WHAT BUSINESS WILL LOOK FOR IN CORPORATE LAW IN THE TWENTY-FIRST CENTURY

**Presenters**

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**Commentators**

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MR. GOLDMAN: Thank you, Craig. Craig has told us about the first hundred years and we'll try to run through the next hundred years. We have a very distinguished panel with us today and let me introduce them to you. To my immediate right, we have Steven F. Goldstone. Steve is currently chairman and CEO of RJR Nabisco. In another life, Steve was a partner in the prestigious New York firm of Davis, Polk & Wardwell, and during the '80s he had major roles in a number of the nation's largest battles for corporate control. In early 1995, he became the general counsel to RJR Nabisco. He then became the chief executive officer in October of 1995.

Steve will offer us his views on the next century from the perspective of both a Wall Street lawyer and a CEO, which is kind of unusual.

To my immediate left is Richard Agnich. Dick has been senior vice-president and general counsel of Texas Instruments since 1988. He also served as secretary of the board of directors and has dealt with significant corporate governance issues. Dick is president of the Association of General Counsel and has served on the boards of the United States Committee of the Pacific Basin Economic Council — that's a tough one — and the U.S. Korean Business Council. He's also a member of the Advisory Board of the International and Comparative Law Center.
Today he would give us some provocative remarks on the necessary prerequisites for survival of global corporations.

Two seats down on my right, Pierre S. duPont, IV, one of our commentators. Pete is the former two-term governor of our state. He also served three terms in the United States House of Representatives. Milton Freeman has correctly lauded Pete as one of the few politicians in this country who has "consistently stuck to principles." Pete now practices law with the prestigious firm of Richards, Layton & Finger in Wilmington. He is also Policy Chairman of the National Center for Policy Analysis.

To my far right, the Honorable Jack B. Jacobs, familiar to us all, Vice-Chancellor of the Court of Chancery of the state of Delaware. Jack and I began our careers as law clerks to the Court of Chancery in 1967 — a few weeks ago — working for the Honorable William Duffy who then presided as Chancellor. Jack then practiced with the prestigious Wilmington firm of Young, Conaway, Stargatt & Taylor.

In 1985, I believe, he became Vice-Chancellor and during the takeover years, he wrote some of the most significant decisions of that time — some of which I won, some of which I lost — *Ivanhoe v. Newmont,*1 *QVC v. Paramount.*2 He frequently speaks, as we know, at functions for the American Bar Association, the Delaware Bar Association and for Tulane University at its corporate law institute which many of you here have attended.

All right. By way of introduction, in 1996, this little dinky brewing company, Spring Street Brewing Company, became the first entity to have a direct public offering on the internet. It was a very inexpensive situation. In 1999, as we know, technology stocks helped the Dow pass 11,000. This is also the year of the Euro dollar uniting fifteen European currencies. Richard Grasso, chairman of the New York Stock Exchange, has recently acknowledged that the exchange must plan to directly trade foreign stocks, no more DRs, in order to keep pace with the global economy.

So where are we going with all this? Eileen Filliben of my office and myself, mostly Eileen, have prepared a piece that is part of your symposium materials entitled "Corporate Governance, Current Trends and Likely Developments for the 21st Century." It's our crystal ball look a hundred years out. So who can tell that we're wrong? We surveyed the current trends in corporate governance and theorize on the likely impact of those trends.

First, technology is reshaping the way companies raise capital, interact with suppliers and relate to investors. Small companies are now raising public capital with direct offerings on the internet.

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Now, as we said the first one was in '96. There were 35 in '97 and over 250 in '98. Electronic commerce is exploding. If you've gone on Ebay, whatever, $7 billion over the internet in 1999 in goods traded. $327 billion projected for 2020. Companies are now using the internet for annual reports and proxies. So you've got a technology explosion.

Second, you've got globalization. The world is shrinking. Country boundaries are being replaced by boundaries of groups of people who are distinguished by their buying preferences. Nationalism is giving way to interdependence and economic efficiencies. The EMU, European Monetary Union, is being used to unite the currencies of the European nations. The Euro dollar is expected to compete directly with the yen and the American dollar.

And in addition to all this, there is a push for a European company statute to allow companies from different member states to merge.

The third prong to this is corporate promoters are rejecting traditional corporate forms today in favor of those providing for maximum potential private ordering. Promoters of these new entities, the limited partnership and the limited liability company, are writing fiduciary duties out of their agreements and the Delaware Court of Chancery is enforcing those agreements.

Among other things, Eileen and I have predicted the following: That corporate promoters worldwide will seek a new form of entity that will afford maximum flexibility and simplicity. The uniform entity will expand the LLC concept and will further meet promoters' needs. Private ordering will replace statutory requisites and common law duties. As the late Judge Henry Friendly of New York once observed, "The business of business is business." It's not fiduciary duties and it's not regulation.

Unit holders will be willing to concede almost all control in exchange for higher rates of return. The bucks. The entity contract will structure all stakeholder relationships and define the duties, if any, of the managers. It may eliminate all meetings and elections. Conflicts will be resolved by interpreting the contract.

We submit, and this is directed to Delaware, that the jurisdiction that creates, sustains and supports this universal entity will be the corporate governance leader not only in this country but worldwide. It's going to be one economic, one corporate situation.

So much for my thoughts and musings. Let's hear what the real experts that you came to hear have to say about the next hundred years. Steve Goldstone will begin by telling us what he believes business will look for in the twenty-first century.

MR. GOLDSTONE: Thank you, Mike. I'll tell you what I think if you give me the microphone.
Thanks a lot for having me here today. In my former life as a lawyer, I had a lot of happy, or let me say some happy, a lot of challenging moments advising clients with transactions under Delaware law. But I don't want to talk to you really from my perspective as a former lawyer, former practicing lawyer. More a little bit from my perspective as head of RJR Nabisco.

And I also want to caution you, I'm not going to make predictions about what's going to happen over a hundred years. I really want to talk about, in my own view based on my experience over the last few years, somewhat of a fundamental concept. And really it goes to this question of the flexibility that we all cherish so much in the law and in the common law versus a businessperson's need for clarity and predictability.

In my few years, just to back up for a second, at RJR Nabisco, if there is one thing that struck me, it probably shouldn't have that much but it did and it may be because of RJR Nabisco's unique situation, was the powerfully persuasive influence of lawyers in the business world in the United States. Now, I guess that's nothing really new, but because I think if you may have heard or read the DeToqueville in his travels in America, he said that "the power of lawyers envelope the whole of society penetrating each component class and constantly working its secret upon its unconscious patient." Perhaps because it worked in secret or they worked in secret, DeToqueville also noted that "the power of lawyers is little dreaded and hardly noticed."

Well, that, in my view, has changed dramatically to anybody who is a corporate director today or who runs a public corporation today. That power has come out of the closet in the latter part of this century. And the question in my view is will we be better able to cope with this power, this pervasive influence in the next century?

And as for the globalization that Mike just described in the twenty-first century, I think the question is will international business and corporate relationships follow worldwide the American pattern or will the United States have to adjust? And I think just listening to Mike talk about that new corporate form and how set out it will be, how concrete it will be, how predictable, how clear it will be, I think goes to this kind of question I'm asking. Because, certainly, from a businessman's point of view, the wide variations in corporate and business law, particularly between the U.S. and the rest of the world, will make less and less sense. And I'm not even talking about our tort system in the United States. I'm talking about our corporate law system.

