

1 analysis, and just slips right into a broad public-interest
2 test. That -- you know, you have that latitude -- extremely
3 broad latitude -- on all the other issues in this merger.
4 And no court is going to reverse you as long as you show
5 that you've thought through the relevant factors and
6 addressed the relevant arguments. This is on a different
7 plain.

8 MR. BARR: Well, let me --

9 MR. STRICKLING: Could I -- let me follow up on
10 his point, and then -- because you're probably headed there,
11 anyway. But it's something I'm still working through from
12 some of Steve's comments -- which is I'll grant you at least
13 for argument's sake the notion that we could define
14 "affiliate" in the context of 271 perhaps differently than
15 we might define it in the context of a different section of
16 the Act. But on this question of statutory construction,
17 how do we invest "affiliate" with meaning in the context of
18 271 but, yet, say it's going to be a different outcome,
19 depending on how we analyze the specific deal? I'm having a
20 hard time understanding what I --

21 MR. BARR: Well --

22 MR. STRICKLING: -- suppose the statutory
23 construction let us reach a different conclusion -- or, a
24 different definition, depending on what the deal was, as
25 opposed to saying, We will define 'affiliate' in the context

1 of 271, and then we'll apply that definition to every deal
2 that comes before us.

3 MR. BARR: The general rule is that options are
4 not equity ownership. We would say that the -- if the
5 Commission wants to treat something that is an option
6 differently, then there has to be something specific about
7 that option and the context that it's being in that would
8 give the Commission the discretion under Chevron to say even
9 though options are generally not equity ownership, there's
10 something about this option that we think is contrary to the
11 purposes of section 271.

12 So, our argument isn't that you're knocked out of
13 the discretionary realm. Our argument is that, if you're
14 going to argue that because this is an option it's equity
15 ownership, you know, that's knocking you out of the
16 discretionary realm. But if you want to say there's
17 something specific about this option or, you know, something
18 about the control in this context, that -- it becomes a
19 case-by-case analysis. And you'd have to look at what's the
20 property, at the options, and is it a property where there
21 is a likelihood and an ability to discriminate -- which is
22 exactly what Green did -- ability and likelihood of
23 discrimination. And that would be specific to the asset
24 being acquired.

25 MR. STRICKLING: But I want to just say something

1 more general, which is, you know, there have been a series
2 of red herrings thrown. And we haven't argued that
3 ownership is not important and that it's all control.

4 Ownership is certainly one of the -- you know,
5 absence of ownership is certainly one of the requirements of
6 the statute. Our point is that there are well-known indicia
7 of ownership and indicia of what an equity interest is --
8 which is, you know, rights to dividends, the right to vote,
9 liquidation rights and so forth. That is what ownership and
10 that's what equity interest involves.

11 Now, what they've come along and said is the fact
12 that you can sell an option and realize some value makes
13 that option an equity interest, because you're guaranteed to
14 get certain value from it.

15 Our point is that doesn't make it equity interest
16 that then becomes -- boom -- I'm sorry. You're -- you know,
17 you're -- *per se*, you're an equity interest because you can
18 sell it and realize value. What we're saying that might --
19 the salability, which is a characteristic of all options,
20 unless it's specifically provided otherwise, may -- it may
21 raise a policy concern -- the fact that you can get some
22 appreciation through a sale, even though heavy penalties are
23 involved. But it doesn't make it an equity interest. And
24 so what you have to look at does the salability of this in
25 this context create a policy problem.

1 Now, as I said, all options would not -- options
2 are usually saleable, and their value -- their fair market
3 value usually is correlated to the equity interest they
4 stand for; because it is, after all, the right to take
5 equity in the future -- or, a privilege to taking equity in
6 the future. And, therefore, the market in valuing it will
7 look ahead, and they'll say, you know, "We think this
8 might," or could, or will, "be exercised -- if not by you,
9 by somebody." And, therefore, this option has a value that
10 correlates to that.

