JUSTICE JACKSON IN THE BOARDROOM: A PROPOSAL FOR JUDICIAL TREATMENT OF SHAREHOLDER-APPROVED POISON PILLS

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INTRODUCTION

On October 20, 2006, News Corporation's shareholders approved a poison pill takeover defense that had been previously adopted by the company's directors.[1] The directors had agreed to hold the approval vote to settle a legal dispute between the company and a consortium of its institutional shareholders.

In a suit filed a year earlier in Delaware Chancery Court, these investors alleged that News Corporation's directors had contracted with them for the votes it needed to approve a corporate restructuring by agreeing to seek the shareholders' approval for certain poison pill provisions.[2] The company moved to dismiss the claim on the grounds that the alleged contract unlawfully limited the board's duty to manage the corporation.[3] In *Unisuper Ltd. v. News Corp.*, Chancellor Chandler denied the motion, holding that Delaware law did not bar shareholders and their directors from contracting to limit directors' power to adopt a poison pill.[4] The Delaware Supreme Court subsequently refused to hear News Corporation's interlocutory appeal.[5]

The *Unisuper* decision marks the latest development in a decade-long debate over whether Delaware law allows shareholders to limit a board's discretion to set takeover defense strategy.[6] Buoyed by Chancellor Chandler's broad

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[1] Julia Angwin, *News Corp. Fends Off Liberty Media*, WALL ST. J., Oct. 21, 2006, at A3.

[2] Unisuper Ltd. v. News Corp., No. 1699-N, 2005 WL 3529317, at *1 (Del. Ch. Dec. 20, 2005).

[3] *Id.*

[4] *Id.* at *4.

[5] News Corp. v. Unisuper Ltd., 906 A.2d 138 (Del. 2006).

[6] *See* Martin Lipton, *Pills, Polls, and Professors Redux*, 69 U. CHI. L. REV. 1037, 1038-39 (2002) (arguing against various shareholder pill proposals) [hereinafter Lipton, *Pills, Polls*]; Ronald J. Gilson, *Unocal Fifteen Years Later (And What We Can Do About It)*, 26 DEL. J. CORP. L. 491, 508-12 (2001) (urging the Delaware Supreme Court to allow shareholder initiated bylaws); John C. Coates & Bradley C. Farris,

language,[7] shareholder rights proponents claim that the decision supports their view that shareholder proposed bylaws can place limitations on board powers.[8] Alternately, the corporate defense bar argues for a narrower reading of *Unisuper* in light of Delaware Supreme Court precedent.[9]

Whether Delaware will adopt Chancellor Chandler's broad formulations outside of a breach of contract setting remains to be seen, but the case, and the circumstances surrounding it, present interesting legal and practical implications for the ongoing debate. Legally, shareholders and directors may contract with each other to allocate corporate power,[10] and as a practical matter, large institutional investors are increasingly gaining the power to force directors to the negotiating table.

Second-Generation Shareholder Bylaws: Post-Quickturn Alternatives, 56 BUS. LAW. 1323, 1335 (2001) (acknowledging that current shareholder bylaws "effectively overrule Moran's legalization of poison pills"); Charles F. Richards, Jr. & Robert J. Stearn, Jr., *Shareholder By-Laws Requiring Boards of Directors To Dismantle Rights Plans Are Unlikely To Survive Scrutiny Under Delaware Law*, 54 BUS. LAW. 607, 608 (1999) (noting that the first bylaw mandating shareholder approval for poison pills was proposed in 1996); John C. Coffee, *The Bylaw Battlefield: Can Institutions Change the Outcome of Corporate Control Contests*, 51 U. MIAMI L. REV. 605, 616 (1997) ("Delaware law suggests that shareholders do have the right to restrict the board for the future . . . ."); Jeffrey N. Gordon, *"Just Say Never?" Poison Pills, Deadhand Pills, and Shareholder-Adopted Bylaws: An Essay for Warren Buffett*, 19 CARDOZO L. REV. 511, 546-52 (1997) (acknowledging that an inquiry into the powers granted to shareholders and directors leads to a "recursive loop," but arguing that shareholders should be able to require shareholder approval of poison pills through corporate bylaws).