It's bad enough dealing with the multiple legal and regulatory systems just in this country, but the problem is obviously exacerbated as transactions involve even greater numbers of jurisdictions around the world and through worldwide mergers, significant numbers of shareholders throughout the world.
Now, here I come back to this point about flexibility because we all learned in law school about the wondrous flexibility and adaptability of the common law and how it was particularly suited to fast-changing economic and business needs. And as a lawyer, I could well appreciate what we were all taught about the advantages of a common law system.

But in the last few years, with my businessperson's hat on, I have to wonder at what cost are we getting all this flexibility.

Now, I'm not a scholar of comparative law, but as I contrast the five-to-ten-page contracts that RJR Nabisco's overseas contracts operating under the civil law often enter into with the fifty or seventy or a hundred page contract that's so typical of transactions here, I wonder whether the advantages of flexibility are worth the price of ever-increasing length and complexity as all of our bright, young lawyers add yet one more clause to their standard forms to deal with the latest pronouncement of Vice-Chancellor Jacobs or Chief Justice Veasey or all of our other colleagues.

It was very exciting for me to be a takeover lawyer in the '80s and I obviously can see it's still exciting to be in the '90s. The development of the law in the Delaware courts in the takeover area was exciting to be part of. Issues relating to poison pills and options and auctions and boards' duties in the takeover context were intellectually interesting and a challenge to any advocate. And I very much recall, like Talmudic scholars, lawyers pouring over every word of the latest Delaware case to try to decipher what those words might portend for the next takeover battle and the advice they'd be asked to give as to whether a particular transaction or action would or would not pass muster under Paramount\(^3\) or Revlon\(^4\) or Unocal.\(^5\) And the list of cases was still getting longer when I stopped worrying about them, or thought I was going to stop worrying about them. But somehow when you become a chief executive and a corporate director, being part of the developing law is not quite as much fun as when you were practicing law.

Just looking at mergers and acquisitions in the U.K., and I know you're all familiar with it and I won't dwell on it, but the rules really are pretty clear and straightforward. You know, English lawyers are always quick to point out that takeovers are governed not by law but by regulation, and whatever you call it, the U.K. code together with the panel that supervises it acts as a British version of civil law. And the principle and rules that govern takeovers for the most part are very clear.

First and foremost, the target company cannot take any action that would "frustrate a bid," i.e., no poison pills, no ESOPs, no stock repurchase

\(^3\)Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34 (Del. 1994).
programs, no sale of assets, no leveraged special dividends unless approved by stockholders. Nor, on the other hand, can bidders create certain techniques that, at least in part, are so much of the takeover seen here.

Now, one could well complain that the British have taken all the fun out of it, and it's certainly no coincidence that where in this country lawyers play such an important part in the M&A process, in Britain, the investment bankers are clearly playing the predominant role. When you have to run a business, whether deciding to make an acquisition or defending against one, don't you think it would be nice to know quite clearly what the rules are ahead of time? Is a director really asking too much if he wants to know whether a particular action is or is not valid rather than if properly presented with the facts, a Delaware court or a Nevada court applying Delaware law, which it might or might not do depending on its interpretation of Nevada choice of law, at any rate, whether some court should uphold the action in question? But only if its own interpretation, for example, of footnote 63 of the Paramount case, is consistent with that of your outside counsel giving you advice. And, by the way, even if Vice-Chancellor Jacobs agrees with you, will Justice Veasey agree with you?

MR. GOLDMAN: Can we look at this a little bit here? First of all, you're saying two things. You're saying today as a CEO, you know what the people in this room, we lawyers, are doing because you used to do it and you used to like it and now you're CEO and you don't like it. So that's one thing.

But the second thing is you're saying you like this English system because it's so clear and essentially the board of directors has no power to do much on behalf of the stockholders. I mean, I think the system that was put into place by our courts here is superior because it allows the directors to negotiate on behalf of the stockholders, rather than getting stampeded into a cash offer which is coercive.

MR. GOLDSTONE: Mike, I'm not going to argue. It's not my point to argue whether the entire comprehensive system works better for shareholders here or in England. Although I will tell you that chief executives of English companies I have talked to do not complain that their shareholders are not well-served and that they're unable to negotiate higher prices.

What they do say is that their directors know clearly what they can do and what they can't do. Let me give you another example, then we'll come back to it. Because what I'm getting at is, and I recognize in this group in particular, this would be controversial. But what I'm trying to get at is as you go and look at the Delaware law as it's going to develop over the next hundred years, and I make no predictions, but my own feeling is a need for more predictability, a need for more clarity among people who are engaging in business transactions is going to be paramount in their choice of law. And
you just suggested it before I got on when you talked about the new form of
corporate transaction.

Let me go on and give you an example with RJR Nabisco. Now, we
didn't have to worry about takeovers at RJR Nabisco after the LBO because
$111 billion, although it was 30 billion at one time, of debt on our balance
sheet is its own poison pill. So we didn't have that kind of problem.

But I want to talk about another issue, because in the takeover
context, while the questions may not always be free from doubt and will
likely depend on a myriad of facts, at least you know what the question is.
But in my own experience at RJR Nabisco, I found that there are times
where directors of a Delaware company cannot even be sure what the
question is much less the answer. And it's not clear sometimes whether a
particular decision complies with one's fiduciary duties to stockholders or
that a court will conclude it will.

And the one that I'm thinking about now is, that we had to deal with,
is whether a fiduciary duty, a board's fiduciary duties, shift or may shift from
stockholders to the corporation as a whole and its creditors if the company
is in the vicinity or the zone of insolvency.

MR. GOLDMAN: You're talking about MGM.

MR. GOLDSTONE: Yes.

MR. GOLDMAN: Credit Lyonnaise.

MR. GOLDSTONE: Yes. And what I'm talking about is, I'm
thinking back and harkening to our own colloquy at our board, and as
business people are listening to lawyers struggle through these concepts and
in the end shaking their heads and going now, what was all this about and
where was it supposed to take us? Because I guess at some times there are
corporations who know when they're insolvent. But what is the zone of
insolvency?

MR. GOLDMAN: It's when you're in the neighborhood.

MR. GOLDSTONE: If you happen to be in the zone, do your duties
shift or do you expect it to balance? And if you're in the zone, how do you
know it? And is it a big zone or is it a little zone or is it like the strike zone?
I mean, does it depend on who's calling balls and strikes?

These are questions we had to struggle with for a long time. And I
can tell you that our lawyers, as they discuss these matters, were as
perplexed as our directors in listening to this, really, I don't think it was a
very, in the end, very enlightening and clear process.

MR. GOLDMAN: Let me just respond to that, if I may, because I
think that it is somewhat clear because what you're talking about is a
footnote in this opinion where a remark was made about considering the total
enterprise including creditors. And the idea was that you are to consider the
total enterprise and not just the stockholders, and that's what the Chancellor
held.
But even in a regular case, in *Paramount v. Time*,\(^6\) when the Delaware Supreme Court was not talking about insolvency or the vicinity of insolvency, it ruled that the board is generally obligated to chart a course in the best interests of the corporate enterprise.

So I suggest to you the tests are quite the same and it's not so difficult. And that it's only when you actually go into insolvency, and that's not like being in the neighborhood or the ballpark or the strike zone or anything else -- when you're insolvent, you're insolvent -- then you've got some duty to the creditors. There is nothing in the *MGM case*\(^7\) that says that there is a duty to creditors or that creditors could enforce such a duty.

