**Case: Unocal Corp. v. Mesa Petroleum Co.**

**Interview of Charles F. Richards, Jr.,**

**Richards Layton & Finger**

**Interviewed by: Samuel A. Nolen, Richards Layton & Finger**

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MR. NOLEN: My name is Sam Nolen, of Richards Layton & Finger, and I am talking today with Charlie Richards, also of Richards Layton & Finger about the Unocal case. The Unocal case was litigated and decided over the course of about five weeks in early 1985. It's one of the seminal cases in our corporate jurisprudence. Charlie, I know you will be able to tell us a lot about the case as we talk here today. Before we talk about the Unocal case specifically, maybe you can give us some color on the takeover years in the early 1980s and how the law developed, how the court developed, how the bar developed, and your firm developed because I think it's important for viewers to understand the context in which these cases arose. Why don't we start, if we can with maybe how the law developed. Was it takeover oriented at the beginning of this takeover boom in the eighties?

MR. RICHARDS: Not at all, really. Until the Williams Act, you didn't really have hostile takeovers. So, the law, if you will, in the end of the seventies, in Delaware, was corporate law made largely by derivative suits and class actions. And the really – the phenomena of one company trying to acquire another company over that company's protest really didn't exist.

MR. NOLEN: So, the principles that we take for granted today that courts apply about takeovers really didn't exist at the beginning of this takeover boom. What was the role, fundamental things, what was the role of the board of directors? Was it passive or active? #00:02:08#

MR. RICHARDS: That's right. And it was a very frenetic period, and the reason why it was so frenetic was you have put your finger right on it; is the rules didn't really exist. So, lawyers were creative in trying to make new rules that favored one side or the other on the target side to come up with new defenses on the acquirer side to come up with new approaches. And the law then developed over a period of maybe seven or eight years gradually, on a case-by-case basis. And, of course, there was some backwards and forwards in the cases as well as the lower courts made one decision and sometimes the appellate courts would vary it.

MR. NOLEN: These cases also involved, as you are really mentioning, new defensive techniques and new aggressive techniques and defensive techniques like advance notice bylaws and restrictions on written consent, that kind of thing— #00:03:23#

MR. RICHARDS: Yes. I mean really until the Household case, which, as you know, was decided at virtually the same time. We may get into that later. But until the rights plan was legitimized, the target corporations had a very, very short time to respond to defend themselves against takeover offers, especially Boone Pickens' kind of offer here where you had a front end loaded takeover. And so, there was frenetic activity defined what came to be called "white knights" or to "sell crown jewels" or to issue diluting stock or make other changes of that kind.

MR. NOLEN: And all of those were developed in the pressure cooker of, I think, out of the Williams Act it was 20 calendar days from when you started a takeover to when you could finish it. #00:04:14#

MR. RICHARDS: Yes, and that became very difficult. But it also made the litigation, as I referred to, compressed within a very short period of time because by the time the offer was to close, you had to have your defense in place and then the offeror, of course, had to challenge it to knock it down.

MR. NOLEN: How did the courts develop over this period of time? I mean the makeup of the courts and the sophistication of the judges on our Chancery Court and on our Supreme Court? #00:04:50#

MR. RICHARDS: Well, of course, it was a learning process for the judges just as it was for the lawyers. There was some change in personnel on the court, and there were some new judges that came on, some of whom came from a more rigorous background or maybe had been participants in takeover battles before they went on the court. So, I think with the accumulation of knowledge and cases, and the evolution of the personnel, there came to be quite a degree of sophistication in the Delaware Courts, both at the Chancery level and the Supreme Court level.

MR. NOLEN: And I think some of those judges, if I recall correctly, were Carolyn Berger from Skadden and Bill Allen from Morris Nichols, and then Drew Moore, of course, went on the Supreme Court. Those are the people you were talking about going on—

MR. RICHARDS: Yes.

MR. NOLEN: -- with a higher degree of sophistication. One of the things that mystifies people when I talk to them about Delaware, if they aren't really familiar with Delaware, is why Delaware became so prominent in cases like this and in, and therefore, in corporate law. And I wonder if you can shed any light on how you think that happened? #00:06:21#

MR. RICHARDS: Well, of course, many of the companies were incorporated in Delaware, so it was a place you could acquire jurisdiction over them. I think at the time, the New York Stock Exchange companies were between 50 and 60-percent Delaware corporations. It also was a convenient forum for many of the litigants whose principal offices, or principal outside counsel might be in New York. And it was seen as a neutral forum, which, in some cases, was desirable to the litigants, and in some cases, not. But as target corporations, they would prefer to go to their home forum where maybe things weren't as neutral. You and I were discussing the other day a particularly striking example of that related, if you will, to Unocal, occurred during Boone Pickens' or Mesa's attempt to acquire Phillips. And Phillips sued in Bartlesville, Oklahoma, their hometown. And through a number of peregrinations I won't go through, the Delaware Court enjoined Phillips from prosecuting their action in Bartlesville. So, when Mesa showed up the temporary restraining order that Phillips had gotten in Bartlesville was going to expire, and Mesa showed up just to make sure that it did expire, the judge in Oklahoma, he looked around, and Phillips was not present because they were enjoined from being present, and that didn't present a problem to him. He entered the preliminary injunction on his own motion as being in the best interest of Phillips and the citizenry of Oklahoma. And that was quite a shock.

