PROFESSOR ANKER: Before I introduce all of our Judges who were able to join us today, I would like to have a few caveats as to how we are going to proceed.

First of all, in our dialogue with the panel, I want to make clear that we are not going to discuss any specific cases. We are not going to discuss any cases that are pending before either the Court of Chancery or the
Delaware Supreme Court. And we are also not going to discuss any fact patterns that are pending before either of those Courts as well.

Also, we are recording the proceedings here today. We have a court reporter here. So I would ask once again that if you have a question for our panel, please give us your name and please be specific as to whom you are directing your question.

Now I would like to introduce our panel.

We have with us today the Hon. Stephen Lamb, who is with our Delaware Court of Chancery here.

We have the Hon. Jack Jacobs, who is also with the Delaware Court of Chancery.

We have the Hon. Justice Walsh, who is with the Supreme Court of Delaware.

And we have the Hon. Myron Steele, who is also with the Delaware Supreme Court.

Our moderator for this panel, I have asked Justice Walsh to lead off the panel for us today.

Justice Walsh?

JUSTICE WALSH: Thank you. It is a bit strange to be sitting up here with an even numbered panel. You know that if you get a tie vote out of an Appellate Court, it acts as an affirmance. I am not sure what a tie vote will get you in this discussion.

It occurred to me in listening to the last segment that it might be worthwhile for us to ask you a process question. There has been a great deal of discussion, and I was very interested this morning to hear Dean Haynsworth talk about the plethora of statutes that are arising not only in Delaware, but all over the country. There has not been a plethora of decisions. We are all grappling with that problem as in a vacuum.

The process question is, where does the Bar, the practicing Bar, or even the academics, where are they looking for definition? Are they looking for a legislative definition? That certainly seems to be the pursuit that has been in place. And if you are, what is it you want the courts to do? If you get all these hard and fast definitions, if you are able to secure a statutory definition, for instance, of good faith and fair dealing, you will not need us except possibly to apply it. But you certainly will not need us to define it.

So the first question I have to ask you is, what do you want the legislature to do and what do you want the Courts to do?

Dean, you look like you are ready to answer that.

DEAN HAYNSWORTH: Well, that really puts us on the spot, does it not?

Harry Haynsworth from Saint Paul, Minnesota.
I think that one reason why people sought legislative enactment of all these various statutes is that when you look at the rest of the country, not Delaware, there is not much law out there with respect to corporations, much less partnerships. And so the point of the statutes, we have to have some organic organizational statutes to deal with the administrative proceedings and things like that.

But the point of the statute is really beyond that. It is to try to distill the principles that the courts have applied in those areas where you need to have that kind of predictability and you try to put that in a statute. So that when courts have to apply these principles in another state, they have something to go by. They know that those cases, and you try to cite that in the commentary, do apply to this particular statutory formulation. So I think that has had a lot to do with why there has been so much emphasis on statutory law in this area.

I think that the courts are charged with the responsibility of interpreting these statutes and of making sure that the principles, these bedrock principles, that we have been talking about today like fiduciary duties and things like that, are applied, and that if there is any modification, it has got to be clear. It has got to be absolutely clear.

So the courts have a very important policing role, I think, in all of this. But, unfortunately, in many states, you do not have judges who have any experience whatsoever in handling any kind of business or commercial statute.

So it is wonderful that you have got Delaware business organization statutes, and I think you have seen a great deal of emphasis, both the corporate and the non corporate, trying to incorporate the case law that has developed in the last hundred years and then put that in a statutory form and hope that, by taking it back to those cases, the judges in other states will be able to apply these cases and statutes in an appropriate fashion.

JUSTICE STEELE: I thought I might make a comment on this just for a minute.

One factor that is often overlooked in Delaware, by people perhaps outside Delaware more than those inside Delaware, is the role that the Delaware Bar plays in shaping the legislation. The corporate law and the alternative business and the statutory law is not really driven by what someone who wishes to be reelected wants to do to the corporate law or to the Limited Liability Company Act. It is driven by people with expertise in both drafting and litigating those issues on the Delaware Bar.

The facility that gives us is not only people shaping the law who have intimate knowledge of how it operates in the real world and how it integrates with the ideas of the people from around the country, but it also gives us the facility that when the courts get it wrong, because we have had
a difficult fact situation before us, and hard cases still make bad law, the Bar can go to the legislature and quickly get it corrected by legislative enactment.