MR. GOLDSTONE: Mike, I'm talking to you about my experience as a director of RJR Nabisco with some very fine Delaware and New York lawyers giving us advice on the subject. And, again, just when I mentioned the footnote in *Paramount*, they sure focused on that footnote in that case and we had ages of discussions on these matters and what are contingent liabilities and our lawsuits against the tobacco company, how are they valued and does that put you in the zone, on and on and on and on.

And I guess where I come out on those things -- and, again, this is not a black-and-white issue for me -- but I just suggest to you that without any solutions, but that if predictability and clarity is going to be the goal of a globalizing business world in the twentieth century, I think that your corporate lawyers are going to have to consider whether to sacrifice some of the flexibility inherent in the legal system that you otherwise so cherish.

MR. GOLDMAN: Well, you should have called me. I could have helped you. It would have been over by now. Jack.

VICE-CHANCELLOR JACOBS: I would like briefly to respond to Steve's "big picture" because I think the point is valid. I doubt that anybody in this room would question the premise that we need predictability — clarity — in our rules, so that business transactions may be conducted without significant fear that persons who decide to go forward with a transaction will become subject to the risk of liability.

The problem is that in the system that we, and when I say "we," I mean we in the United States and in the common law world, we cannot attain that level of perfection in all areas at all times. One reality of our judge-made common law system is that the law develops incrementally. Your example, Chancellor Allen's footnote in *Credit Lyonnais*\(^8\) regarding the zone of insolvency is a new development in the law, at least for us. New

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\(^{\text{6}}\)Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1989).

\(^{\text{7}}\)Jedwab v. MGM Grand Hotels, Inc., 509 A.2d 384 (Del. Ch. 1986).

developments give rise to questions and uncertainties, which require time to be worked out in the case-by-case judicial process.

If there is some way to improve on that system, we would welcome any suggestions. To my knowledge, to date no system has been devised that can do that.

For me, the topical question is: will the globalization of business and the continued need for speed and flexibility require changes in the system to eliminate these kinds of uncertainties? And, if that is not done, will the system have to be replaced?

To provide some perspective, it is useful to note that our present system was not an inevitability. It was not predestined that the courts of states such as Delaware and others would be deciding these fundamental questions. The British system, which Steve cites favorably, is an example of a system of adjudication that may be somewhat more predictable, precisely because no adjudication is involved, at least in the corporate takeover area.

We in the United States could have done that. There is no question but that takeovers pose major problems of public policy. Are they good? Are they bad? What size of acquisitions should be allowed or disallowed? In what industries? To what degree should they be regulated and by whom?

It was always within the power of Congress to create some type of administrative agency that would regulate this phenomenon much as the Brits have done. Congress chose not to do that, however, for reasons that I will discuss later if there is time. My point is simply that much of what has happened in this country, where courts and particularly state courts have decided these important questions, may be viewed as somewhat of a historical accident.

But your point is a good one, and it should be addressed on its merits. The question is there a way that we can do better?

MR. GOLDSTONE: You know, Jack, I don't have any disagreement with that at all and I made it clear that I don't have an easy solution to it. I will agree with you that I do find it disconcerting at times, not only in my own company but as a corporate director, to see good people who are willing to serve sometimes in difficult situations. My company is a company that owns a tobacco business and directors who are willing to serve and try to work through the problems that that company has ought to be admired. And they are wonderful people and work hard to do that. And very often you come up with situations where the only way you're going to get answers to these questions under our system is for these directors to be sued. And then in hindsight you will find out what the answer is.

And to me, looking out over a hundred years, I would like to think that perhaps there is a way in this business context we can find more clarity and more predictability.
MR. GOLDMAN: All right. Why don't we turn up the burners a little bit more here with Richard Agnish who will tell us about the necessary prerequisites for survival of global corporations in the twenty-first century and, of all things, will add a point or two on federal chartering.

MR. AGNICH: Thanks, Mike. The best thing about my topic is that no one is actually expected to speak for all of business, though a successful CEO like Steve Goldstone at least has that right. But certainly not a general counsel, even if his client happens to be high tech, global, provide a great shareholder value, and in general on top of the latest and greatest buzz words. So while I have obviously not been so imprudent as to speak to you without touching base with my own CEO, the other CEOs on the board, I have to take responsibility for what I'm saying.

The best thing about being early on the program, indeed, almost first is just that. You have the opportunity to state the blindingly obvious for the first time. All other presenters have to either be quite clever as they state the obvious or actually come up with some new thoughts. As I look through the list of presenters, I may be the only one who might be guilty of stating the obvious so perhaps it's just a problem unique to me.

But at the risk of stating what I think is terribly obvious, flexibility and speed will be necessary prerequisites for survival for global corporations in the twenty-first century. Sound strategy must be added to these for those who wish to move beyond survival and on to success. Flexibility in this lexicon relates to structure and speed to decision making. I don't think that my concept of flexibility is inconsistent with the desire for certainty that we just discussed.

Of course, the competitive advantage conferred by a flexible structure is hardly a new phenomenon. Just over a century ago, a lawyer by the name of Samuel C.T. Dodd came up with the idea of creating a trust in New Jersey to hold the shares of some forty oil companies in Ohio, New York, and Pennsylvania, and the large multistate oil corporation, not too creatively named Standard Oil was born, even while most state laws prohibited them.

Michael Goldman has talked a bit about "private ordering" in his seminar materials and in talking to us he suggested it may well be the contract between investors and operators, rather than law and regulation, that determines the governance of the business enterprises.

In the future, I think my bottom line message here would be if the laws don't provide or permit a flexible framework for business, creative businessmen will.

The thought of private ordering is well worthy of your consideration. After I read Michael's remarks, I took a look at my own company's experience, Texas Instruments, and noted that we've engaged in a number of large joint ventures as a minority shareholder and technology provider, where the technology transfer and shareholder rights agreements governed
the operation of the business to a far greater degree than the corporate laws of the place of incorporation, whether it be Taiwan, Thailand, Italy, Singapore, or China. While these were not public companies, the capital providers there were content to rely on the contractual documents to make the risk/reward tradeoff they wanted, and this even when the contract interpretation, in the event of a dispute, is grounded in neither the investor's country nor the country where the operation is headquartered. Some of the ventures were quite successful. Others less so. But they conducted their business for a decade, changed ownership and changed form without major dispute. In short, they provided flexibility and they worked.

It's hard to believe that forms of private ordering won't continue to be important in the global economy, particularly in Asia and most particularly in China. Obviously, private ordering has appeal to foreigners in China where the rule of law is not terribly powerful. In China, the culture and political tradition tend to separate economic endeavor from the primary interest of the state. Indeed, it sometimes seems that the major impetus for state, corporate, and economic regulation in China comes from sources of capital throughout the world and, of course, American lawyers rather than from an internal Chinese belief that they are for the good of the order.

The thought here is not whether Delaware General Corporation Law should be transposed directly to China or the rest of the world, although in my judgment, they could do a lot worse. Rather, it is that corporations, including those based in the U.S., must have the flexibility to adjust the structure within which they do business to the cultural, political, and economic realities of China, of Asia, or wherever they do business. That's not to say that it isn't appropriate to impose some core value standards, such as the Foreign Corrupt Practices Act considerations, on companies which choose to be based primarily in the U.S. I do suggest, however, that we try not to move beyond a few core beliefs. To do so would hamper greatly the flexibility of companies and thereby render either the regulated corporation or the regulated entity or both impotent.