MR. NOLEN: So, the Delaware Courts weren't anybody's home turf. #00:08:25#

MR. RICHARDS: That's right.

MR. NOLEN: And that was an attraction to them. And they were also quite responsive, weren't they, in this sort of pressure cooker schedule that the Williams Act laid out? #00:08:36#

MR. RICHARDS: That's right. They scheduled these things in, really, whatever time they had. And the Unocal case is a perfect example of that, I guess we will get to it later on, but the appeal in the Supreme Court took place over three or four days. But in an ordinary case where you're taking a lot of depositions and a preliminary injunction, the discovery would take place in a week, and the briefing would take place in a week, and the Chancery Court would either issue or deny a preliminary injunction, and then, it was all over.

MR. NOLEN: How did these changes in the takeover era affect the legal community? We've talked about the court a little bit. The court was terribly responsive, but the Delaware legal community was pretty small in 1980, wasn't it? #00:09:29#

MR. RICHARDS: It was. I think, I'm not sure, but I believe that Richards Layton & Finger, in 1980 was in the thirties someplace, and of course, we had to expand rapidly. And I think you referred to the other day that by the time you joined the firm, it was close to a hundred. I forget what year you mentioned that was.

MR. NOLEN: Well, I had joined, actually, in 1980, and I was either number 33 or number 34 at the firm. But by the time of the Unocal case, I think we were at about a hundred lawyers. And that was just five years later. #00:10:07#

MR. RICHARDS: So, that was a very rapid expansion. And of course, our firm, and other firms were able to attract some very highly qualified lawyers. But also, because of the rapidity of the development, and because in the beginning, Delaware wasn't as well-known as a forum as later, we also had some difficulty in getting all highly-qualified lawyers. So, that created some difficulties in staffing up cases because the quality of people that you had to work was varied.

MR. NOLEN: Right. And the sophistication of the lawyers who worked on these cases, and it was a fairly small number of lawyers who worked on these cases, ramped up pretty quickly in the eighties, I gather. #00:10:57#

MR. RICHARDS: Absolutely. I can't tell you how many cases that I had been in that were takeover cases by 1985, but it was quite a bit, and I can remember I had represented Mesa and Boone Pickens in, I think, five transactions prior to the Unocal transaction alone. And that was just one client. And of course, I wasn't the only partner at Richards Layton & Finger who was litigating these takeover cases. So, in terms of the general body of the corporate litigators we had in our firm, many of them, by then, had been in 20 or 30 cases.

MR. NOLEN: Now, you mentioned that you had litigated a number of cases for Mesa Petroleum and its principal was Boone Pickens. I think I counted Cities Service, Superior Oil, Gulf Oil, Phillips Petroleum, General American Oil, and then, of course, there was Unocal. So, you had a pretty good relationship with Boone Pickens. #00:12:07#

MR. RICHARDS: Yes. And, I guess I met him early on, and he was a very charismatic, really, leader and quite iconoclastic, as far as the oil industry goes. For example, he was headquartered then in Amarillo, which was a relatively small town and he later moved to Dallas. But he surrounded himself with young people, which was unusual in the big oil companies, and I think some of the people that were involved in the Unocal case, Sidney Tassin, who wrote that affidavit that you drafted up, I think he was 29. David Batchelder was about 34. He had a number of young women working for him in the oil company, which was unprecedented in the big oil companies. And he had a very different idea than the major oil companies had, which I can expand on if you'd like.

MR. NOLEN: Well, I think that would be a good idea. You mentioned he had this idea; he had a philosophy about what they should be doing? #00:13:18#

MR. RICHARDS: Yes, I mean he thought that they had moved from they were mostly, or were started by entrepreneurs, and were big risk takers. And then, as these companies, because huge conglomeration of assets, they had their management changed into from entrepreneurs to bureaucratic, and he felt that their interests became focused on the interests of the bureaucracy, or of the company, and they had more or less forgotten about the shareholders or return to the shareholders. And during this period of time, these companies did not increase their dividends, although they had this tremendous cash flow. So, what did they do? I mean Exxon is a perfect example, but not the only one, they had this cash flow, they didn't have enough prospects to drill, so they went and bought Montgomery Ward. Well, they had no expertise in running that company—

MR. NOLEN: That was a retailer.