I suggest that there are very few states who have perfected that kind of streamlined system to the degree that Delaware has. And those states that have copied our corporation law and our other law, and even those that have had by statute adopted all of our case law, still lack a Bar with the expertise we have who can go to the legislature with a tremendous amount of credibility and enact the changes that need to be enacted to suit their business clients and to suit the public policy generally that ought to apply.

So I think that is something we should never overlook.

VICE CHANCELLOR JACOBS: Just a footnote to Justice Steele's comment about the role of the Bar.

I think what should also be underscored is the role of the Bar in shaping the decisions made in litigation. Several speakers have pointed out that when courts decide alternative entity issues, they need to keep in mind, and not lose sight of, the big picture issues, particularly the policy that underlies the statute that creates the entity in question.

The likelihood of a court's success in achieving this in specific cases is, in great measure, a function of the quality of the briefs that we get. And so, litigators who put these questions to us should give us the information that judges need to confront those questions.

One case that I thought was an exceptionally well-written decision where the lawyers had provided all of that information to the court, was Elf Atochem. Regardless of whether you agree or disagree with the result, anyone reading that decision knows precisely what statute drove the decision, and why the court had to reach that outcome given that statute and the particular LLC agreement at issue in that case.

If we are able to get briefs of that quality in all of our alternative entity cases, we will have much greater comfort in what it is that we are deciding.

VICE CHANCELLOR LAMB: I should start by thanking Professor Anker for today's symposium and joining everyone else in commenting on how beautiful and how intelligent and how persuasive she is. And I had not had my chance to say that before.

One thing I mentioned to Vice Chancellor Jacobs a minute ago is something that I have found tremendously helpful in today's discussion is the focus on the concept of good faith. And it really has helped me crystallize what that should or does mean as it is applied to corporation law. And I think at the moment the corporation law is moving in a direction of calling good faith a separate free-standing, equal, fiduciary duty. I found today's discussion of its derivation and its relationship to the other duties
of care and loyalty to be very helpful and I will try to use it sometime in the future.

Maybe we can bring these two areas of the corporation law back into sync with the law in these alternative entities in a way that makes more sense.

I also wanted to note that in all of these sort of discussions that we have been having today, much of it has been out of context of any kind of issue that you are talking about. So are we just talking about fiduciary duties or contract law.

I think I spent most of the day thinking about the application of an action in my court involving one of these alternative entities that deals with a self-dealing transaction between whoever the manager is or the controlling entity of this alternative entity and the entity itself.

And I think you will have a couple of different possible scenarios, one of which is that there will be particular well-written, highly crafted contract terms that will specify how self-dealing transactions should take place. And that might well be because it was always contemplated by the promoter of the entity that there would be a need to engage in self-dealing transactions.

Or it may be either there are no such contract terms or they are incomplete. And so I think there will certainly be—if they are incomplete or they are missing, it will lead to an application of agency law fiduciary duties or even, excuse me, Lou, trust law fiduciary duties, applied by the Courts.

But that leads me to my last observation. I have had a couple of cases recently in corporation law area where companies have been insolvent or on the brink of insolvency. And the law says generally that, one who is a director has fiduciary duty to creditors.

And, yet, when you begin to look at what is proposed by way of some transformative transaction and at the terms of the contract that govern the rights of the creditors, I think it becomes very difficult. I have had a great deal of difficulty seeing or ascertaining what it means to say that fiduciary duties are owed to those people beyond saying that you have to be fair to them.

Take, for example, a convertible debenture that contains no financial covenants at all, and all it really was was a right to convert into common stock at what was hoped to be a bonanza price. And it turns out that, instead of having a conversion rate of $15, the stock is trading at $.10. What is left of the contract terms of that debenture that would lead a board of directors to give the interests of the debenture holders in being repaid their capital primacy over the common stockholders?
It is very hard to apply both concepts (i.e., contract law and fiduciary duty law) at the same time in those circumstances because, you know, you can be perfectly fair to those debenture holders by allowing the board to honor the terms of the contract and to perform a transaction that in the context of that contract is not the least bit unfair.

JUSTICE WALSH: We have a question over here.

MR. VESTAL: Allan Vestal from Kentucky.

I want to go back to something that Dean Haynsworth said about the genesis of this whole process, the idea that we would make it easier to cross state lines to get thoughts about how the laws ought to be interpreted and applied.

I have no doubt that that was originally one of the goals. If it was, though, I would just drop a footnote that we have not done very well on that score, and especially in the area of fiduciary duties.