Before I get ahead of myself, I would like to take a moment and talk about the elephant in the living room: threat of federal chartering. Earlier drafts of my remarks were actually a bit more favorable towards this concept, but I ran into Michael in Tucson and got the impression that if I came out strongly for federal chartering, I would be the first non-New York lawyer to be lynched in Delaware. So I don't want to do that.

By federal chartering, I mean everything from full-fledged formal chartering to a continuing usurpation of corporate regulation by the federal government directly or through the stock exchanges that it regulates. This latter category of "creeping federal chartering" includes everything from the securities acts of the '30s to the current effort to regulate audit committees.
In his book 21st Century Corporate Board, Ralph Ward says, "The idea that world powers like General Motors, AT&T, or Du Pont are granted their legal framework out of a tiny office in Delaware seems ludicrous" — remember, I'm quoting. It's not my words — "especially as we are about to start a new global millennium. Also, federal chartering has a cyclic nature. This suggests that at the very point when the idea seems least likely, we are most certain to begin a swing back toward it."

The current euphoria over stock market gains and the movement, or at least lip service, to a smaller federal government may not make it to, much less through, the twenty-first century. And when there's a downturn in the economy and when those who have invested in internet stocks find they've lost a great deal of money, we're probably not going to look in the mirror and find blame there, but we will seek further regulation of corporations, perhaps even formal chartering.

We shouldn't take it for granted that business will fight against federal chartering. Again, as Ward notes,

"It is easy to see why there could be business support for some form of federal chartering . . . [T]here have been many occasions when big business has seen big government not as an oppressor but as a savior, and it is possible that the future environment could open another such window. If federal corporate certification could supersede state lawsuits, coordinate often contradictory federal regulations, and set clear standards for board behavior, it might well draw new fans from the business sector . . . If federal incorporation could . . . be limited to a uniform, omnibus 'hold harmless' standard for governance, there just might be a future to it."\(^\text{10}\)

On occasion, business has supported preemption of state regulation. For example, business was enthusiastic about the Securities Litigation Uniform Standards Act of 1998 which sought to require that securities fraud class actions be tried in federal court under federal standards. On balance, though, I think full-fledged federal chartering will not occur unless it is the only way out of a debilitating regulatory morass.

MR. GOLDMAN: First of all, I want to say that Jesse invited this fellow here, not me.

What about legislative efficiency? We have here in Delaware a legislature that we can go down to when something comes up and get the

\(^{10}\)Id. at 343-44.
statute changed. They're very responsive to us. Will Congress be as responsive and will Congress act quickly?

Second, we have the Court of Chancery which is one court rendering one set of decisions reviewed by our Delaware Supreme Court as opposed to the crowded federal dockets where you have all these circuits, where you have split views on what's going on. For example, what does a violation of 13(d) mean and can you get damages, can you get an injunction. It's sort of all over the place. You have a situation where the judges deciding your fate in takeovers or whatever are really judges who day-to-day decide criminal cases and decide automobile accidents. As we know, many of these judges would equate the business judgment rule with the reasonable man standard of tort law which says, as we all know, the reasonable man never makes a mistake. I don't think business wants that kind of decision.

For example, let's look at the Model Act. I'm on the ABA committee that drafts that statute. We are changing the law now to try to make it clear for these judges that the business judgment rule is not the reasonable man standard.

Also, in Delaware we have the Division of Corporations, which is very responsive to the needs of corporations. What federal government bureaucracy is going to be as efficient as that?

Finally, we have the Delaware case law. Again, it's one set of courts and one set of judges. It has developed a balance between management on the one hand and stockholders on the other. You take the poison pill, for example. The directors can put it in. The stockholders can't force them to take it out, but the stockholders can throw the directors out of office in the election process. So you've got that balance.

MR. AGNICHE: Well, I feel a little bit like the fellow in west Texas who was a little taken back when he was being accused of murder when the judge noted that we ought to just hold this trial under the tree so we can get on with the hanging.

I think I agree that if I could be sure that my client would be judged under Delaware rules strictly by Delaware courts, it might be fine. But I don't have that choice. Right now I've got that and the complex federal intrusion and other state intrusion. And my only point is that at some stage of the game, granted, I'm not sure what Delaware lawyers and Delaware Bar does about it, but it does represent a threat to the viability of the system.

What you've said about the vagaries existing under federal law, federal regulation, and Congress is true. But two points: One, we have to do it anyway; and second, there is always the possibility that something workable can be crafted. You've seen, even the defense business which we're no longer in, confronted with an impossible morass of regulation where everything was criminalized and people were being suspended willy-nilly, negotiated with the Department of Defense and Justice what
amounted to a private ordering for how we would deal with disclosures of possible violations of contracts without people going to jail.

So as you'll see later on, my conclusion is that Delaware's the place to be. I think we would all be naive to assume that that's not going to come under a fair amount of attack.

MR. GOLDMAN: All right. Let's get to the good part.

MR. AGNICH: Let me switch a little bit and talk about shareholder democracy because in addition to having stepped a little bit on the holy of holies here, I'm also going to come out against democracy. I'm not going to run for office, as you can tell.

It's clear that innovations in information and communication systems are bound to fuel efforts to increase participation, even "direct democracy," by citizens in government and by stockholders in corporations. John Naisbitt places the case for this when he says,

For centuries we have elected people to represent us, to give us voice in far-off forums, and then we have judged how well they represent us . . . . Because we are now in a position to know all we have to know as soon as everybody else knows it — including those who represent us — we do not have to have that kind of representativeness anymore. We don't have to have people on the scene who have the knowledge and information to make judgments for us. We have the same information and knowledge and we are also on the scene.11

I don't need to tell this group that Section 351 of the Delaware General Corporation Law permits a corporation with up to thirty stockholders to be managed by the stockholders rather than by a board of directors. With improved information and communication systems, why limit this approach to thirty stockholders? Why not 300? 3,000? 30,000?

Of course, we all agree there are limits to the value of direct democracy, at least I hope we do. Daniel Ludlow, a university professor, tells the story about his son bringing a rabbit home from elementary school for the weekend. And as he looked at that and thought about the visit, he asked and was curious as to whether there was any chance that additional bunnies might occur during the visit. So he asked his son whether the rabbit was a boy or a girl. His son said it was a boy. Sensing a real teaching opportunity, Dr. Ludlow asked, "How do you know?" His son replied, "The class voted on it."

11JOHN NAISBITT, GLOBAL PARADOX 46 (1994).
It seems clear to me then that even a global village needs a group of elders to lead and watch out for the long-term best interests of all of us, both present and future.

Bill Gates, and while you might not look to Bill Gates for issues of law, at least for issues of technology, I think he's got pretty good standing, made some interesting comments about direct democracies that relates to governments. And I think it applies to corporations as well. He said:

Personally, I don't think direct voting would be a good way to run a government. There is a place in governance for representatives — middle men — to add value. They are the ones whose job it is to take the time to understand all the nuances of complicated issues. And politics involves compromise, which is nearly impossible without a relatively small number of representatives making decisions on behalf of the people who elected them. The art of management — whether of a society or a company — revolves around making informed choices about the allocation of resources. It's the job ... of policymakers to develop expertise. This enables the best of them to devise and embrace non-obvious solutions that voters in a direct democracy might not even entertain because they might not understand the tradeoffs necessary for long-term success.  

