THE COLOR OF MONEY

THE FIRST-EVER PROXY FIGHT FOR CONTROL OF A NATIONAL BANK

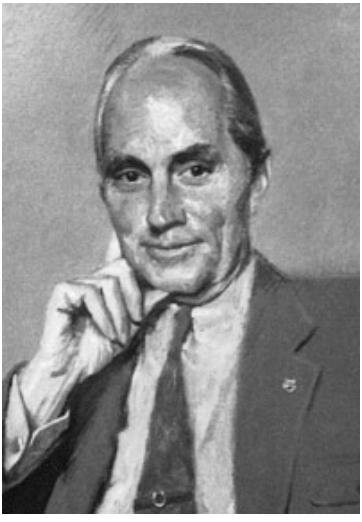
Allan B. Ecker

THE SECURITIES AND EXCHANGE COMMISSION has evolved sophisticated, well-considered Proxy Rules governing proxy contests for companies that are listed on the New York Stock Exchange. The Rules are designed (1) to bring about "transparency," that modern business *desideratum*, from the players, and (2) to level the playing field on which the "Fight for Control" is waged.[1]

National banks – that is, banks chartered by the United States, and not by a state government – are regulated and supervised by the Comptroller of the Currency, a non-political federal official headquartered in Washington, DC. In 1969, the Comptroller of the Currency, William B. Camp, had no Proxy Rules. For good and sufficient reason: Until I started one that year, there had never been a proxy contest for control of a national bank. Camp, a Treasury Department career official appointed by President Lyndon Johnson (a Democrat) three years earlier, would in time be renominated by President Richard Nixon (a Republican).

Allan B. Ecker was a Paul, Weiss associate and partner from 1953 to 1977.

[1] The late David Karr, a friend who was a well-paid publicist for Big Business, wrote a book of that name describing proxy contests in which he played a key role. To my amusement (and his), I ran across Karr's book in the "Cowboy Westerns" section of a Rome bookstore.



William B. Camp served as Comptroller of the Currency from 1966 to 1973. He is the only Comptroller in the history of the office (which dates to 1863) to be nominated by a President of one political party and renominated by a President of another political party.

At the time, I was a Paul, Weiss, Rifkind, Wharton & Garrison partner. Steven J. Ross, CEO of Kinney National Services, Inc. ("KNS"), asked me to conduct a proxy contest aimed at taking control of North Jersey National Bank in Hackensack, NJ. In existence since 1889, the Bank was enjoying great success in the increasingly wealthy suburbs.

To provide transparency and to level the playing field, I urged the Comptroller, in regulating the fight for control of the Bank, to apply the SEC's Proxy Rules, "as nearly as may be." Grateful to be furnished with a ready-made, practical, and explicit standard, Comptroller Camp swiftly agreed.

The proxy contest came about this way:

Originally, the law did not permit a non-bank to own a bank. Then Congress amended the Bank Holding Company Act to permit a corporation – a "bank holding company" – to hold the stock of only one bank, but also of one or more non-banking businesses. The bank holding company would be regulated by the Federal Reserve Board and (in the case of national banks but not state banks) by the Comptroller of the Currency. Steve Ross, whose diversified and growing KNS conglomerate was engaged in the funeral, car rental,

car parking, industrial cleaning, and wallboard businesses,[2] saw an opportunity. Ross hoped that owning a national bank might make it easier to secure credit for acquisitions,[3] and would introduce the multiplex Ross enterprises to a new cast of customers, suppliers, and co-venturers.

Ross's first step was to sign up a prominent, hands-on banker, Charles A. Agemian (pronounced: "Adge-a-Main"), whom he eased out of a well-earned retirement. Then 60 years old, Agemian, born in Syria, had begun his banking career in 1927 at the bottom, as a bank messenger. But in time Charlie, by combining brains, ambition, a strong aptitude for financial arithmetic, and a heady dose of personal magnetism, worked his way up to important positions as Cashier and then Comptroller. Later Agemian earned degrees from The American Institute of Banking and Stonier Graduate School of Banking at Rutgers University. By 1963, Charlie had risen in the profession to the very pinnacle: Executive Vice President of David Rockefeller's Chase Manhattan Bank.[4] (A name-dropper, Charlie always referred only to "David," borrowing Rockefeller's importance by the implied intimacy.) Ross knew that naming Agemian as his lieutenant would provide instant credibility in the banking community. Moreover, as a Rutgers graduate, Agemian had roots in the New Jersey soil.

Ross's second step was to ask me to organize a "shell" national bank, to be called Hackensack National Bank & Trust Company. The Hackensack had no customers, no deposits, and no loans. Its sole reason for existence was to be the legal vehicle into which the

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[2] That same year, Ross acquired Warner Bros.-Seven Arts Inc., and changed the name of KNS to Warner Communications Inc. – soon to be a major entertainment and communications company. See my article about Steve Ross and Frank Sinatra, "Chairman of the Board," at 12 GREEN BAG 2D 153. In short order, Ross profitably divested the original miscellany of service businesses, at the rate of one closing a month for five months.

[3] Regulatory prohibitions and limitations on related-party transactions would prove to frustrate Ross's hope largely or entirely.

