBART: Yes, yes.

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

MS. HABBART: Yes.

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

MS. HABBART: Tender.

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

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

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

MS. HABBART: Yeah.

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

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

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

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

MR. LAMB: Right.

MS. HABBART: You know, they—

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

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

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

MS. HABBART: The voting agreement—

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

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

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

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

MR. LAMB: Do you mean as a deal – in connection with the deal—

MS. HABBART: As a deal ... right—

MR. LAMB: Yeah, of course.

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

MR. LAMB: It made perfect sense.

MS. HABBART: As did the irrevocable—

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

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

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

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

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

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

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

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

MR. LAMB: For whom?

MS. HABBART: The majority and the court—

MR. LAMB: Oh, for the Supreme Court?

MS. HABBART: Yes.

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

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

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

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

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

MS. HABBART: -- isn't that—

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

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

MR. LAMB: -- in which they're not getting paid anything. I mean that would be a hard thing to do, but... So, but if there is no merger, there's no one who wants to buy the stock; the Board's duty at the time, and I think it believed its duty was to do the best deal it could do for the creditors. And that deal got better and better to the point where finally, in its discussions with Genesis, Genesis said, all right, we'll pay the—we'll do a merger, and we'll give – you know, we'll exchange a little stock, and the creditors get paid in full. That was a hell—that was a great outcome.

MS. HABBART: The point you made about how the shareholders who issued the irrevocable proxies would have been crazy to do so if they thought there was a real chance there was more money on the table from somewhere. That must have been an important indicator to you, I would think. #00:23:50#

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

MS. HABBART: Right, right.

MR. LAMB: -- of defensive mechanisms because that was adopted to apply to actions taken unilaterally by a board of directors. And these actions were not taken unilaterally. Certainly, when you combine the voting agreement with the merger agreement because, in fact, you have a majority in voting power of the shareholders who are acting with the Board to secure this transaction—

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

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

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

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

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

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

MS. HABBART: Wasn't ‘til September—

MR. LAMB: I didn't know it in September. I don't think I knew that until November. And, yes, it did surprise me because Omnicare's position was that they couldn't really go forward without due diligence. The merger agreement had a provision in it that governed whether or not NCS could provide information to Omnicare. I believe the Board of NCS met shortly after the merger agreement was signed – maybe the very beginning of August, and, at a meeting, concluded that because of the conditionality of the Omnicare offer—

MS. HABBART: You are correct.

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

MS. HABBART: But Genesis, at that point [overlapping]—

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

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

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

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

MR. LAMB: Yeah, possibly. Although clearly, when it got to the preliminary injunction, and then the appeal stage, Omnicare's case would have been much weaker if they did not have an actionable tender offer, or if they still had this highly conditional proposal. They, you know, then the Supreme Court would have been faced with the prospect of enjoining the deal that is certain and is going to have this insolvent company pay its creditors in full, and to enjoin that transaction in favor of a conditional, uncertain future. Actually, it was interesting. It would have put the court – me, and then, the Supreme Court in the same position that the Board of NCS was in in July when it approved the merger. And I don't think – I know I wouldn't have, and I don't think the Supreme Court either would have -- insisted or have been willing to force that risk on to the shareholders of NCS because the whole thing could blow up. I mean, once the deal is enjoined, Genesis could walk away. Omnicare then drops back to bankruptcy [overlapping]—

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

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

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

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

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

MR. LAMB: You know, who knows.

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

MR. LAMB: Yes, they did. I mean because the records show that in July, when the NCS Board was in this series of meetings and Genesis had made its last proposal, or its maybe next to last, and Omnicare threw this thing over the transom, threw the letter saying, you know, we're here, now we want to pay your shareholders three-dollars-and-fifty-cents a share in a merger and we'll pay everybody. When that happened, the NCS Board was subject to this exclusive arrangement with Genesis, so, they couldn't go back to Omnicare and speak to them. But Judy Mencher, who was the advisor to the creditors' committee, the informal creditors' committee, she got a copy of the Omnicare letter—

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

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

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

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

MS. HABBART: Back to the initial argument that you said rang true to you—

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

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

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

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

MR. LAMB: I never knew.

MS. HABBART: You never knew.

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

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

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

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

MR. LAMB: -- and he was very strong, as he always is; he's a great advocate. And his – he was very convinced and convincing about the position the NCS Board was taking. So, then, by the end of September, the beginning of August, I started noticing his tone of voice was different. And that's when I guess they must have entered into discussions with Omnicare and made, you know, [unintelligible] maybe, I wasn't paying enough attention to tell you, but when Omnicare actually changed its tender offer and eliminated the conditionality—

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

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

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

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

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

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

MS. HABBART: What was interesting that after -- what went on after your decision, in terms of how – between Genesis and NCS, and their bidding the agreement, they came out with was Omnicare paid Genesis 25-million [overlapping]—

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

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

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

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

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

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

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

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

MR. LAMB: Omnicare and Genesis had, after the Supreme Court acted and sent it back to me, at which point I had to enter an order enjoining the Genesis transaction. Then, over a period of a weekend or something was sort of an auction where Omnicare bid, Genesis outbid them, Omnicare outbid them, and the price – this was mostly just in terms of the shareholder price. And the price got to wherever it got to, five-fifty a share, or something. But there must have been claims that Genesis was at least talking about because they got, at the end of the deal, even though Omnicare won, they agreed to pay Genesis this sum of money to – for -- in exchange for a release. I don't know what the claim was, but—

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

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

MS. HABBART: Yeah, it was.

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

MS. HABBART: That's what I'm saying—

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

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

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

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

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

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

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

MS. HABBART: Yes.

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

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

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

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

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

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

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

MS. HABBART: I don't know either.