There has been, of course, a shift of power to stockholders as concentrations of stock ownership have developed among pension funds and mutual funds and as these funds have increasingly become activists. Peter Drucker saw this in 1975, sees it now as a challenge for business in the twenty-first century. 

"[T]he emerging American theorem that business should be run exclusively for the short-term interest of the shareholders is . . . not tenable and will certainly have to be revised."

Is there any limit on the possible development of direct democracy in the governance of corporations? As the Fleming case in Oklahoma suggests, the limitation may simply depend on what stockholders can put in bylaws. You all know about that case, I won't review it with you, but it does raise the question whether there's any limit on the subject matter of stockholder-adopted bylaws. Some stockholder activists have already

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13Peter F. Drucker, Management Challenges for the 21St Century 60 (1999).
proposed bylaws on repricing of stock options, and on qualifications of directors, including the independence and maximum age of directors.

What are some of the other possible subjects of stockholder-adopted bylaws? Let's consider one scenario. Stockholders amend the bylaws to (1) add a provision that special meetings of stockholders can be called by holders of ten percent — or maybe even less — of the outstanding shares, complete with details specifying timing, notice, etcetera, (2) reduce the quorum required at the stockholders meeting to one-third of the outstanding shares, (3) change the required vote to a majority of shares voted for or against a matter (rather than a majority of shares present at the meeting), and (4) give stockholders, rather than the board, the authority to fix director compensation. Then, from time to time, a few stockholders can cause a referendum to be held about any subject that interests them and, at least in some cases, make the results of the referendum stick through a bylaw amendment or otherwise (e.g., reducing director compensation as punishment for not siding with the activist stockholders).

Presumably, the threat of these referenda would be used primarily to bring pressure on the board to implement the pet desires of activist stockholders.

Another scenario might involve a stockholder-approved bylaw requiring a company's proxy statement and proxy card to include board nominees who are nominated by any group of stockholders owning, for example, ten percent of the outstanding shares. Or, taken a step further, what about a bylaw that limits board nominees to those who are nominated by such stockholder groups?

I would call your attention to an excellent piece in the December issue of the Tulane Law Review that Larry Hamermesh has written called "Corporate Democracy and Stockholder-Adopted By-Laws, Taking Back the Street," which I think is an excellent study.\(^5\)

I will say, from my perspective, and I don't think there's going to be a whole lot of private disagreement on this at least, a tide of stockholder democracy would not be welcome. What's needed is a balance between a short- and long-term focus. As I said, flexibility and speed will be requirements for corporate success if not survival in the twenty-first century, but that's not all. The ability to stick to a sound, long-term strategy, even in the face of short-term problems, is absolutely necessary.

It is not only an appropriate standard but probably a necessary one to insist that a management team develop and pursue the right long-term strategy, one that enhances shareholder value significantly. But it's a bridge

too far to demand that each step along the way increase shareholder value in real time.

I speak to that with some passion. My own client, Texas Instruments, has undergone a fairly radical change in the last three years from an evenly balanced defense/semiconductor/personal computer/conglomerate combination of businesses to a highly focused digital signal processing integrated circuit company. In part as a result, shareholder value has almost tripled over that time. It turns out that the sale of the defense business, the exit from DRAM, and notebook computer businesses, and some strategic acquisitions have been favorably received by Wall Street. But if they had not, would the end strategy have been any less viable? I don't think so. It is a tough but very appropriate standard to insist that a management team develop and pursue the right long-term strategy—-one that enhances shareholder value significantly. It is a bridge too far to demand that each step along the way increase shareholder value in real time. I'd submit to you that without the capability of a board of directors to govern the corporation and allow management to pursue long-term strategies, you would not see anything but focus on the next quarter's results.

One more thing about shareholder democracy. The information and communication systems of the future will make proxy contests much easier and less expensive than is currently the case. With the database of stockholders' e-mail addresses and/or with proxy voting on the internet, a robust proxy contest could be run inexpensively from a home computer. With increased opportunity to select directors of their choice, activist stockholders should not get much sympathy from the courts or legislatures as they pursue other means to influence the management of corporations. They have the ultimate power.

New flexible structures, global corporations moving quickly, and instantaneous communications, all of these are actually here. And to the extent they haven't come to the way corporations are governed, they will. Nevertheless, I think U.S.-based corporations will still seek a known and proven governance framework. I think many of them will continue to look to Delaware. Why?

Delaware is the preferred state of incorporation by business and its constituents because as former Chancellor Bill Allen has noted, it is "a jurisdiction that attempts honestly to fairly balance the various factors that may conduce to the greatest long-term production of wealth."\(^6\)

As long as that continues, there will be great advantage to being in Delaware and to using this framework to provide certainty. But I think we

\(^6\)William T. Allen, *Whence the Value-Added in Delaware Incorporation?*, CORP. EDGE (Delaware's Division of Corporations), Fall 1997, at 2, 3.
will see more movement towards private ordering. Whether to the full new structure that Mike envisions or not, I don't know. And I would also leave you with a thought that if regulation comes from too many sources and gets too cumbersome, business will try and find a way out. And if that way out is through Washington, it will take it.

But for now, Delaware's the place to be.

MR. GOLDMAN: All right. That's a redemption. Let me just say with regard to Fleming, I think a number of us here have written articles and we would take the position that the Oklahoma Supreme Court got it wrong and they went too far because the shareholder by-law advocated there would prevent the directors from exercising their duties. Under Delaware law, the proper balance to that is not to do it that way, but if you totally disagree with the board, you should remove the board. And that's the balance to that. But you cannot inhibit them in the hour of need from protecting the stockholders.

Any other comments on that? Okay.

MR. GOLDSTONE: The only thing I would add there, Dick, is from — I don't know what your experience was at TI, but in the times when TI had its tough road to hoe, but even to all of our ends, RJR Nabisco's ups and downs over the years, many times we had sophisticated long-term institutional shareholders angry with us or do it this way, raise the dividends, do this, do this. But in the end, I think most institutional shareholders recognize they're not looking to manage the business. And in the end, there's always the proxy, there's always removal of the board.

So I find it hard to believe that in the long-run, the drive for direct shareholder democracy is something that is going to get wildly out of hand because I don't think it has the support of sophisticated institutions.

MR. AGNICH: I think you're right. And we found good opportunity to work with those institutions as well. Though I guess I still get disturbed every now and then with thoughts or utterings of constituent representatives and what roles should institutions play in selecting the board. And my concern is that it could lead, when the technology's there, to a more democratic form.

MR. GOLDMAN: Okay. Thank you. Our first commentator, Governor duPont, has some comments on the gap between the technology and the law.

MR. DUPONT: Well, Dick Agnich had enough tinder in there to start a Chicago fire and I'm tempted to leap right into the fray, but let me do it in a little more orderly manner and come at this question of corporate governance in the twenty-first century from a little different perspective.

Now, all of us know that technology is changing the way the world works. We see that in our offices. We see it in our private lives. But let me give a little background because often when you're in the trenches fighting the battles, you kind of don't see the big picture.
To start with, the speed of commerce is accelerating, the breadth of commerce is expanding and the cost of commerce is declining, and all three of those things are happening very, very rapidly. I suppose it’s the fault of Gordon Moore out at Intel who back in 1965 made up what became Moore’s law, and that is that microprocessor technology would double in capacity and halve in costs every eighteen months. That law has been true empirically for thirty years, going on thirty-five years.