MR. RICHARDS: Right.

MR. NOLEN: A consumer retailer— #00:14:19#

MR. RICHARDS: And then they bought Reliance Electric and Engineering, which was an electrical equipment manufacturing company. And he was very critical, liked to talk about Shell Oil Company, which spent a billion dollars on a prospect called Mukluk, up in Northern Canada, and didn't get any oil. And so, what he said was, look, if you don’t have a reasonable prospect, why don't you distribute some of this money to your shareholders? And that as the basis of the royalty trust, for example, that he tried to get Gulf Oil to adopt.

MR. NOLEN: I guess that in retrospect you would say that that philosophy is the one that has really won out in economic terms over the ensuing decades, notwithstanding the resistance of target companies to doing that at the time. #00:15:10#

MR. RICHARDS: That's true. I mean not just his philosophy, but the whole takeover phenomena gradually forced directors to concentrate more on the shareholders' interests as opposed to the interest of the entity, if you can think of the entity as disassociated from the shareholders. And so, directors had to respond to these offers in a more positive way, and they had to be thinking about the shareholders more prospectively than they had been.

MR. NOLEN: Yeah. And this really sort of spread from the oil patch across all areas of the economy—

MR. RICHARDS: Yes.

MR. NOLEN: -- over time. So, the mantra of the activist. Well, why don't we talk now about the evolution of the Unocal case itself? And I don't know if you can shed any light on how that transaction developed, what were the – when did you first find out about his interest in doing that? You had been litigating these cases for him; I think the Phillips case was still continuing into 1985, and so— #00:16:23#

MR. RICHARDS: Well, you know, from time to time, I would meet in Texas at various locations with Boone and his team of investment bankers and lawyers. And we would consider prospects. As you know, they weren't all oil companies that, at one point in here, I don't remember just the date they went after a gold company, Newmont Mining. And I remember vividly the occasion because they pulled a trick on me. Boone called me up, and he said I want to have a Super Bowl party. And I don't know whether he told me about Unocal or not, and he said I want you to come down for this Super Bowl party and we are going to then talk about what we might do next. And there also was a deposition taken in an unrelated case going to take place in the next couple of days. So, he said, well look, this Super Bowl party is going to be a western party, I am going to have bales of hay around, and everybody is going to wear a western costume, so I am going to send the jet up to pick you up at the New Castle County airport. And do you have cowboy clothes? And I said, yes, because I had taken my kids out to Arizona, so I put on my cowboy hat and my blue jeans and my western shirt and my boots and the whole thing because he was going to pick me up in the plane and the car was going to take me right to the party. So, oh, and he also told me the party was going to be televised because by that time, he was sort of a really a popular figure and on television and in the newspapers every day, and so somebody was going to have a show about this Super Bowl party. So, I went down there, and I arrived at the Super Bowl party, and there were no bales of hay, nobody was in western clothes. All the investment bankers and other lawyers that were there, they were all in their three-piece suits. And there I was somewhat sticking out. I'm pretty tall anyhow, and with—

MR. NOLEN: Six-eight? #00:18:30#

MR. RICHARDS: Yeah. And with cowboy boots and my cowboy hat on, I really stood out in this party; I can tell you that. So, he then took me around to the host of the TV program, and he said I want you to meet my ranch foreman, Slim Richards. And I was then asked whether or not I had any view about the price of pork bellies or wheat futures or something like that, and of course, I had to make up something.

MR. NOLEN: Well, did you ever get around to talking about Unocal? #00:19:03#

MR. RICHARDS: Yes, and in the next couple of days, we talked about Unocal. And of course, before you could launch the offer, which wasn't offered for some period of time, why you had to line up the financing, and you had to talk to partners and get people to lend you money, and you had to arrange for them to come down and then they had to be satisfied as to the merits of the deal. And I can remember one transaction I was quite interested in, and Canadian entrepreneurs came down, and we were having two days of conferences, and it was going to be very, very detailed. And so, after the first day, these people said well, we're leaving, and we said, well, why are you leaving? You know the second day is going to be the most crucial explanations. And the guy said well, I only have one question. I said, am I going to be invested in pari passu with Boone Pickens? Yes. Can he get any money out without distributing some to me? You know, no. He said that's all I need. I'm relying on Boone, and they and their group got back in their jet and flew back to Canada and said they'd lend us a billion dollars. And I think that gives you the temper of the times, really. Pickens by this time was able to establish and get very significant amounts of money based on his reputation and his assurance that this was a good deal, he was in for it, so they would go in for it too.

MR. NOLEN: Well, with that money, he built a pretty substantial toehold in Unocal. Something like 13-percent— #00:20:53#

MR. RICHARDS: I think that's right. I don't know how much that was worth at the time, but I am sure it was more than a billion dollars.