11 If the mere fact that I can translate an option
12 into its fair market value means it becomes the equity
13 interest, that obliterates the whole concept of an option
14 and the future interest. So, the issue is does the fact
15 that I can sell this and realize appreciation -- does that
16 create a problem here, under this statute? And we would say
17 the answer is no. And I want you to -- the purpose of the
18 statute -- this goes to something you were saying, Paul,
19 which is when we're finished 271 law -- when we get 271, it
20 all states, the purpose of the statute isn't that we start
21 from scratch, that we can't -- you know, that we sort of
22 have to sort of hang out a shingle for the first time and,
23 you know, take the first customer in and start from scratch.

24 We're allowed to jump into the business and, you
25 know, buy any company we would want to at that point. And

1 it could be a company that's been doing business for 20
2 years in the long distance business. So, there's no notion
3 that it's unfair for you to get a head start in that sense;
4 that you can glom onto a company and take in a company
5 that's been doing business.

6 Now the next question arises. Well, is there
7 something wrong with our ability to place an option on a
8 company that says, "Look. If we can get 271 done in five
9 years, which puts a time table on us -- if we can get it
10 done in five years, then this is the company we want to
11 acquire? Now, is there something bad about that under --

12 MS. SILBERTHAN: What about the concept of
13 retroactive benefits?

14 MR. BARR: I'm going to get to that.

15 MS. SILBERTHAN: Because that, to me, is the
16 real --

17 MR. BARR: Okay. I'm going to get to that.

18 Is there something bad about, you know, sort of
19 picking your dance partner, basically, and making -- you
20 know, making a bet, you know, That's the person I want to
21 merge with?

22 Now, we would say particularly where that's a
23 unique company that would -- you know, which there'd be a
24 lot of synergies with us getting, a lot of benefits for us
25 to ultimately get that company. And it's not reproducible.

1 It's not something that we could just say, Gee, if we lose
2 that, we can always go out and buy another one like it.

3 That actually adds to the incentives and steps
4 them up significantly -- the net incentives.

5 Now, is the statute concerned with whether we pay
6 then or pay now? Does the statute say it's okay to pay fair
7 market value then --

8 MS. SILBERTHAN: But what are you paying now --

9 MR. BARR: Excuse me. Is it okay? Does it make a
10 difference whether I pay then or pay now for purposes of the
11 statute?

12 And if -- by the way, the values now and then
13 should correspond, because the value today is a projection
14 of what it's going to be worth five years from now. The
15 current market value, if people are sort-of projecting the
16 business correctly.

17 So, the fact that I prepay an option actually
18 creates a higher incentive for me than if I had the option
19 of walking away from it at the end of five years without any
20 skin in the game. So, the prepayment of it is actually
21 something that creates more incentive.

22 Now the question is --

23 MS. SILBERTHAN: To get through 271.

24 MR. BARR: -- to get through 271. Now, the
25 question is, is there something bad inherently about

1 participating in some appreciation if I sell that option.
2 What is the -- where does 271 come -- you know, what is a
3 bad appreciation versus good appreciation? And what 271 is
4 concerned in is not some abstract notion that, "Regardless
5 of ownership and control -- even if you were never to end up
6 or could end up with it -- we don't want you participating
7 in growth or appreciation in that sector." That's not what
8 271 is about.

9 What 271 is about is, "We don't want you go to get
10 a head start or to do an end run in terms of being able to
11 operate at two levels of the market -- the one in which you
12 have your bottleneck and then the long distance market -- in
13 a way that gives you the benefits of coordinating and acting
14 as one." That's -- that is what you don't want to have
15 happen. That's what 271 is designed to prevent.

16 MS. SILBERTHAN: Can I have just two quick points?

17 WOMAN: Well, I do think they need to -- I mean I
18 think --

19 (Laughter.)

20 MR. COFFEE: Given the offer, I want to stay
21 within my competence, which is the corporate law competence,
22 and not get into 271. But I have heard two broad corporate
23 law statements that I think are just way too over broad.
24 And I haven't addressed them earlier, because I was focused
25 on what kind of option this was.