In 1972, the best top-of-the-line chip that Intel made had 3500 transistors in it. Today, the top chip has seven-and-a-half million. That, it turns out, is just exactly a doubling of capacity every eighteen months for thirty years.

We all know that sending a letter through the post office takes days or weeks. Sending it by FedEx takes two days. Sending it by e-mail takes less than a second. E-mail now exceeds the use of printed mail by the ratio of about fifty to one. So the communications revolution has been very dramatic.

The same is true regarding the breadth of commerce. Eight years ago there were a million web sites. Today, there are 40 million. $8 billion in online purchases in 1997. $327, according to our research, $327 billion by 2002. Seven percent of the people in America owned stock in 1952. Fifty percent do today and half of those are families with incomes of $50,000 or less. So the economic interest is expanding rapidly across the population.

Finally as to cost, the cost of a bank to cash a check for you manually if you go up to the teller’s window is $1.15. It’s 38 cents if you do it on an ATM machine. And two cents if you do it online. So the pressure to move to technological solutions is very rapid.

All of these things are fundamentally changing the way the world works. That’s happening in corporate law, too. Electronic proxy voting is common, though I find it very irritating that you have to vote each single piece of paper. You can’t somehow accumulate them all and click the mouse once.

Online annual meetings have begun. And I would only say that CEOs had best gird their loins because, as I’ll get to in a moment, that can turn out to be a vicious business. According to the New York Times two weeks ago, small shareholders bound together on the internet to organize themselves and press their claims in a Delaware bankruptcy proceeding. The small shareholder, of course, is always at the bottom of the food chain in a bankruptcy. All these shareholders got together. They added up to about twenty percent of the stock when they were all accumulated and technology allowed them to press their case in court.

SEC filings are electronic, as you all know. Delaware incorporation is easily done online. Chancery Court decisions and pleadings are electronically available. And, lo and behold, even the states are entering the
electronic age. Forty-eight out of the fifty have their statutes online. Pennsylvania and Louisiana for some reason have decided that's not a priority. In thirty-two states you can do some business online, not very much. You can register a car in New York, I am told, if you're very good with the computer. But that is the only state in which you can do that. You can get fishing licenses in a few places, but the transactions are coming.

But now coming to some of Dick Agnich's areas. There's one area of great importance to corporations where virtually nothing has happened in thirty years going back to the 1970s, and that is the area of federal government rulings regarding corporate matters. In general, the time periods for decisions by government agencies overseeing corporations — the SEC, the FCC, the Federal Trade Commission, the Justice Department — the period in which they respond has not changed since the early 1980s. Everything else in the world is getting faster and the government is standing still. Those of you who've tried to get a Hart-Scott-Rodino ruling know that the mills of the Lord grind very slowly in Washington.

The SEC has promised to expedite the registration process for established corporations, but no regs have been issued, no implementation begun. Trying to get a tax ruling in a corporate merger out of the IRS sometimes happens quickly, but more often than not, it's a matter of weeks.

And it's hard to see as the information age accelerates how we can continue this way. Somehow the ruling organizations in Washington have got to come out of the nineteenth century and into the twentieth century if we're going to succeed. Tax rulings are going to have to be made in a matter of days and not a matter of weeks.

And I wonder that we're not going to move, and I'd be interested in Dick's reaction to this, to some kind of a default process whereby you can proceed unless ... I don't think the federal government has any interest or intention of moving in this direction yet, and that's a problem.

MR. AGNICH: It seems that something has to happen. Oddly enough, I picked the analogy of China. The Chinese, I think, helped invent bureaucracy and they certainly have raised it to an art form. As with many central governments, decisions seldom if ever emerge from the bureaucracy.

So what happens is each of the regional autonomies develops its own rules apart from Beijing, or individuals and firms wind up contracting with a Chinese company, which through personal or family relations or otherwise, is able to secure approval apart from a formal process. It's pure grave uncertainty, but you're right, there's a default mechanism there that everybody knows that the central government will be slow to act, so these other networks, much like the Internet, develop around it.

MR. DUPONT: Well, I think that's something as we think of corporate governance in the next hundred years, that needs to be at the top of the agenda.
Two other points: Certainly, the global corporate community is going to have to come to some understandings as mergers between corporations from different cultures become routine rather than the odd transaction.

Another issue that's out there that generally comes up in a consumer context is the challenge of internet taxation. There are 20,000 taxing jurisdictions in America, give or take. And at the moment we have a three-year moratorium on taxation of transactions on the internet.

The challenge here is if you break that moratorium and go to some kind of a national tax system, that that will replace the local tax system. And whether you're for that or against it, it sure is going to be a different way of doing business, and that is something that corporations will need to think about as well.

Finally, two other points: One, the federal charter question. One thing that the technology explosion should have taught us is that uniformity is the enemy of innovation. What we have seen in the explosion of technology is tremendous creative impulses being loosed in the economy and marvelous things resulting from them. Going to some kind of a federal chartering system, of course, stifles innovation and probably would make things worse, although it would make things much easier, perhaps, for the CEOs.

But the good news is that at the moment we're still on a state charter basis and hopefully we will stay that way because federal chartering has some pitfalls.

Let me close with one final challenge and quote one of the real wise men of corporate governance, and that is Walter Wriston, former CEO of CitiCorp. And let me just read this. "Revolutions aren't made by gadgets and technology. They're made by a shift in power which is taking place all over the world. Today, intellectual capital is at least as important as money capital, and probably more so. But the world's accounting system is based on hard assets you can see and feel. We don't book keep intellectual assets. Take the relative market capitalization of Microsoft and General Motors."17 And as an aside, remember, this was written in 1996. So these numbers are quite different today. "Microsoft, which has no fixed assets except for a few buildings in Seattle, has a market capital of $71 billion. General Motors which has a lot of assets, has a market capital of $38 billion."18 And the final sentence of Mr. Wriston's comments, "The marketplace is capitalizing intellectual assets while the accounting profession is not."19

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18Id.
19Id.
I would conclude by suggesting that the general corporate law faces exactly that problem, the problem of the accounting profession. Recognizing that accelerating technologies are changing the realities of corporate governance, the challenge of the corporate bar for the twenty-first century is to facilitate the use of those technologies and help corporations use them to the benefit of their companies and their shareholders.

As someone said at the beginning of our program, they weren't going to be here a hundred years from now to see whether we were right or wrong. But factor in technology: a man named Ray Kerzweil has written a book called The Age of Spiritual Machines.

MR. GOLDMAN: We're going to take Viagra. We'll all going to be here.

MR. DUPONT: Well, you won't have to be. Ray Kerzweil the author of The Age of Spiritual Machines — and that's an interesting title and it's an interesting book -- surveys technology in the past and he says there's going to be more change in the first twenty years of the next century than in the whole previous century. And my guess, speaking at least for the panelists, is that we will be here twenty years from now. So we don't have to wait a hundred years. We only have to wait for twenty.

MR. GOLDMAN: Thank you, Governor.

Let me just point out that state law does need some catch-up work here. Technically you cannot actually have an annual meeting online under our law because it has to be at a place, and cyberspace is not a place.

However, at this time, stockholders are viewing annual meetings online, the first one being in 1996 when Bell & Howell had its online meeting and forty people were present in person and 950 attended on the internet. And as Craig Smith said at the beginning of the program, we're working on things like this now so it's just a matter of time before we have it. Another example would be whether or not electronic consents are valid because they don't have signatures. So these are things that we have to work on.

Let's turn now to Chancellor Jacobs who will look into his crystal ball and tell us about the judiciary of the future.