MR. NOLEN: And once he built that toehold, what happened next? How did that develop? #00:21:06#

MR. RICHARDS: Well, he then made an offer and I have forgotten exactly, but I think it was like 52-bucks a share or something in cash for I don't remember exactly, I may remember a number of the details, but for 51-percent, at least, of the company, and then he said he'd have a backend of some kind and it would be debt securities, which would be worth the same amount. And so, of course, that was what was then referred to as a front-end loaded tender offer with backend, which came to be regarded, at least by defendants, as junk. And so, the notion was everybody would rush to tender because they won't want to be left with the debt securities.

MR. NOLEN: Unocal was, at this time, also just on the cusp of, as I recall, having its annual meeting. And Mesa – didn't Mesa make a proposal to bring up something at the annual meeting? #00:22:13#

MR. RICHARDS: Yes, it did. And of course, Unocal interpreted its advance notice bylaws as saying that you can't bring it up. And so, I think that was the first action we brought in the Court of Chancery. And then, I guess a meeting – they adjourned the meeting and then well, we said, we'll bring it up at the adjourned meeting, and I believe they said no, you can't do that either. And so, we sought a second temporary restraining order, which we got in the Court of Chancery.

MR. NOLEN: So, I want to take us back to the schedule on which this case proceeded. I believe the case started on April 12, let's just assume it started on April 12. And the complaint at that time, if my recollection is correct, was just a complaint on this interpretation of the advance notice bylaw to prevent Mesa from bringing anything else up. Was Unocal also taking other actions at the time that were intended to prevent Mesa from doing anything? Do you recall? #00:23:27#

MR. RICHARDS: Well, I am not sure what you are referring to. They were, of course, scurrying around, trying to come up with a defense against our offer and ultimately, they came up with their self-tender offer, which was at a much higher price, I think 72-bucks, and which was going to exclude Mesa, which would completely blow Mesa up. I mean it would completely dilute their interests.

MR. NOLEN: Right. And before they announced that proposal, though, I saw in some of the papers that they had gone out to Mesa's banks and threatened Mesa's banks with various legal consequences if they continued to fund Mesa. And they had done other things like that. Was that common in those times for— #00:24:20#

MR. RICHARDS: Yes. I don't know about the particular threats or doing that, but generally speaking targets went out and tried to do everything they could to disrupt your financing and to you know, try to threaten your investment banks claiming that they had conflicts of interest and if you had too many lawyers, threaten your lawyers, saying that you had conflicts of interest and that sort of thing. I mean I think targets did anything they could to make an acquirer go away.

MR. NOLEN: And so, the case started as an attack on the interpretation of this advance notice bylaw, and it was assigned to Vice Chancellor Berger, is that right? #00:25:05#

MR. RICHARDS: That's right.

MR. NOLEN: And the Vice Chancellor heard on a very accelerated basis a TRO motion with respect to that issue, the advance notice bylaw. And granted, a TRO, as I recall. #00:25:26#

MR. RICHARDS: That's right.

MR. NOLEN: Do you remember that part of it?

MR. RICHARDS: Yes.

MR. NOLEN: And it's not really relevant so much to what the case came to stand for, but it's relevant to get a flavor of how these defensive things developed. While that was being heard, you mentioned it a minute ago, Unocal proposed a self-tender offer. Can you describe what that was about? How that worked? As a defensive measure, of course. #00:25:57#

MR. RICHARDS: Yeah...well, their offer was at higher priced than Mesa's offer; I think it was 72-bucks versus 52-bucks or something like that. And it also excluded – Mesa couldn't participate. So, the result of that would be a massive dilution of Unocal and plus a tremendous handicap to Unocal's operations going forward. I remember the testimony about the amount of debt that they would incur to do this and so forth and so on, and their chief operating officer, or E&P officer, I'm not sure which, he testified rather weakly that even though their capital budget would be greatly reduced, I mean more than cut in half and so forth, he reckoned that they could operate through the end of the year. Well, that seemed pretty weak to us.

MR. NOLEN: You were already in April, and he was talking about well, we can make it through the end of the end the year? #00:27:02#

MR. RICHARDS: Yes. But we made that argument to the Supreme Court, and the Court of Chancery and the court didn't seem to be impressed by it.

MR. NOLEN: The Chancery proceedings I guess started on the advance notice bylaw, but they quickly morphed into proceedings on this discriminatory self-tender. An initial feature of the self-tender was that Unocal wouldn't take down any shares under its offer unless Mesa first took down shares in its offer. And that changed some days later, didn't it? #00:27:47#

MR. RICHARDS: Yes, it did.

MR. NOLEN: They agreed to make – Unocal agreed to make its offer not dependent on Mesa taking down its shares?