And one of the reasons we have not done very well, we have crafted a—I am thinking in the partnership area, we have crafted a statute that has not been uniformly adopted. The lack of uniformity in the adoption means things have gotten more complicated, not less, and that the cases coming down are not as easily transportable across state lines. The introductory language in Section 404 starts with, fiduciary duties are limited to.

But we have states that have adopted it with the introduction, fiduciary duties include. Fiduciary duties include but are not limited to.

In that type of context, you have to be very careful about looking at cases in other jurisdictions and try to apply them.

I keep waiting for the big malpractice—legal malpractice cases to start coming down where people have either not thought about the choice of where they are going to form the entity or have formed the wrong kind of entity.

I saw one a little while ago that was publicly reported where it appears as clear as anything from the public reports that the lawyer simply organized this firm in the wrong state and it was a mistake that cost the client somewhere in the neighborhood of $20 million.

We have not seen these malpractice cases and the reason we have not, I think, is that the standard of conduct within the Bar is so bad because nobody understands the nuances of it and no one has done that analysis. I just do not think we have made it easier for practitioners. That is a comment that a number of people have made in different contexts today but that is something I think we ought to be thinking in terms of what the role of the Judge is.

I was rather comfortable with the way we used to do it. I think the reliance on contract is overdone and we have taken in some contexts, we
have taken the thinking, the reasoning of judges out of the process and I think that is unfortunate.

JUSTICE WALSH: I had occasion to say to someone listening to this discussion today that in my experience, the concept of good faith and fair dealing has been most often applied by our court in the employment contract situation. Particularly in cases involving the employment at will doctrine.

It has evolved almost as a last resort as a way of giving the improperly discharged employee something. Carrying that concept over into the litigation I think is going to be very, very difficult. Because that is not your last resort if it is included in the terms of the contract.

MR. KASTER: It was heart-warming to hear your comments about the debenture which was poorly written and, for lack of a better description, the court determined that equity principles suggested that a board of directors play fairly with the bondholders.

With respect to alternative entities, what flexibility do the courts have in applying legislature provisions such as the contractarian principle? I suggest that the policy of looking out for the public is often overreached by business interests. I am speaking of trammeling common law protections in the case of a situation where common sense suggests they are needed as a matter of fairness.

Cases, as jurists know better than I, are not necessarily decided based on the literal wording of legislation. Each jurist has his or her own moral or judicial sense of what is right in determining whether to be a strict constructionist.

And I am wondering Vice Chancellor Lamb, apropos, of what you said concerning fairness as opposed to strict contractual construction, whether you believe whenever fairness requires the courts to protect the individual's common law rights when the contractarian principle has been used to push the envelope.

As I read the Delaware entity statutes, they seem to permit promoters and holders of majority interests to void accepted common law protections. Do you sense that the courts have the inherent ability and willingness to limit the contractarian principle in the context of consumer-investor protections?

VICE CHANCELLOR LAMB: Well, I think our courts—we have done that, if I understand your question. I mean we apply—if there is some ambiguity in the way the document is drafted, in the kind of document you are talking about, which is a document, a contract of adhesion, some promoted partnership.
We construe the terms of the partnership against the drafter in order to protect the reasonable expectations of the people who invested in the partnership. We do not usually call them consumers.

MR. KASTER: The lawyer who was my mentor as I grew up in the law had a gag test when we were trying to decide how to deal with a trying issue. If a contract provision unsettled his sensitive stomach, he would contend that the provision could not be applied literally.

I have never been privileged to practice law in Delaware but as a law school lecturer with respect to alternative entities and as a drafter of agreements I have studied the decisions of the Delaware courts. It seems the courts are struggling with the issues of good faith, fair dealing, and fiduciary responsibility versus the contractarian principle. There has been considerable confusion because of that struggle and perhaps there has been sophistry in seeking to arrive at the appropriate balance between the various parties rights.

It seems to me that there have been cases where the courts have interpreted a provision as a contract issue rather than a fiduciary matter to come to the right decision. For the drafter of an agreement or a litigator, it may be difficult to know what the Delaware courts see as the limits of the contractarian principle.

One of the panelists has said someone making an investment is seeking a profit and should be bound by the terms set forth in the papers, even if they are unduly one-sided and were not negotiated, as in a take-it-or-leave-it syndication where there is no negotiation. Moreover many investors are not sophisticated enough to understand what they are reading or the unit investment in a syndication may not justify retaining counsel to explain the legal technicalities built into the small print.