VICE-CHANCELLOR JACOBS: Thank you, Mike. Before I gaze into my crystal ball, I want to make three personal observations. First, I am the only speaker at the table who has a microphone that wasn't hooked up to anything. Is someone trying to deliver a message to me?

Second, I am fully aware that the worst position for a speaker is to be sandwiched between the audience and the coffee break, so I will be appropriately brief in my remarks. Parenthetically, the second worst position is to have to follow someone as eloquent as Governor duPont, and I will be appropriately humble in that regard, as well.
Third, and finally, Dick Agnish's apology for making comments that he thought might be viewed as obvious was unnecessary. Let me tell you, Dick, that my son frequently informs me that I have a keen sense of the obvious.

Because we judges are restricted in what we can say substantively, I will talk about something else, which we lawyers refer to in the grand scheme of things as "process." Having heard what our other speakers have had to say, I suggest that it would be an incomplete for us to talk about what form the corporation law will take in the future, without also pondering the legal and institutional framework in which corporation law will be administered.

Dick Agnish spoke of speed and flexibility as being the two imperatives that will determine what businesses will survive and flourish in the twenty-first century.

Mike Goldman echoed the same thought in his written materials, which were very well done and which I commend to you. Michael projects that these imperatives will lead to a supranational business organization, or groups to different supranational business organizations, that will be regulated by a supranational court or courts modeled somewhat along the form of system presently being developed in the EU.

Of course all of this is possible, but I submit that the one world/one court concept is at this point a linear, logical projection from trends that at this point in time are only imperfectly perceptible to those of us who are caught up in the cross-currents. To express it in more theological terms, the course of history is linear only to God, who is the one author who knows in advance where we are going. And, history is accessible also only to historians who have the wisdom and brilliance of 20/20 hindsight and who can impose upon the chaos of historical fact some kind of logical or conceptual order of their own choosing.

The rest of us mortals can only guess what will happen. We are more like the ants who are building an ant hill. To the extent ants have cognition and can project what the ant hill will look like, I suppose ants will do that. But, these predictions and projections are woefully limited and subject to forces that they can hardly comprehend let alone control. An example of such a force would be a four-year-old child riding over the ant hill with a tricycle, or a bulldozer coming along and scooping it up along with the other earth to construct a new neighborhood development.

So, if history is any guide, caution and skepticism should be the watchwords in this hazardous business of predicting events of potentially cosmic significance.

In the short time that remains, what I would like to do is to share some few thoughts (perhaps musings would be a better way to put it) about where one component of our corporation law — the dispute adjudication system —
may be heading. My predictions are modest and probably parochial, in the sense that they are made from the standpoint of the Court on which I sit. Quite possibly these ideas will be thoroughly shot down by my colleagues on this panel, but if that happens we would still emerge a lot wiser, with more focused thoughts.

To talk about where we're going, it is essential to understand where the business dispute adjudication system is today and how it got there. Only after having done that is it possible to attempt to relate the macroscopic changes in the business environment to the forces that will dictate changes to the more microscopic dispute resolution system.

For the short-term — which I define as anywhere between five and ten years — one can do that with at least some sense of confidence. But to project for the long-term — which I define as fifty to a hundred years out — the accuracy and sense of confidence recedes exponentially.

So my starting point will be the Delaware Court of Chancery, because that is my frame of reference. The first question is where that court came from and how it got there. It is a historical fact that the Court of Chancery did not exist until 1792 — three years after the U.S. Constitution was ratified. At the beginning point, the court was basically a constitutional court of equity in an agrarian society. It was not established as a business court. Indeed, the Delaware General Corporation Law was not enacted until 1899, over one hundred years after the formation of the Court of Chancery. Even then, no major activity flowed through that court until a confluence of two events took place in the early part of the twentieth century. The first of those was Woodrow Wilson, then Governor of New Jersey, whose administration essentially outlawed large public corporations which took the form of business trusts. The result (to oversimplify) was an outmigration of those entities out of New Jersey and an inmigration into Delaware, as their state of incorporation.

The second event was the Great Depression, which led to a series of financial reorganizations of major corporations. Many of those reorganizations were adjudicated in Delaware because the corporations being reorganized were incorporated there.

My basic point is that our Court did not begin to surface as a corporate law court until the early 1930s — after the Depression and 150 years after its creation. From that point on, however, the Court did experience a gradual increase in business and corporate law cases. That phenomenon was accelerated by another historical accident, which was New York's adoption of a "security-for-cost" statute, which created barriers to the filing of derivative actions and basically encouraged the filing of many of those suits in Delaware. Those derivative suits also furthered the development of corporate law by our court and by the Supreme Court of Delaware.
Even so, our court and, indeed, state courts in general throughout the country did not remain the center of the corporate legal cosmos. By the 1960s, the action gradually became centered in the federal courts. I started law school in 1964 and remember that during my first year, our class received a complimentary copy of the Harvard Law Review, the lead article of which was a piece by a person named Fleischer, that predicted the federalization of the entirety of state corporate law. Fleischer predicted that all of state substantative corporate law would become federalized, primarily under the rubric and through the case law development of Rule 10(b)(5), promulgated by the SEC under Section 10(b)(5) of the 1934 Act.\(^\text{20}\) The reason was that lawyers showed a marked preference for filing their corporate law cases in the federal courts. These were viewed as the courts of choice because state courts perceived as either (1) too slow in resolving these disputes or (2) not sufficiently competent to do so, or (3) overly concerned about the interests of management and insufficiently concerned about the interests of investors. By 1975, the prediction was rapidly becoming conventional wisdom. In that year I had occasion to attend a Rule 10(b)(5) corporate law conference. The CLE sponsor gave the attendees a set of materials, about two inches thick that was basically a compilation of all of the Rule 10(b)(5) jurisprudence up to that point. Again, the prediction was that Rule 10(b)(5) in the federal courts would be "where it was at" in terms of the future development of corporation law.

And that was the state of the corporate litigation world proceeded until 1978, at which point that world was abruptly changed when the U.S. Supreme Court decided Green v. Santa Fe,\(^\text{21}\) which it held that the substantive fairness of corporate transactions that lawyers were then attempting to have adjudicated by the federal courts under Rule 10(b)(5) was not a concern of the federal court system. This system under Rule 10(b)(5), the Supreme Court held, is concerned only with disclosure, whereas the substantive fairness of the transaction is exclusively a concern of the states. The result was a complete reallocation of the corporate law dispute business from the federal to the state courts. A further result of the largely historical accident of that decision was that the Delaware Court of Chancery became one of the most active corporate law courts in the country, because over half of the Fortune 500 companies and thousands of medium and small cap companies were incorporated in Delaware.

Let me pause for a moment to observe that this juncture was a crossroads for both state corporation law in general and corporation law in Delaware. I say that because the question legal scholars were asking at that


\(^{21}\)Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977).
point was whether having been given back this jurisdiction by the U.S. Supreme Court, state courts would adapt to the needs of public investors who felt a greater need for protection? Also, would state courts be capable of adjudicating these disputes in a way that is speedy and flexible? Those qualities, to use Dick Agnish's words, are the imperatives demanded by the business community.

The need for that speed and flexibility, I submit, was accentuated by the corporate takeover movement which, again, by serendipity or historical accident, happened to converge and coincide with these other trends at this particular point in history. The problem with the takeover cases is that the transactions that the courts were called upon to preview required a re-examination of fundamental issues of corporate law that everyone thought had been long settled — the basic relationship between stockholders and managers. That reassessment required and ultimately led to the creation of new ways of looking at that question and the development of new doctrines to deal with the hostile takeover phenomenon.