MR. RICHARDS: That's right. Then they also made another change; I think, initially, the directors and officers of Unocal were not going to – a tender into their offer, and then they decided that they were.

MR. NOLEN: How did that change affect the dynamics? #00:28:15#

MR. RICHARDS: Well, it gave us an argument that the directors were interested because they were going to get this benefit of the $72 offer, and all of the other shareholders were not; i.e., Mesa was not. But that argument, ultimately, proved futile in the Delaware Supreme Court as well.

MR. NOLEN: The discriminatory self-tender was something that had never been tried before, but there was a Delaware precedent that was relevant, wasn't there? There was a case decided by Vice Chancellor Hartnett called Fisher against Moltz, as I recall. And that formed a basis for many of the arguments that were presented to the Chancery Court. And the Vice Chancellor did grant a restraining order on the basis, if I recall correctly, that the directors of Unocal owed a fiduciary duty to all of the stockholders, including the 13-percent stockholder, Mesa, is that right? #00:29:28#

MR. RICHARDS: That's right. That was our principal – we had other arguments, as I am sure we will develop in this conversation, but that was our principal argument throughout that they had a fiduciary duty to Mesa as a shareholder, and in fact, as the largest shareholder, and they couldn't take this punitive step towards us. And that was the argument that prevailed below and the argument that we pressed the hardest in the Supreme Court.

MR. NOLEN: But as you say, there were other arguments. You had a due care argument. Do you recall any of the details of that?

MR. RICHARDS: Well, I do. I mean we – I believe they – Unocal talked about how many hours they had spent in these meetings and you know, it was a long number of hours – eight hours or something and how their outside directors had met separately, and so they had a very elaborate discussion. But it turned out that many of the directors were actually on the phone, and so the transparencies, as they were used in those days, and the slides, and so forth, that they were explaining, which were quite complicated, if you looked at them, they only heard an oral recitation of it. And if I am not mistaken, the guy that wrote the minutes of these meetings, which turned out to be 20-some pages, beautifully written, was on the phone in London and where the meeting ended at 2 a.m., or something like that. So, we were a little bit cynical as to this due care show. But both the lower court and the Supreme Court really brushed that aside, and they said they thought that Unocal had shown due care. I mean, of course, they had their investment bankers there all testifying as to what the values were and so forth.

MR. NOLEN: Now, I saw from the papers and from the opinions that the bankers in these presentations really only talked about their methodology; they didn't talk about the numbers – about how they came up with the numbers except in terms of methodology. I don't think that would pass muster today, but I guess at this time, the court wasn't quite so focused on how the investment bankers got to the bottom line and how much the directors understood about it. Was that your impression? #00:32:13#

MR. RICHARDS: Well, I am not sure why that happened in that case, but I do know that over time, the trial courts became much more skeptical of investment bankers who always seemed to be able to come up with the opinion that it was higher than whatever an acquiror would want to pay. And so, I think the trial courts examined these opinions much more carefully and indeed, to the dismay of the bar from time to time, I think that some of the trial judges came up with their own opinions as to what the companies were worth.

MR. NOLEN: You mentioned also the interest of the Unocal directors in agreeing to tender their own shares. How did that factor into your arguments? #00:33:06#

MR. RICHARDS: Well, you know, of course, Unocal was trying to get the benefit of the approval by the outside directors. I think inside directors were seen at this time as a little bit self-interested because their jobs were at stake, presumably. But they didn't have a direct financial interest but with this self-tender, at this high price, $72 a share, and I think the market price for Mesa was, I forget how far below – I mean, for Unocal was how far below Mesa's, and I think it was in the forties or thirties. So, now they had a chance to get $72 a share for their shares, that is the directors' and the officers' shares. And so, we argued strongly that this made them interested and not disinterested, and therefore they should be deprived of the business judgement rule. And that didn't happen.

MR. NOLEN: Yeah, and of course Unocal's offer was not for a hundred percent of its own shares; it obviously couldn't do that. It was for some smaller percentage. So, anybody who tendered was going to get prorated, right?

MR. RICHARDS: That's right.

MR. NOLEN: And anybody who didn't tender was going to end up with an interest in a company that maybe could make it through the end of the year, as you said the CEO said, or the COO said? #00:34:45#

MR. RICHARDS: That's right.

MR. NOLEN: But all the directors—

MR. RICHARDS: So, you would have paid out 72-bucks and who knows what Unocal would have been worth once you'd paid out 72-bucks, but presumably someplace in the twenties, or lower. So, Mesa, having bought its stock at whatever the prices were at 40, would now have a stock worth 20 or less, or whatever the numbers were.