I recall reading that Alexander Hamilton said the people are a great beast and that government must look out for them. As a member of the Bar, I believe that the contractarian principle should have its limits. Perhaps it is possible for the courts to do a little bit more for the public in evaluating the common law protections overrun by those promoters who have relied on the contractarian principle rather than providing a measure of fairness in their agreements.

VICE CHANCELLOR LAMB: Well, one of the things you have to keep in mind, I think is cases that involve people purchasing a security and complaining about what they purchased does not come to us. Because those are the 10b-5 cases or the '33 Act cases.

We get the cases where the entity is ongoing and there is some complaint about how it is being managed or there is a proposal to merge or there is a proposal for some other sort of self-dealing transaction. So that is when we get the case.
VICE CHANCELLOR JACOBS: Let us focus—most of our fiduciary cases in business entity situations are transactional. But I do think that Mr. Kaster's question brings to mind what someone described as the definition of a liberal in corporation law. In corporation law, a liberal is someone who believes in bondholders' rights.

To shift gears for a minute, I have one question for the practitioners and the academics in this field. That question follows up on Dean Haynsworth's very eloquent remarks of this morning.

I thought the Dean made a very persuasive case that we need to add more coherence to our alternative entity law by having a statute, a single statute that brings all those laws together in some sort of clear way. But then having made that case, Dean Haynsworth then went on and made what I thought was an equally persuasive case that the costs of doing this, particularly the transitional costs, may not make it worth a candle.

I am interested in the viewpoint is of the practitioners in the field about the desirability of having an entity rationalization statute in the various states; and, secondly, how practical it will or will not be to get that done.

MR. KEATINGE: Robert Keating from Denver.

I think that Dean Haynsworth described it—described the sort of strong ambivalence that we all have in this area. I think that it would be a fair statement to say that most of us believe that, where possible, the statute should be coordinated, that is where there is not a principled difference among the various forms. It makes sense for the forms to be coordinated. Where there is a difference, I think most of us believe that the differences should be reflected and continued.

Certainly in Colorado what we have tried to do is to take as many of the sections as we think we can, put them into a hub-like function. And so much of what I refer to as the plumbing, the name, the registered agent, a lot of the sort of ministerial things are being pulled into a central statute to apply to all of the various business forms.

And what we are discovering doing that, what I have discovered working on the project that Ann and Harry are heading up and the one that Bill Clark is heading up, is that as you do that, you begin to get sort of a distilled picture of what the difference between corporations and unincorporated entities is. At that point, I think you find some disagreements. I think Bill—and we have all been speaking for Bill today because we know Bill cannot speak for himself.

Bill, I think, would tend to take more things as being common among the entities than many of us would. But I think that once we have gotten the things out of the way that we can all agree, there is no reason for rules governing filings with the Secretary of State or registered agents or what
constitutes doing business in a state to be different from entity to entity.

Once we have gotten those out of the way, then we get to the point where there is an interesting discussion. And I think the discussion then resolves itself back to the question that Justice Walsh asked in the first place, which is, what do we want to try to codify and what do we—what we recognize is going to be so contextual so that it can only be resolved through the development of case law.

But I think that there is a tendency to say, I would sure like to get the extraneous differences resolved and coordinated so that we can then focus on what I think we perceive to be the true differences and then perhaps try to make some decisions as to whether one of those approaches is so preeminently right that it ought to replace the others.

VICE CHANCELLOR JACOBS: How likely is it that this is going to be effective?

MR. KEATINGE: In Colorado, we have been doing it now since 1997. And we have a single chapter of "associations and corporations" title that continues to grow and everything else continues to shrink. And that is been one way of doing it.

I think that as time goes along, both the conference and the ABA entity rationalization committees are doing something along those lines. And, of course, Texas I think is doing something similar to that. And I think these things are actually going to ultimately occur in a number of states.

JUSTICE WALSH: One of the tensions I see here is a comment made about the malpractice problem.

The tension I see is that the practicing lawyer, particularly the lawyer who is drafting entity documents, wants a statute that he can understand and apply. It is simplistic, if you will. He thinks it fits a situation.

A statute like that tends to be overbroad, tends to be general. It may use terms that nobody has a clear understanding of. You may have a good transactional statute that is going to get you in trouble when you start applying it in litigation. That is a tension I see with what we are trying to do here in the way of statutory definition.

The practitioner is sort of like a lawyer drafting a will for a client. He would love to go into the form book and pick out one that fits exactly and all he has got to do is change the names. But when he has to craft a couple of interesting trust provisions, he gets a little unsure of himself.