1 We've heard several times now from Mr. Barr the
2 broad claim that options never confer equity rights. Now,
3 Prof. Gilson doesn't say it quite that broadly. This is
4 even a broader statement than anything that Ron said. I
5 think you got to look at that closely. I think that is
6 wrong. You've heard from me through several declarations
7 that the securities laws generally do consider options to be
8 an equity equivalent. You've heard that under 16(a)(4),
9 13(b)(3); and there're other provisions.

10 I think you should recognize that the SEC is the
11 agency that probably has the greatest expertise in this
12 area, certainly the longest tradition of case law. And the
13 irony is that the SEC originally got its definition of
14 control by looking to the Supreme Court's decision in the
15 Rochester Telephone case, which was construing earlier
16 language -- not 31, but a different provision -- in the
17 Communications Act. So, these things once were very
18 parallel. Okay.

19 So, securities law does tend to view options as
20 equity equivalents. It's not just securities laws. The tax
21 law, I've suggested, has an evolved treatment of options and
22 often sees it as an equity equivalent, and often will
23 characterize debt or options as something like equity.

24 I mentioned quietly a few minutes ago common stock
25 equivalents. This is how the accounting profession treats

1 both convertible securities and options. If they are,
2 quote, "in the money" -- and this is in the money; they're
3 not -- that is, an "in the money" option is one where the
4 option price is near or below the market price, so that
5 there is a gain built in.

6 In this kind of setting, changing one dollar into
7 eight dollars is an "in the money" option, and accounting
8 would treat this as a common stock equivalent. And I think
9 accounting is a very relevant form of expertise that you
10 should look to before you say broadly that equity rights
11 never -- common options never confer equity rights.

12 There's also a point we haven't made previously
13 that actually the bankruptcy code does consider options to
14 give some recognition of bankruptcy and to be a kind -- a
15 subordinated kind, to be sure -- but a kind of equity right.
16 Against that, you've only heard references to a couple of
17 cases that they -- state law cases from all over. They
18 basically tend to involve one shareholder selling an option
19 to another. They don't involve the corporation's issue or -
20 - and that's very different.

21 The case they principally focus on is somewhat
22 ironic. The case that Ron was talking about is Harff v.
23 Kekorian, which says in a very different context that for
24 purposes of a derivative action, the holder of an option or
25 a convertible security does not hold an equity right giving

1 them the right to bring a derivative action. This is a
2 question about a standing to bring a lawsuit.

3 Interestingly -- and I have to point this out for
4 its irony -- the American Law Institute, in a project that
5 Ron was a co-reporter with me on, decided that as a matter
6 of policy that result was wrong. If you look at 7.01 of the
7 American Law Institute, "We reject Harff v. Kekorian. Look
8 at a --

9 MR. GILSON: -- at the entire holding. The court
10 also held that there was no fiduciary duty --

11 MR. COFFEE: Just -- just -- can I --

12 MR. GILSON: -- in that setting, and the American
13 Law Institute did not reverse that portion of --

14 MR. COFFEE: The portion of the case that we say
15 is that even for purposes that are quite remote -- quite
16 remote in terms of whether or not you can bring a derivative
17 action, a holder of options or convertible securities should
18 be entitled to bring an action to test its rights.

19 Now, I don't think the fact that the ALI thinks
20 that Harff v. Kekorian is wrong in other cases -- and
21 there're a number of other cases where they are right --
22 should influence you at all. I think what you should know
23 basically is there were cases going both ways on this point,
24 and basically the Delaware chancery court was construing a
25 very narrow statute.

1 The chancery court was looking at a statute that
2 said a holder of outstanding common stock can bring a
3 derivative action. And they narrowly construed that to say
4 a holder of an option or convertible security is not a
5 holder of common stock.

6 We're not dealing with that kind of statute here.
7 We're dealing with a statute that talks about equity
8 interest. And I don't think you can read a holding that
9 says that you are not the holder of outstanding common stock
10 to mean that you're not the holder of an equity interest or
11 its equivalent. That's a much broader text, a much broader
12 playing field to work with.

13 So, there are a number of precedents that suggest
14 that options normally are treated as conferring equity
15 rights. You have a few scattered corporation cases that I
16 think are primarily dealing with options issues between
17 shareholders to shareholders.