MR. NOLEN: Right. So, you had due care issues; you had self-interest issues, both by the insiders who were going to lose their jobs, and the outsiders who were going to tender their shares. But those didn't seem to resonate with the Chancery Court in its decision on the temporary restraining order against the discriminatory self-tender. The court really focused on the discriminatory aspect of it that you owed a fiduciary duty to Mesa as well...do you recall—#00:35:51#

MR. RICHARDS: That's right, and, of course, I don't know what went into Chancellor Berger's thinking, other than what she wrote in her opinion, but you can imagine that since she decided she was going to hold for us on the duty that Unocal owed to all of its shareholders, that it wasn't necessary for her to hold for us on these other matters. And I think lower courts try to make their opinions bulletproof on appeal. And I am imagining now, but she may have felt that the safest ground was the grounds that she rested her opinion on and that you could disagree about due care and interest. And especially in the Delaware Courts at that time, in many cases, I think some outside observers may have felt that the Delaware Courts would lean over backwards to find due care and to give the presumption of the business judgement rule to target boards. So, whether Vice Chancellor Berger just didn't like those arguments or whether she thought well, I don't have to get into that thicket because I am going to decide it on another basis.

MR. NOLEN: And Van Gorkom had been decided not too long before that and had created a firestorm of anxiety about where the court was going. #00:37:34#

MR. RICHARDS: That's right, and Van Gorkom really stood out in contradistinction to most Delaware decisions about the exercise of due care by boards.

MR. NOLEN: So, the Vice Chancellor entered a restraining order against the discriminatory self-tender, against Unocal's discriminatory self-tender, and Unocal then tried to take that to the Supreme Court on interlocutory appeal. And what happened then? #00:38:04#

MR. RICHARDS: Well, the Supreme Court said no, they weren't going to take it; they weren't going to certify the questions because a preliminary injunction had been moved and scheduled and there would be a more developed record. And so, they said we're going to wait for that. And by the way, they said there are four questions that we are particularly interested in and that we direct the lower court to answer.

MR. NOLEN: Those four questions are pretty key to understanding where the Supreme Court was going and what people were thinking. And maybe it makes sense for me to just say what the four questions were and then you can tell me what – when you saw that you know, what handwriting you saw on the wall. But the four questions were: first, does the directors' duty of care to the corporation extend to protecting the corporate enterprise in good faith from perceived depredations of others, including persons who may own stock in the company? Second, have one or more of the plaintiffs – and I'll skip over some of the words – in dealing with Unocal or others, demonstrated a pattern of conduct sufficient to justify a reasonable inference by defendants that a principal objective of the plaintiffs is to achieve a selective treatment for themselves by the repurchase of their Unocal shares at a substantial premium? Third, if so, may the directors of Unocal, in the proper exercise of business judgment, employ the exchange offer to protect the corporation and its shareholders from such tactics? And fourth, if it is determined that the purpose of the exchange offer was not illegal as a matter of law, have the directors of Unocal carried their burden of showing that they acted in good faith? Now, those are pretty charged. #00:40:07#

MR. RICHARDS: Yes, there really wasn't any question in my mind when we got those four questions as to the hostility of Justice Moore towards our position. And there was no doubt about it at all because on the certification of the question, which he denied, he had us in his conference room, and he grilled us for about two or three hours with none of the other Justices present, in which he evinced his hostility to Mesa's offer. And indeed, Mr. Pickens was well aware of the fact that Justice Moore regarded him unfavorably based on his judicial and extrajudicial statements. So, that was quite discouraging when we got those four questions. For example, I think a couple of his questions might have been legitimate inquiries, but we regarded his assertion of what lawyers popularly call the "bad man defense" as being wholly out of whole cloth. Unocal had really not raised as a justification for what they were doing that Mesa and Pickens were the worst of the kinds of acquirors you know, bust-up, break-up people who are causing employees to be fired and sent around. I mean there were acquirors who had very bad reputations, and there was a line of cases that said if you really had a bad reputation, that gave the board much more justification for opposing these offers. That defense hadn't been raised by Unocal. And so, that was very discouraging. And as I am sure you won't forget, we had one night to put together what was regarded as the fourth Tassin affidavit, and I think you were the draftsman with Sidney Tassin—

MR. NOLEN: That's true.

MR. RICHARDS: -- and it was about a 20-page affidavit, as I recall, which recited in detail all of Mesa's previous transactions, demonstrating that he never – well, he never acquired anybody or broken anybody up or done anything, and he had never taken greenmail, either. So, that issue was sort of dropped, you know. The court sent the four questions down, but they abandoned that issue in their opinion. I mean they did find, as the lower court found, that Mesa had some sort of a reputation as a greenmailer, but the bad man defense was sort of dropped.

MR. NOLEN: Yeah. Had Mesa, at any point up to this point, asked – made any contact with Unocal seeking a sort of selective repurchase of its shares at a premium? #00:43:37#

MR. RICHARDS: No, no, there was no evidence of that.