[7] *See Unisuper*, 2005 WL 3529317, at *6 ("[W]hen shareholders exercise their right to vote in order to assert control over the business and affairs of the corporation, the board must give way.").

[8] Stuart M. Grant & Megan D. McIntyre, *Unisuper v. News Corporation: Affirmation that Shareholders, Not Directors, Are the Ultimate Holders of Corporate Power*, 1557 PLI/CORP 17, 19 (2006).

[9] A. Gilchrist Sparks, III, *Corporate Democracy – What It Is, What It Isn't, and What It Should Be*, 1543 PLI/CORP 279, 284 n.8 (2006) ("[T]o the extent [*Unisuper*] suggests that directors . . . are bound to act in accordance with shareholder instructions . . . [it] should be disregarded.").

[10] *Unisuper*, 2005 WL 3529317, at *6.

The question then shifts from whether shareholders can unilaterally force management action to how Delaware should treat the agreements to which the parties mutually agree. Suppose that a shareholder, or hostile bidder, challenged the adoption or the use of a shareholder-approved poison pill. How should Delaware courts handle these challenges?[11]

Drawing on Justice Jackson's federal separation of powers formulation in *Steel Seizure*,[12] this paper proposes that when boards and shareholders act in concert to formulate corporate takeover defense policy, the board's power is at its maximum.[13] Using the framework provided by existing corporate takeover jurisprudence, Delaware courts should give broad deference to corporations adopting and using shareholder-approved poison pills. In doing so, Delaware courts can give meaning to the shareholder vote, encourage dialogue between shareholders and directors over takeover policy, and retain the predictability and thoroughness of the takeover common law as it has developed over the past twenty-five years.

Part I traces the longstanding debate over takeover defenses and provides a brief overview of the relevant case law, setting out the standards by which Delaware courts currently review takeover defenses. Part II examines potential challenges to shareholder-approved poison pills, proposing broad deference to these agreements, both at adoption and when used to combat an unwanted takeover

[11] In answering this question, I am assuming *disinterested* shareholder approval in a corporation without a controlling shareholder. Interested shareholders participated in the approval of the News Corp. pill. *See* Angwin, *supra* note 1.

[12] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-39 (1952) (Jackson, J., concurring).

[13] *See id.* at 635. The analogy of shareholders and directors to the co-equal branches of our federal government is an imperfect one. I employ separation of powers doctrine only insofar as it illuminates the analysis of institutional power struggles between parties to the institution. *Cf.* Sparks, *supra* note 9, at 281 & n.1 (observing serious problems with the analogy between our corporate form and our representative democracy often employed in the debate over allocations of corporate power).

bid. Additionally, Part II proposes that Delaware allow shareholders and directors to agree on stronger defensive measures than it currently permits under existing doctrine. Part III returns to Jackson's framework to consider how the shareholder-approved poison pill integrates with existing poison pill jurisprudence.

I. BACKGROUND

A. The Initial Debate

The poison pill, among other defensive measures, was developed during a time of increasing hostile takeovers in the 1980s.[14] "Corporate raiders" funded much of this activity through junk bonds, with the goal of breaking up target corporations and selling off their assets.[15] The raiders used the threat of junk bond financing to coerce shareholders into tendering their shares, or alternately, "greenmailed" boards into buying them out to avoid a threatened takeover.[16]

Target boards countered these tactics with a variety of defensive measures designed to discourage unwanted takeover bids.[17] In 1982, Martin Lipton developed the most elegant takeover defense, the so-called poison pill.[18] Lipton's

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[14] Marcel Kahan & Edward B. Rock, *How I Learned To Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law*, 69 U. CHI. L. REV. 871, 873-75 (2002).