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

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

MR. LAMB: Look, I think people that have tried to use a number of ways to deal with the problem. I don't know that any – it must have been the case in the NCS charter that they didn't have the right to act by written consent. Because, mostly, after this decision, most of the cases that came along were ones where the shareholders had the right to act by written consent. And so, since the merger agreement made a provision that we need, you know, this deal is off the table unless we deliver consents by a majority of the voting power in 24 hours, or something like that.

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

MR. LAMB: Way before that. I mean back in the ‘68 amendments.

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

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

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

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

MS. HABBART: I need the transaction lawyers to understand what they were thinking there. But the fact is that if – even if you accept the premise that you act by written consent and avoid some of these issues, that's form over substance, is it not? #00:41:21#

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

MS. HABBART: Agree.

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

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

MR. LAMB: Right, so Outcalt and Shaw were not – they remained on the Board, and the Board had ultimate power over the transaction, but the committee was two outsiders. And so, when you look at that, you say, oh, well, is that because they thought Outcalt and Shaw, as a result of their majority ownership, were in a conflicted situation? And the answer was no. It was because the conflict was between that they saw, and they were trying to deal with was between the shareholders on the one hand, and the creditors on the other hand. And so, they set up this committee-

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

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

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

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

MS. HABBART: Do you think, perhaps, that was something that – do you think there was some impact on the fact that there was an order put out in December, but the Supreme Court's opinion didn't come out until April. #00:45:13#

MR. LAMB: Yeah, I mean it's an understandable practice in that it was a situation in which the Supreme Court had to act quickly because of a tender offer, and you don't want, in that circumstance, to take a month to write your opinion before you issue an order because the world might change in that intervening period of time and the transaction might go away. I understand that. But it is true that when instead of writing an opinion, in the Court of Chancery, we write our opinions, we can write them overnight, or in a day or two. It's obviously different on a panel -- when you're dealing with five Justices; you can't just go write the opinion by yourself. So, it's an institutional issue too, that creates some problems. I think, when you issue an order that isn't – you know, it's thought through, but the terms of the order haven't the benefit of the kind of analysis you have to do when you write an opinion. So, you know, you know, you don't really know exactly where you're going to land when you write the opinion. I think in this case, the opinion pretty much tracked the order, so, it wasn't that much different.

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

MR. LAMB: They were totally aligned with the other shareholders. So, the idea of the Board having to protect the interests of the minority after a majority of the voting power of the shareholders, and those whose interests were completely aligned with all the other shareholders, had already acted in a way that was going to make the deal a foregone conclusion. I don't you know, I don't get it, so... I don't get it. I didn't get it at the time. But the case has never been overturned. Justice Steele notably had the Tulane conference that followed. I'm pretty sure he was quoted as saying that the opinion had the half-life of a fruit fly, but it hasn't proven to be true. It's still here.

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

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

MS. HABBART: It works against it.

MR. LAMB: Right.

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

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

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

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

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

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

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

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

MS. HABBART: Well, true.

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

MS. HABBART: Right. Think about that, if it happens right away and it's a day late, and the merger has already happened, and the money is given, but somebody like Omnicare objects or exercises appraisal rights. I don't know. #00:50:14#

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

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

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

MS. HABBART: One would think, right?

MR. LAMB: Right.

MS. HABBART: One would think. But then, technically, just because it's not a public company, you know, some of these same arguments might apply, would they not? #00:51:09#

MR. LAMB: They do, yeah.

MS. HABBART: So, it's a disincentive—

MR. LAMB: I'm just saying people have learned to deal with it using written consents and in most public M&A, it doesn't really matter because you don't have the situation. MS. HABBART: Well, that's true ... but even in the situation where it's private, and you use the written consents, you know, I still think that it's not a nice story—

MR. LAMB: So, I did have a case maybe a decade later – no, it couldn't have been a decade, but five years later, I had a case that I think was in a written consent --using it -- that raised these issues. So, I mean in terms of whether this ever occurred again, I can remember one case, when I was a judge, where the issue was pretty squarely presented, although it may have been in the context of a written consent, and I don't remember the context exactly, although it was clearly raising these issues. And I was aware that, while I was considering the motion for a preliminary injunction, the Supreme Court Justices, or at least some of them, were already reading the briefs and were prepared to take this matter up and overturn this decision.

MS. HABBART: Really?

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

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

MR. LAMB: Oh, it was set up – you know, it was teed up.

MS. HABBART: But then it didn't—

MR. LAMB: They didn't appeal.

MS. HABBART: -- go the distance.

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

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

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

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

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

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

MR. LAMB: But it would have been fun.

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

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

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

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

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

MR. LAMB: Of course.

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

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

MS. HABBART: Interesting.

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

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

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

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

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

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

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

MS. HABBART: Can you recall any argument that you didn't like? Or that you thought why are you raising this? #00:55:46#

MR. LAMB: No.

MS. HABBART: No?

MR. LAMB: And the losing arguments, I didn't agree with – I didn't have any problem with—

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

MR. LAMB: Trying to—

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

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

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

MR. LAMB: Oh, yeah. Well, that was absolutely clear, and it was clear from the record. And I think we've been through it all with – just with the fact that Judy Mencher went back to Mr. Gemunder and said, you have to get that out of your offer, and they considered it, and they decided not to because they couldn't take the risk. But it's the very risk they were trying to get the company to take, so... At the end of the day, I was pretty sure, so.

MS. HABBART: As a judge, I would imagine that arguments like that would not sit well with you.

MR. LAMB: No ... doesn't bother me.

MS. HABBART: No ... all right.

MR. LAMB: So, thanks very much.

MS. HABBART: Thank you.

#00:57:14#

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