MR. NOLEN: Yeah, there was no evidence. So then, the four questions go back. There's a preliminary injunction hearing in the Court of Chancery on depositions and evidence and so forth. And the Vice Chancellor then issued her preliminary injunction opinion and that opinion, if I recall, was completely consistent with her restraining order opinion in holding that fiduciary duty was owed to all of the stockholders, and that included Mesa, and that precluded the selective self-tender. Is that right? She— #00:44:24#

MR. RICHARDS: That's right. And those of us on the Mesa side of the case, considering the internal politics of the Delaware judiciary, we were quite impressed with Vice Chancellor Berger's courage because it was pretty clear that Justice Moore was trying to guide her to a different result, and she adhered to her opinion about the matter.

MR. NOLEN: She did find due care on the part of the Unocal Board, she found good faith on the part of the Unocal Board; she said it wasn't established that Mesa was a greenmailer, but there was reasonable apprehension of the same, so there was a basis for good faith. As you said, she didn't bite on the interest, but she did hold very clearly on this point of not being permitted to discriminate against a single stockholder in making an offer. And that, then, went up to the Supreme Court. #00:45:36#

MR. RICHARDS: Yes.

MR. NOLEN: And just in terms of the schedule on which this happened, her opinion was May 13, I think it's instructive, these dates, her opinion was May 13. The Supreme Court took the appeal, and the opening brief in the Supreme Court was filed on the fourteenth of May; one day later. And the court adopted a schedule when this came up that provided how long for the appeal. #00:46:19#

MR. RICHARDS: Yes, it was, you know, those three or four days that you're talking about I think you were asking me earlier about how these things were managed. How they were managed was I think we got about 15 lawyers present, which was a considerable part of our firm in those days, in a conference room and we divided up all the work that had to be done, including the affidavits and the briefing of the different sections, and then, we did that overnight so that we were in a position to file our papers the next morning. So, it was a very intensive period of time, particularly intensive when you consider that the technology, which exists today, did not exist then. So that putting the separate pieces of the briefs and the other papers together really occurred between 2 and 6 a.m. in the morning.

MR. NOLEN: I do remember that there was not much in the way of memory in the typewriters of those days. That made it a little difficult. So, the opening brief was filed on the fourteenth, the answering brief on the fifteenth, the reply brief was filed on the sixteenth, and oral argument as held the same day, on the sixteenth. #00:47:51#

MR. RICHARDS: I believe that is correct.

MR. NOLEN: And what do you recall of the argument?

MR. RICHARDS: Ha-ha! Well, you know, I recall the argument really quite well. We were talking earlier, this was a very intensive period for me, you haven't referred today, but when we were preparing for this session, we talked about the juxtaposition of this case with the Household case. The Unocal argument, I believe, took place on a Wednesday, and the Household case was argued the following Tuesday. And at the Unocal argument, there was a – well, I should say for the audience that maybe is not as sophisticated - the Household case was the poison pill rights plan, so this became paradigmatic, if you will, defense; and in Unocal, I was representing the paradigmatic acquiror. And so, people wondered if there was some inconsistency between these positions. And of course, there wasn't. Our firm and other firms had decided long before these cases that you could represent both acquirors and targets. And the devices here were quite different. But my co-counsel in Household, Wachtell Lipton, they were concerned about this, and they asked me about it, whether there was some conflict, and then about 10 of them came down to listen to the Unocal argument to see whether or not I would say something or the Supreme Court would say something which would, in their minds, disqualify me as the advocate for the to be followed Household argument. So, that added a little bit of pressure as I was standing up there arguing. I think it's worth saying for people who don't know, unlike most of the Chancery cases in my career prior to this, we would argue these important cases, and the only people in the courtroom would be the plaintiff's counsel and the defendant's counsel, and usually not even a representative of your client. But in Unocal, the courtroom was completely filled with lawyers, not just Delaware lawyers, not just arbitrageurs, but lawyers who had come down from major firms in New York and elsewhere to hear what was going to happen. And the same thing was true the following week in Household, where the argument was held in the Kent County Superior Court courtroom, and there were several hundred people there, and the newspapers; *The Wall Street Journal* talked about the stream of black limousines coming – they made it a sort of a picturesque argument coming into this little town of Dover. And so there was a lot of brouhaha that was surrounding these cases, and it added to the intensity, if you will, of the time.