18 On the other side, the other broad statement I've
19 heard is about control -- and again making no references to
20 271; just talking about control. You're being asked to say
21 in this time that the following five elements together do
22 not constitute control.

23 The starting point for this is Ron's basic
24 philosophy, which is you should take these instruments and
25 disaggregate them and say you've got this element and you've

1 got this element. I think if you go back to your early days
2 in law school, you'll remember that property was usually
3 described to as a bundle of rights -- a bundle of rights.
4 Over here we've got this, over here we've got that. And to
5 understand the full, complete rights at issue, you needed to
6 integrate them to understand them.

7 It doesn't in my mind matter whether the right is
8 in the instrument or whether it's a separate contract right.
9 But look at the rights that are possessed here. First of
10 all, an option to have 80 percent that is basically
11 convertible at any time. That alone is preclusive. No one
12 else in the world has any incentive to try to look at this
13 company and take it over, because it knows that 80 percent
14 option will simply make its costs irrelevant, and it will
15 not realize any long-term gain.

16 But with that 80 percent, you've also got the
17 right to appoint the initial management. All of the
18 officers will be appointed by you, and many of them will be
19 former employees of AT&T and GTE -- and already are; they've
20 been identified -- many of whom will have existing stock
21 options with AT&T and will understand where their bread is
22 buttered --

23 SEVERAL: --

24 MR. COFFEE: I'm sorry. I'm sorry. Wrong party.

25 (Laughter.)

1 MR. COFFEE: I'm glad someone's -- shows you're
2 still listening to me. Shows you're still listening. Okay.

3 MS. ATTWOOD: That was the deal you said you
4 wanted.

5 (Laughter.)

6 MR. COFFEE: Besides -- the five elements that go
7 together. And my basic text to you is that you should
8 integrate these rights, rather than always disaggregate
9 them. An 80 percent control option that I think is
10 preclusive by itself; 2) the right to appoint all of the
11 managers, so they're going to be in place, and they're going
12 to know who the mother ship is, in Peter's phrase; 3) you've
13 got not only the board of directors being initially
14 appointed by Bell Atlantic and GTE, but under the latest
15 provision, you now have a staggered board -- which means it
16 would take several years before someone could replace the
17 majority of the board even if they thought that there was
18 some point in doing that. So, staggered boards --

19 MS. ATTWOOD: One of the things -- can you help me
20 with this? One of the things that I've asked about that
21 question -- they say if you really want an independent
22 board, you can't expect to hire somebody and say that
23 they'll be fired after a year, because you won't get an
24 independent board. Can you --

25 MR. COFFEE: I think it's --

1 MS. ATTWOOD: -- tell me --

2 MR. COFFEE: -- just the reverse.

3 MS. ATTWOOD: -- corporate -- well, okay.

4 MR. COFFEE: Just the reverse. People generally
5 will resign even from a staggered board when they see a
6 change in control. They don't want to be in a hostile
7 relationship where management and the true owners may sue
8 them. There are -- roughly half the boards of Fortune 500
9 companies are not staggered boards, so I wouldn't make a
10 statement that directors of all those companies are not
11 independent. I'm talking about the highest level of Fortune
12 500.

13 MS. ATTWOOD: But if you were setting up a company
14 that was spinning off and you were trying to figure out how
15 to have an independent board, would it -- are you suggesting
16 that it would be better to have -- how would you set that
17 board up? Let me ask you that question.

18 MR. COFFEE: I think the problem with the
19 staggered board is -- it depends on your starting point in
20 determining whether or not this company is controlled. I
21 think either the market has control or the original
22 management and founder team have control.

23 The market has a better chance of gaining control
24 if there can be a proxy fight that allows a market insurgent
25 who's dissatisfied with management to come in and take over

1 this company. So, my starting point is the control would
2 either be with the first movers -- the founders who set it
3 up -- or it will be with the market. A staggered board
4 precludes market interference, capital market transactions.
5 And I think the capital market is where you should place
6 your bets if you were looking to find that this company was
7 subject to market checks.