Our Court, but also the Delaware Supreme Court, rose to that challenge by developing doctrines embodied in decisions such as Revlon,22 Unocal,23 Blasius.24 These and other cases created a new perspective and set of rules designed to strike the balance between the interests of management and of investors within the context of this new phenomenon.

I submit that Delaware courts were able to achieve that balance successfully because they had the flexibility to adjudicate these types of cases in compressed periods of time. I am sure that Steve Goldstone and others who were involved as lawyers in these takeover cases will remember that by their very nature, takeover cases compress one or two years of litigation into one or two months. That reality was exemplified time and time again by cases such as Time Warner.25 I notice, by the way, that Chancellor Allen, who is in the audience, had to decide that complex case within the space of a few weeks. Other examples were the Paramount v. QVC26 case, the Macmillan27 case, to name but a few.

Again, to reiterate, speed and flexibility was, in my opinion, the reason why our Court became transmuted into a business court and was able to develop the way it did in the latter part of the twentieth century.

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In a nutshell, that is how we got to where we are. Can we say that it was planned or predictable? The answer is clearly no. It wasn't predictable in 1792, it wasn't predictable in the 1900s, and it wasn't even predictable in 1967.

That leads me to the final question which is: where are we going? Again, I ask you to indulge me for one moment while I try to distinguish between short-term and long-term trends.

One important near-term trend — and for this I give full credit to my colleague Chancellor Chandler, who is the driving force behind it — our Court will be adapting to the needs of the business and the corporate law community by improving its technology. We already have video conferencing, which enables us to conduct "nationwide" and conference hearings, and relieves attorneys from other states from having to travel to Delaware to participate in an office conference or oral argument.

Chancellor Chandler has predicted that at some point our Court will also have the capability to have online access to briefs and evidence, filed in major cases, so that we judges will no longer have to have large piles of documents physically hand-carried up to our offices in order to review a record. The entire record, including the briefs, in any major case, would be condensed into one or two CDS, which will then be plugged into a computer. With hyperlinking, we would be able to call up and review any document, any testimony developed during the course of a case, and even any decision and its case history cited by the lawyers.

A third possibility — and I admit this is futuristic but it has been predicted by Professor Grundfest at Stanford — is that we may evolve to the point of conducting internet hearings. Now that is something I know very little about, but, as we lawyers say, that shouldn't preclude me from talking about it. What Professor Grundfest has in mind is that if we are truly a global economy, we will be having oral arguments by lawyers located in different parts of the world without their having to travel to one place. The question is how do you do that in real time if the hearing is at 9:00 in the morning in Wilmington and at 2:00 in the morning in Tokyo? Well, that may not be doable.

So one thought is that this process could be conducted by internet communication, where the oral arguments will be presented by lawyers in different parts of the world through the internet system. If the Court has questions, it would propound those questions to the lawyers by keyboard and transmit the questions through the internet. We would get back answers, although perhaps not immediately. By this process, we are told, courts will conduct their proceedings through a "kind" of global communication system. Whether that will happen, I don't know, but it is a great idea.

I believe the major change that will have to occur over the short-term will be faster and cheaper adjudication, because that is a legitimate need of
the business community of which the entire court system should be acutely aware.

MR. GOLDMAN: I guess the Grundfest idea, I heard him express this, was that instead of litigators responding to the judge's questions, he said you would have more intelligent lawyers such as corporate people. They would all get together in a room and they would decide upon this answer. And I don't know how well that's going to work. As the late John W. Davis once said, "No six lawyers can draft anything."

VICE-CHANCELLOR JACOBS: Let me just talk for a few short minutes about the "faster and cheaper adjudication" problem.

This problem is one that has already had real world effects in the form of institutional change. Number one, there has been a movement away from court adjudication of business disputes altogether. Many of you are aware of the significant increase in the amount of ADR resolution of business disputes. The reason is that general counsel and corporate executives want to get these matters decided quickly and much more cheaply than would be possible if they had to process all these disputes through the traditional adjudication systems.

Strangely, however, that movement is also complemented by a parallel movement towards creating business courts in other states, in many cases courts modeled after our Court of Chancery. So the picture is not as clear as one might think.

My own speculation is that there will always be a need for some kind of court adjudication because there will always be cases that are too big, where the stakes are so high, that the decision makers will demand formal adjudication by the traditional system. But the imperative, the tradeoff, if you will, will be that it will have to be done more quickly and less expensively. The challenge for the court system (as distinguished from the alternative dispute resolution system) is whether our Court or for that matter any court can handle an ever-increasing business law case load on the same fast track that it has handled takeovers and transaction/injunction cases. If that is the wave of the future, then we must continue to find new ways to adapt.

Finally, we come to the long-term. This is the shortest part of my presentation because frankly I have no idea where we will be in the next fifty or a hundred years. One issue will be whether courts or some other quite different structure will be the mechanism for resolving business law disputes. Will we go to the British system where administrative agencies, rather than judges, decide these kinds of questions?

The answer, I think, will depend on the macro, political and economic forces that will be at work at this time. The EU is creating supranational corporations, and one predicated effect is that there will be supranational courts. If our country and other countries form a competing economic union
alagous to the EU, then conceivably we may evolve into a system involving a national American or a supranational business law court. Whether or how this will work out, we can only guess.

But what I can say is that history shows that in this area it is perilous to predict, and that the only thing that we can be confident of is that whatever happens fifty or one hundred years down the road will not be linear.

Thank you.

MR. GOLDMAN: Thank you, Chancellor.

MR. AGNICH: One of the comments that was made drove home to me the power of this jurisdiction, and also the frustration we have, and that relates to this problem of intellectual capital being recognized. I think at the root of the current push towards "reform" and the focus on audit committees is a frustration with the way research and development and goodwill are dealt with in acquisitions. And a frustration on behalf, I think, of the SEC that GAAP is not always being followed in the way they'd like. So shouldn't someone step back and ask whether GAAP treatment of intellectual capital is the problem, rather than assuming it's the board's behavior that needs to be addressed? You do that here in Delaware. I don't see it happening in Washington. The frustration I have is that even though you do it here, you can't solve my problem. That really hit home, because intellectual capital is an area TI is always concerned with.

MR. GOLDMAN: Governor?

MR. DUPONT: Let me make one comment going back to the things that several panelists said about online annual meetings. The internet is providing information to people who didn't have it before. It's a hugely empowering technology, but it is also a wild west kind of a place. And the corporate bar is going to have to think through the problems that instant empowerment of small groups of shareholders will create.

It would be very easy on the internet to create bylaws that may not be in the long-term interest of the corporation. Because the internet is such an empowering mechanism and it is so easy to organize on it. So that's going to be a big challenge as we go forward.

MR. GOLDMAN: Yes. And you notice most of the companies that have the internet proxy voting will cut off voting on the day before the decision, because the votes come in so fast and you just can't follow it. Whereas, if you allowed internet proxies on the day of the election, you could be up fifty-one percent and a nanosecond later down thirty percent. So I think the statutes and the bylaws are going to have to deal with this.

We've run overtime and we're encroaching upon your break period. But if there are any questions, we will take them now. Do we have any? Everybody wants their break.

Thank you, panelists, and thank you, audience.