MR. KEATINGE: I think that is a valid point. And I think that is what I have seen in my practice, and I would say my practice is probably as close to the ground as almost anybody's here, is that my clients would like something that is simple, certain and absolutely tailored to their every wish.
VOICE: In less than five pages.
MR. KEATINGE: And for less than seven hundred dollars.

And what that—that tends to create a tension that even as transactional lawyers we have to confront. I can give them my fifty page operating agreement or, for twice as much, I can take out all the references that are in there in case they happen to have intangible drilling costs, which they will not in their supermarket.

But in order to deal with the sort of the economies of trying to do what you are talking about, I end up having to give them more than I have to. And that to me is, I think, almost an occupational hazard.

I think that what I am really hoping that all of this leads to is that we as lawyers will do more of what I have heard described very well today. What I take away from today is the idea that if I bring you a document where I have truly defined the agreement of the parties where you can understand what the deal is, regardless of whether we have got waivers of fiduciary duty, regardless of whether the train is going this way or that way, however we want—however we put it together, we truly understand what our clients want, I hear you saying that you will enforce it. And I think that is really what the ultimate consumer of our services and yours is looking for.

JUSTICE WALSH: I think George had a question.

MR. COLEMAN: Yeah. George Coleman, Dallas.

Vice Chancellor Jacobs, to answer your question. In Texas, our bill right now for a unified code, which is a hub and spoke in much the vein that Dean Haynsworth was suggesting, has taken seven to seven and a half years and is now down to a mere seven hundred pages plus comments of another six or seven hundred pages, which causes the legislature, the legislators to gag slightly as they are trying to fathom this thing.

We have had—this is our third time in the legislature with this bill. It seems as though it is going to get passed by at least one of the houses this time. We have gotten it through the Senate last time and hopefully through the House this time and get it passed.

It is, as Bob Keatinge was saying a minute ago, it cures a lot of the plumbing issues and it tries to rationalize or harmonize mergers and other organic changes but leaves the issues that are peculiar to let us say corporations down to the corporations section.

One of my concerns, and I think Dean Haynsworth raised it earlier, is to try and bring this down to the economics so that the less than totally affluent client can afford to have something drafted is in pretty good condition.

And one of those things that I keep hoping we will find is somebody to define clearly what the attributes are that we want to salvage for each of these entities and try to define it in that method.
Now, that may be very simplistic. But I would think that within twenty elements or so, if you compare each of the statutes that we might be able to get to something that is a fairly good catalog and then draft our statutes and draft our hub and spokes from that or to meet that type of specification.

JUSTICE WALSH: Any other comments?

MR. HERING: Lou Hering from Wilmington.

On the issue of the question of fiduciary duties owed to creditors. I think that is a very interesting topic and I am working on a transaction where it helps a little bit to put it into perspective, at least for me. Because it is a situation where there was a buyout of a company a few years ago and things did not go as anybody had hoped. The company is clearly insolvent, but it is not in bankruptcy. And there are actually a lot of companies like that, and those companies are in workout.

And everybody at the table—well, actually, it is interesting—not quite everybody at the table. But I think everybody at the table who understands the situation, or is not posturing to try and get something that they would not really be entitled to, realizes that if the senior debt is not going to be paid in full, then how could you say that any junior stakeholder has any continuing interest.

And so really if the board of directors at that time is continuing to operate the company, as they are, then for whose benefit should they be operating that company? And they are in this situation operating it for—I mean they are negotiating a restructuring to try and save as much value in this company as possible because this company, like most other companies, if you just essentially tried to liquidate it, would raise very little. But if you can maintain the business and restructure it with a lower debt load, then you will get more out of it than any other way. And that is being done for the benefit of the senior creditors.

Now, I think the hardest situation is where—

VICE CHANCELLOR LAMB: And the equity is not going to get anything out of the restructuring?

MR. HERING: Equity is not going to get anything.

VICE CHANCELLOR LAMB: The junior creditors are not going to get anything?

MR. HERING: The junior creditors may get—they may get a little equity.

VICE CHANCELLOR LAMB: How do you get it approved outside of bankruptcy without it going to the stockholders?

MR. HERING: This type of deal would go into bankruptcy.

VICE CHANCELLOR LAMB: All right. So you eliminate the stockholder vote by putting it in bankruptcy basically?
MR. HERING: Well, that is right. I mean we will go into bankruptcy under the absolute priority rule, which says that the stockholders will not get a vote or they will be deemed not to agree if any senior stakeholder is not getting paid in full.