8 It's not subject to market checks, because there's
9 an 80 percent option which makes it simply irrelevant and
10 futile for anyone to see to take this company over. And
11 it's got a staggered board that means even if someone was
12 willing to take it over for the short run, like a Carl Icahn
13 -- suppose we have a market irritant who wants to do a
14 smaller acquisition and try to take control through a proxy
15 fight during the period that there will be no conversion.
16 That person also can't do this because of the staggered
17 board.

18 Now as far as approaching --

19 MR. BARR: Excuse me.

20 MR. COFFEE: -- management --

21 MR. BARR: Are you suggesting the test of whether
22 we control a company is whether someone else can come in and
23 take it over?

24 MR. COFFEE: I think control has to be somewhere -

25 -

1 MR. BARR: Control is whether we control the day-
2 to-day operations. Obviously, the whole purpose of the
3 option is that, ultimately, we want to acquire --

4 MR. COFFEE: No, I don't --

5 MR. BARR: -- the company --

6 MR. COFFEE: -- suggest that -- when you put
7 things in place and make it impossible for anyone else to
8 change that, you continue to perpetuate --

9 MR. BARR: --

10 MR. COFFEE: -- the original control.

11 MR. COFFEE: Well, I think I am answering the
12 question.

13 MS. ATTWOOD: But you have to separate --

14 MR. COFFEE: The elements that I'm saying are here
15 -- is you originally put the officers and directors in
16 place. And you have no incentive to choose the most
17 independent, difficult, idiosyncratic people who will fight
18 you. The officers in particular know where their bread is
19 buttered. They now know -- the market itself, which could
20 challenge this, sees an 80 percent option and a staggered
21 board. That also is preclusive -- meaning there can't be a
22 challenge.

23 And, finally, there are two other factors. We
24 have these investor protection safeguards which may be
25 normal in an ordinary merger, where you're talking about a

1 three- or four-month period. They're not so normal when
2 they're extended for five years, because that means that the
3 business policies of this company -- whether it will pay
4 extraordinary dividends, whether it will engage in major
5 sales, whether it will engage in mergers -- are, in effect,
6 contractually subject to the control of the original party
7 who put these events in motion. You're still retaining that
8 strength.

9 When I talk about property as a bundle of rights,
10 one of the rights of the contract -- rights you have people
11 saying you can't change basic, fundamental benefit policies.
12 There has to be continuity.

13 And, finally, even if the staggered board wasn't
14 enough, you now have this sort of poison pill provision that
15 says no one else can control more than 15 percent. Because
16 in my analysis control is really only open when it's
17 contestable. Control is going to remain with the original
18 founders who created this company and have the 80 percent
19 right to reclaim it.

20 This is consistent with the securities laws, too,
21 which recognize even if there was an independent board, a
22 current shareholder who owns 90 percent will be in control
23 even if every director is independent; because that 90
24 percent control gives you real control, and no one's going
25 to resist it.

1 Putting those five elements together, I've got to
2 tell you this is a fairly clear case for saying these
3 elements together warrant control. If this doesn't do it, I
4 don't know what else can.

5 MR. BARR: If no one minds, I'd like to respond
6 just briefly --

7 MR. STRICKLING: But why don't you -- I'm sorry.
8 I didn't mean to interrupt you.

9 MR. BIRD: It's a somewhat different issue -- it
10 really goes back to something Prof. Coffee was getting to,
11 the trouble here, creating a dangerous precedent -- and it
12 was unnecessary because there were other ways this could be
13 done.

14 MR. COFFEE: Yes.

15 MR. BIRD: You didn't go into detail what those
16 other ways were, but one question I have is since the --
17 capturing the interim appreciation -- we'll call it the
18 interim appreciation was one of the things that convinces
19 you this is not a lofty offensive.

20 A big part of the equity, probably that will not
21 bear? Would this be alright?

22 MR. COFFEE: Let's put it this way. Let's count
23 the factors I was looking at. If the only option here were
24 an option that allowed you to buy control -- 80 percent --
25 at fair market value on the date of exercise, at least the

1 following elements would be different. It would not be
2 costless, it would not be riskless; and it would be
3 contingent, rather than non-optional.