[4] Bankers liked to quote Agemian's early-warning system for making loans: "If the potential borrower doesn't haggle over the terms of the loan, then don't make the loan. That means he doesn't intend to repay."

target going concern, North Jersey National Bank – and all its customers, deposits, and loans – would be merged, under the new Hackensack name, if the Ross-Agemian side prevailed.[5] There were two issues on the ballot: (1) the election of a Board of Directors (the incumbent slate *vs.* the rival slate nominated by Ross and headed by Agemian), and (2) the approval or veto of an Agreement and Plan of Merger that I had drafted.

The predicate of a successful proxy contest is that no one person or group owns outright, or has voting control over, a majority of the shares. North Jersey's principals had once owned a majority of the national bank's shares, but, in order to raise needed capital, had issued so many shares to the public over the intervening years that the principals now controlled only a plurality of the vote. In private transactions, KNS purchased a substantial number of the outstanding shares – the essential ticket-of-admission to the proxy contest.

Now, as stage manager, guided by the strategic advice of Steve Ross and the tactical banking savvy of Charlie Agemian, I went after the Big Middle: the uncommitted voters. At first, North Jersey's principals declined to make available the names and addresses of the shareholders – an essential tool if the Ross-Agemian side expected to garner a majority. Because there was then no well-developed federal corporate law, I persuaded Comptroller Camp to apply New Jersey corporate law by analogy. State law provided that any shareholder (such as KNS), on payment of a fee, was entitled, in connection with an annual or special meeting, to demand and receive a list of all shareholders. We got the list.

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[5] The idea of using a shell bank as a technique for acquiring an existing bank has found renewed favor in the context of the recent wave of bank failures (97 between January and October, 2009). Encouraged by the Federal Deposit Insurance Corporation, private equity funds have organized "inflatable banks" – shells into which failed banks are then merged, with a fresh infusion of capital by the private equity funds. As with the Hackensack, a key factor in the success of such bank reorganizations is the ability of the private equity funds to find well-qualified, experienced bankers and lure them out of retirement to take charge, as Steve Ross did with Charlie Agemian. Source: 6th Annual Institute of Mergers and Acquisitions, sponsored by Penn State Dickinson School of Law and New York City Bar Association (September, 2009).

Keyed-up by the thrill of combat, an able Paul, Weiss associate, Albert K. Butzel, and I worked at fever pitch, devising letters and newspaper ads aimed at the shareholders of the target bank, each extolling the benefits of the prospective merger. All these missives had to be cleared in advance with the Comptroller. The other side was not idle, and sometimes astute in its responses. As required by SEC "transparency" rules, we disclosed that Hackensack National Bank & Trust Company[6] was a wholly owned subsidiary of KNS, a company based in New York City. The incumbents played up the carpetbagger ownership, scaring the voters into thinking that their friendly hometown bank would lose its personal touch if the City Slickers (that's us!) took control. The other side's boldest touch was to print on green paper – subliminally, The Color of Money – the ballot that they intended to mail to the bank's shareholders, naming the incumbent directors as candidates for reelection, and opposing the merger. When I heard about this, I appealed to the Comptroller. He disallowed color-coded ballots because they would destroy the ordained level playing field.

The voting was a close contest. Results hinged on challenged ballots: semi-legible signatures; variations between the names of legal and beneficial owners; a single signature on a joint-name account. One substantial bloc of shares on our side turned out to be held by a convent. The incumbents challenged the ballot, saying the Mother Superior should have signed, on the ground that she was, in effect, the CEO. My wife Elizabeth, learned in matters religious, said that if the nun who signed the ballot was in charge of the convent's finances – in effect, the CFO – then the ballot should be counted. She was. And it was.

At the last minute, the incumbents staggered the Ross-Agemian side. They filed a lawsuit in the U.S. District Court for New Jersey, seeking to enjoin the proposed merger. I called on Martin London, a skilled Paul, Weiss trial lawyer, for rescue. London was afraid

[6] In 1970, the Hackensack would be more mellifluously renamed Garden State National Bank. New Jersey glories in its reputation as the Garden State, where everyone – well, almost everyone – grows vegetables or flowers in a home garden.

that the incumbents, represented by New Jersey counsel, would be the beneficiary of what he called Courthouse Home Cookin'. So we retained a local firm as co-counsel. But it was London who pulled the laboring oar. There was a two-week evidentiary hearing, with thousands of pages of testimony and two days of oral argument. At the end of the plaintiff's evidence, the judge not only denied the incumbents' motion for an injunction, but also granted London's motion to dismiss the complaint altogether.

At long last, victory for the pro-merger forces! Charlie Agemian on Cloud Nine. Ross also pleased.

To create a *terminus ad quem* to the overly dragged-out proxy contest, Comptroller Camp ordered that the Certificate of Merger would not be effective unless signed on the last day of the month and filed in his office by 5 p.m. That day, I arranged for Charlie Agemian to sign the Certificate of Merger, with a notary to witness his signature, and asked Eamon O'Leary, a Vice President of the Bank, whom I knew to be reliable, to fly to Washington, DC. His instructions were to notify me once he had filed the Certificate. Not having heard from Eamon by 1 p.m., I phoned the Bank anxiously, only to learn that Eamon was still at his desk. Why? He was waiting for "Mr. Agemian," a non-delegator, to countersign a $100 travel voucher. [My expletives deleted.]

For want of a nail . . . .

When, finally, I got the confirmatory call, I drove to the target bank. There, armed with a screwdriver, I carefully removed the antique doorknob from the front door. (As I write, the doorknob is a paperweight on my desk.)

What old-time property lawyers, like me, call: *livery of seisin*.