And these kind of transactions are approved all the time.

VICE CHANCELLOR LAMB: Is it not more interesting when you are not going to do it in bankruptcy and you still have to get your stockholders' approval?

MR. HERING: Well, I agree. And I was coming to that. Because this case is sort of easy. It is hard for anybody I think to argue. But some people would. But it seems hard to argue that if the debt, which always goes ahead of equity, is not being paid a hundred cents on the dollar, why should the guy who got common, who bought common for the upside, get anything or any consideration.

But the hard situation is where your company is not insolvent. It is in the so-called zone of insolvency. And there it seems to me that if—if you could reasonably expect that even though you are not insolvent today, if you look at all your projections, you are going to be insolvent several months from now, then it would be—it would be inappropriate for the board to disregard the interests of the creditors and say simply, you know, you have your negotiated rights or, if you are general creditors, you have no rights, knowing that they are effectively going to be the owners of the company in a few months and that is where you just really have to balance and say, we have now, you know—we have people who are not equity but they are, in fact, going to be equity in a few months even though the old equity may still have an interest. Because it is going to have to be a negotiation, as you suggest.

But I think you just then start to consider their interests a little bit more as if they were just part of the equity pool.

VICE CHANCELLOR JACOBS: I think that Lou Hering has made out a good case for having that subject be the topic for next year's seminar.

Just by way of footnote, I was unable to make this morning's segment of the symposium, including Mr. Keatinge's remarks, because I had a two and a half hour oral argument involving precisely the issue of when fiduciary duties rose in connection with a company that went insolvent and was unable to pay its senior debt. The issues are so complex that I ended up having a headache. I was so glad to come here for relief.

JUSTICE WALSH: I might also say that that very scenario was the subject of the Vale corporate court competition this year.

VICE CHANCELLOR LAMB: And also in the recently published Omnicare US Healthcare issue.
I raised it just because I thought it was an interesting way of looking at it and trying to apply fiduciary duties and contract rights at the same time and dealing with the same group of people.

MR. KEATINGE: If I might turn your question around to you. Because I have wondered.

As we are writing, we seem to be codifying more and more, spelling things out more and more specifically in statutes.

As Judges, how do you react to that? Is that helpful or harmful?

JUSTICE WALSH: Well, there was an interesting comment earlier today about the common law. It was always my understanding that statutory modifications are intended to erode or change common law rights. At least that is what I was taught when I was in school. Maybe they teach it differently today.

So it seems to me you look first at the statute. Particularly if the purpose of the statute is to establish a new framework of rights.

Now, you may bring to the litigation certain concepts and in a Court of Equity you are bringing in a broader array of concepts than you would bring in a court of law, for instance, fairness.

But if the effort is to codify, the statutes have to control. That has got to be your starting place. And whenever you are in doubt, I do not think you reach back and apply a common law principle that the statute was intended to supersede.

At least that would be my approach. Maybe some of the other judges think differently.

VICE CHANCELLOR JACOBS: I have actually gone on record with my thoughts on that subject at the University of Maryland symposium. They will be coming out in this May's Business Lawyer.

But in a nutshell, the array of business entity cases that we have gotten, most of them involve cases beginning in 1989. So we have only about fifteen years of experience. That experience includes struggling to find a rule of decision regarding which doctrine to apply in a particular cases involving a particular entity. It is that reinvention, that new analysis that we have to go through every time which is, at least in my view, was fairly painstaking and requires considerable caution. If there would be a way to legislate those ground rules, it would be a lot easier, from my point of view.

JUSTICE STEELE: I could answer it far more simplistically, as you might have guessed; and that is, I favor statutes that make issues easy to resolve. I do not favor statutes that raise additional issues.

And I think that is the problem that we see. And the best example of that is 102(b)(7). If you want to talk about indemnification, ask yourself, how in the world the term "good faith" ever got inserted into that statute.
When you find out how it got inserted into that statute, is an ugly thing to look at. And it was inserted when no one knew what it meant. Now, as a result of being there, we are all trying to figure out what it means. And it has created a cottage industry of its own.

But no one knew when it went in there what it really meant. It was in there as a tradeoff between the plaintiffs and the defense bar and it is a nightmare for us.

VICE CHANCELLOR LAMB: We should amend it and put in bad faith and try that for a while.

JUSTICE WALSH: Okay. It is 5:30.

PROFESSOR ANKER: All right. Thank you very much.