4 Those are significant differences. There'd still
5 be questions about what you're going to do with its 80
6 percent earnings, but it looks like that's going to be --
7 there's going to be an attempt to erase that from the
8 picture.

9 So, the nature of the option would be
10 significantly different. An 80 percent option is still a
11 very strong factor that means control would not be
12 contestable, but it would be a different picture.

13 MR. BIRD: I have a question for Bell Atlantic,
14 which is -- I agree that it's a greater incentive to have
15 not only the option of capturing the company, but the --
16 capturing the interim appreciation. But in terms of the
17 incentives under 271, is that -- first of all, is that a
18 necessary incentive?

19 And, second, since you get the appreciation as
20 long as you meet the test within five years and get the
21 accumulated appreciation for all five years, is there any
22 possible disincentive to do it sooner than you have to, as
23 long as you get the whole increased incentive at the end of
24 the period -- as long as you meet -- as long as you cross
25 the finish line and get everything.

1 So, why cross it after two years?

2 MR. BRADSHAW: We're not saying that the incentive
3 is the appreciation in the company, in the option. We're
4 saying that the incentive is the incentive to get that
5 particular business back so that you can integrate with it
6 and get the benefits that 271 holds out as the reward, or
7 the carrot, for the BOC who complies with the checklist, for
8 example.

9 MR. BIRD: But you would have that incentive
10 whether or not you --

11 MR. BRADSHAW: That incentive is there --

12 MR. BIRD: -- appreciation.

13 MR. BRADSHAW: -- and here it's powerful because
14 of the unique attributes of this Internet company that we
15 would like to get back, integrate with the rest of the
16 company and get a large portion of the synergies -- the
17 vertical synergies -- that we think will benefit the
18 company.

19 So, it is the data strategy of the new company.
20 And if it can't succeed in getting through 271 and quickly
21 getting that asset back and integrating it and achieving
22 those benefits, then it loses its data strategy, it loses
23 the -- I mean I think that's very analogous in that sense to
24 what was at issue in the Qwest-U.S. West order, where you
25 had the network of Qwest that had been built out across the

1 country, and now they're not able to provide the retail
2 service in U.S.-West territory.

3 And the Commission said it creates a powerful, new
4 incentive, because they want to be able to get to 271 in
5 order to actually realize the integrated synergies of having
6 that network. It's -- in that sense, it's analogous.

7 MR. BARR: But there's also a phase -- carrot and
8 stick -- going on, which is that the whole notion is that
9 there are synergies -- both the negative and the positive
10 ways. There are synergies involved if we can operate
11 together and joint market. And we lose forever every year
12 the synergies, you know, on a state-by-state basis. Can't
13 get them back to the extent we are delayed in getting 271 in
14 each state.

15 MR. KEISLER: But that incentive is going to exist
16 whether they recapture it at the market price or no price.
17 I mean right today, Bell Atlantic wants to have a
18 nationwide, interlata data business. If they don't do this
19 transaction, Bell Atlantic has an incentive to get under 271
20 to get that business.

21 If they do this transaction, Bell Atlantic has the
22 same incentive to want to get in and get that business and
23 do that business. And if they recapture at the market price
24 versus recapture it at no price, they have an incentive to
25 get Genuity back and do that business. That doesn't

1 distinguish our alternative, which takes away the
2 appreciation value, from theirs.

3 MR. BRADSHAW: Well, two points on that. First of
4 all, the incentive is much greater in this situation than in
5 the situation of you simply divest it completely and then
6 five years from now or four years from now, you have to go
7 out and find whoever -- whatever potential partner is
8 available to acquire. In one sense, it has to do with the
9 uniqueness of this particular business, but in the other --
10 which would be lost forever to us if we didn't get to 271.
11 In the other case, it has to do with the simple thought it's
12 the difference between, "If you don't do X, you can't have
13 children," and, "If you don't do X, you won't get your
14 firstborn back." I mean there's a greater ince- --

15 MS. ATTWOOD: Don't give us those choices, okay?

16 (Laughter.)