MR. NOLEN: Yeah, and I think your chronology is even worse than you recall because the argument in Unocal was on Thursday, your argument in Household was on the following Tuesday. And that thing that, of course, intervened was the court's ruling, the oral ruling by the Supreme Court in the Unocal case on Friday. So, you had argued – the appeal had been taken on Tuesday, the appeal was decided on Friday, after full briefing and argument. So, in less than a week, and you had, then, this Household argument, you know, just on Tuesday of the following week— #00:52:15#

MR. RICHARDS: Well, and just to follow up on the possible or apparent conflict between the two positions, I had occasion to review the Supreme Court transcripts in both of these cases, but by the time I, as you say, but the time I got to Household, Justice Moore asked me, he said, well the Unocal decision doesn't seem quite as bad to you today, does it, Mr. Richards? And I said, no, Your Honor, it seems just as bad. And I then—and then I said I'd be prepared to reargue it, but maybe now is not the time. And then I tried to distinguish a rights plan, which in that case, we argued didn't do any damage to the company and was prospective only, to what Unocal was doing and the damage that their self-tender would do to the company, let alone Mesa. So, everyone was very aware – everybody was very aware of these two cases coming to a conclusion at the same time, and it was quite a crescendo, if you will, for what was going on at that time.

MR. NOLEN: I guess you weren't getting much sleep those days? #00:53:32#

MR. RICHARDS: No, no way.

MR. NOLEN: What was your client's expectation going into that argument? If you can tell...

MR. RICHARDS: Well, you know, he – guided by us, you know, hope springs eternal. So, he certainly was hopeful, and you know, he was encouraged by Chancellor Berger's decision. But as I explained to him what we saw as the significance of the four questions, and the general feeling that the Supreme Court of Delaware at that time was a bit more sympathetic to targets than it was to acquirors, I think that changed over time, afterwards, but I can't tell you what he thought, but he was certainly advised that the outlook wasn't encouraging in the Delaware Supreme Court.

MR. NOLEN: And he had a perception of how Justice Moore perceived him, I imagine? #00:54:38#

MR. RICHARDS: Yes, he did, and because Justice Moore had been outspoken, and this wasn't before the event, but I think it's indicative of what his feelings were; is after the event, there was an annual meeting of the Delaware Bar Association. And Charlie Crompton, of Potter Anderson and Corroon, he was the President of the Bar Association, and he invited Boone Pickens to come and speak to the Bar Association because he was this celebrity figure and a very interesting figure. And Justice Moore wrote a letter to all the members of the judiciary suggesting that since Pickens was a frequent litigant in the Delaware Courts, that under the canons of judicial ethics, they should not attend the Bar Association dinner. And that made a number of Justice Moore's colleagues quite angry, and Chief Justice Christie called me up, and he said I will be – I was going to introduce Mr. Pickens; he said, I'll be happy to introduce Mr. Pickens and sit next to him on the podium. And various other judges brought themselves to my attention to say we distinguish ourselves; we dissent from this suggestion of Justice Moore that it would be unethical for us to attend.

MR. NOLEN: That's quite a story. #00:56:19#

MR. RICHARDS: It's really unbelievable, you know, that such a thing would happen. That's the way I felt.

MR. NOLEN: Well, the opinion, of course, of the Supreme Court validated this discriminatory self-tender as within the business judgement of directors and legal to do and consistent with the duty of loyalty and so forth. But the SEC took a different view, didn't it, afterward? #00:56:49#

MR. RICHARDS: It did, and of course, ha, I, you know was asked to speak at various seminars you know, after this and so forth. And the fact that the SEC had adopted the all holders rule, they had proposed it a few weeks after the Supreme Court's opinion, and then they adopted it, making illegal a discriminatory self-tender, I thought established, at least in my mind, what we were saying is that this was an extremely inequitable thing for Unocal to do; i.e., it became illegal thereafter. And I used to mention that in seminars, that sort of stuck in my craw, but it didn't do any good then, it was a matter in the past.

MR. NOLEN: What was the aftermath in terms of Mesa's investment in Unocal? What was the aftermath— #00:57:56#

MR. RICHARDS: Well, of course they were now sort of stuck. I mean after the Unocal was permitted to go forward, we withdrew our offer; therefore Unocal withdrew its self-tender, and the Unocal stock sunk, and there we were, their largest shareholder unable to move forward with what we wanted to do. On the other hand, if there was anybody that detested Mesa, it was Fred Hartley and the Chairman of Unocal and his board, and they didn't want Mesa hanging around as their largest shareholder, thinking up whatever they might do in the future. So, an arrangement was made – and I have forgotten the – it was a device, but that was a tax advantage to Mesa. Mesa sold its stock back to Unocal, but on some terms which permitted or avoided an adverse tax consequence. So, the whole experience cost Mesa quite a bit of money, but they were able to exit on terms that weren't too unfavorable. And I can't remember the exact details.

MR. NOLEN: And then, Unocal itself was acquired later?

MR. RICHARDS: Yes, acquired later.

MR. NOLEN: About 20 years later, so... Well, thank you very much, Charlie. This has been very interesting. I appreciate you spending time with me today and telling these background stories and the background, really, of this era. Thanks very much.

MR. RICHARDS: Yeah, well, it's been fun to go back and think about it again.

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