17 MR. BRADSHAW: In the latter case, the incentive
18 is much greater. And that's sort of the point.

19 MR. KEISLER: But the analogy is unfair, because
20 there's an emotional -- I mean -- no.

21 (Laughter.)

22 MR. KEISLER: The reason is -- well, there is an
23 emotional attachment there.

24 MR. GILSON: Actually, the -- I'm actually quite
25 pleased that I waited, because the interchange that's just

1 taken place was really what the -- what's at issue here --
2 the relationship of this transaction and the goals of 271 to
3 open up local markets.

4 Having said that, I want to at least track where
5 Jack seemed to summarize the view of corporate and related
6 areas with respect to options. Taking the evidence most
7 favorably to my friend, what we find is a list of different
8 statutes which treat options in different circumstances in
9 different ways.

10 Hart-Scott-Rodino treats them in one way. Hart-
11 Scott-Rodino treats it that way because of the purposes of
12 Hart-Scott-Rodino. The Securities Act treats options 180
13 degrees different than Hart-Scott-Rodino because of the
14 purposes of the securities law. Accounting treats ownership
15 and when you have to account on an equity method, or any
16 other method, based on a set of concerns that relate to
17 generally accepted accounting principles. Bankruptcy rules
18 will disregard an option or regard an option under
19 particular circumstances that depend on the policies of the
20 bankruptcy laws.

21 Corporate law -- and let's take the opinion that
22 Jack found ironic. There are two parts to that opinion.
23 One dealt with whether a bond holder with a convertible
24 right was really a stockholder for purposes of bringing a
25 derivative suit. The court said no. The portion of the ALI

1 judges that Jack described came out the other way. But the
2 other portion of the opinion dealt with whether the board of
3 directors owes the holder of a convertible interest that
4 classic equity right that is a fiduciary duty. In that
5 respect, the court said no, they didn't. And on that issue
6 they ALI judges came out the same way.

7 The point -- what we've identified -- Jack and I,
8 being diligent fellows -- is a lengthy list of circumstances
9 in which different state and federal regulatory schemes
10 treat options in a fashion that relate to the purposes of
11 that particular regulatory scheme.

12 MS. JOHANA MIKES: But can you expand upon the
13 underlying rationale of the precedent that you cite for
14 saying options are not equity? And isn't it the speculative
15 nature of the instrument -- or the future conversion?

16 MR. GILSON: No, to be honest. I think it's -- We
17 have to take it statute by statute, but it's a -- well,
18 first, let's start with a speculative right. This option is
19 treated as if it's constantly convertible. Jack said
20 basically "convertible at any time." I think that was his
21 language.

22 The option isn't basically convertible at any
23 time. The option is convertible by Bell Atlantic only on
24 satisfaction of the basic interests of section 271. That is
25 they can exercise that option to convert when they've opened

1 up all of their markets, as section 271 wishes to encourage
2 them to do. So that there is a speculative nature -- let me
3 put it this way. There is a significant uncertainty with
4 respect to the convertibility of the exercise option.

5 MR. KEISLER: Can we clarify that?

6 MR. BARR: Can I interject here. I want to answer
7 precisely the question. The difference between an option
8 and a contract is that a contract obliges me to carry it
9 out.

10 The legal definition of an option -- and this is
11 just simple, black-letter law -- is that it's a privilege.
12 It's at my discretion. So, if I contract to buy your house,
13 I have to buy your house. If I have an option on your
14 house, then I don't have to; I have a right to -- if I want.
15 Now, you will find in black-letter law that that is the
16 characteristic of an option. And that is the only
17 contingency. That contingency as to whether I will or will
18 not is the only thing that makes it an option. The fact
19 that it is vested; the fact that it is immediately
20 exercisable and has positive net value; the fact that, you
21 know, the whole world can predict that, as a practical
22 matter, I'm going to do it. That doesn't make it a non-
23 option. It is an option.

24 Now, our option actually has a condition precedent
25 that makes it far more contingent than options generally.