[15] *See, e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180-81 (Del. 1986) (characterizing Pantry Pride, the hostile bidder, as a highly leveraged company aiming to "bust up" Revlon using junk bond financing); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 956 (Del. 1985) (identifying the back end of a two-tier offer as junk bonds and the offeror as a corporate raider); Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 653-54 (Del. Ch. 1988) (identifying the threat of a junk bond-financed acquiror seeking to sell the target's assets).

[16] *Unocal*, 493 A.2d at 956 n.13.

[17] *See* Kahan & Rock, *supra* note 14, at 875 (naming tactics such as "shark repellants," "greenmail," "white knights," and "Pac-Man").

[18] *See* Lipton, *Pills, Polls*, *supra* note 6, at 1037 ("I invented [the pill] in the summer of 1982 to deal with the takeover abuses that emerged in

plan quickly gained popularity because it (1) could be quickly adopted by the board at any time, (2) presented few transaction costs, and (3) did not otherwise affect corporate operations.[19]

Hostile takeover activity, and the defenses that it spawned, drove at the heart of our corporate governance system, and sparked a fierce debate that rages on to this day.[20] Delaware grants broad authority to directors to manage the "business and affairs" of the corporation.[21] Directors, as fiduciaries of the shareholders, must deploy this authority in the shareholders' best interest.[22] Shareholders, as residual owners of the corporation's assets, must approve fundamental corporate changes, including mergers[23] and sales of assets.[24] The pill gave directors the power to stall a takeover bid before the offer reached the shareholders,[25] presenting the question of whether director action, or inaction, represented the best interests of shareholders in the face of a premium hostile takeover bid.

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the 1970s . . . ."); *see also* Kahan & Rock, *supra* note 14, at 875 ("[The pill] rendered most other defenses moot.").

[19] Kahan & Rock, *supra* note 14, at 875. The pill typically consists of a plan under which the board of directors distributes rights to target shareholders to purchase shares in either the target company or the acquiring company at a deep discount upon the occurrence of certain triggering events, such as the acquisition of a threshold percentage of the corporation's shares, or the successful acquisition of the target by a hostile bidder. If the Board wishes to accept a takeover bid, it can redeem the rights at minimal cost. *See* Kevin L. Turner, Commentary, *Settling the Debate: A Response to Professor Bebchuk's Proposed Reform of Hostile Takeover Defenses*, 57 ALA. L. REV. 907, 911-12 (2006).

[20] *See Unocal*, 493 A.2d at 954 n.9; Kahan & Rock, *supra* note 14, at 871, 874.

[21] DEL. CODE ANN. tit. 8, § 141(a) (2007).

[22] *Unocal*, 493 A.2d at 955 (citing Guft v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939)).

[23] DEL. CODE ANN. tit. 8, § 251(c) (2007).

[24] *Id.* § 275(b).

[25] Kahan & Rock, *supra* note 14, at 875.

Efficient market theorists, or holders of the "Finance View," argued for director passivity.[26] They believed that capital markets, through premium tender offers, accurately value corporate assets. The spread between an offer and the target's current market price represents inefficiencies in the target's operations, or underperformance by the target's board.[27] Tender offers, therefore, act as a monitoring tool for corporate management.[28] Lucrative tender offers oust underperforming boards and put their corporate assets to better use; directors can avoid the offers by performing well.[29] Board resistance to premium offers chills this beneficial reordering and likely results from a desire for self-preservation.[30]

Holders of the "Institutionalist View," led by Lipton, saw things differently. They felt that economic power and wealth creation rests within corporations, not within the markets.[31] Hostile bids, by their nature, skew toward the short-term perspectives of shareholders. When presented with a premium offer, a consistent majority of shareholders, made up of arbitrageurs speculating on a quick gain, professional investment managers needing to show short-term performance returns, and ordinary shareholders concerned

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[26] *See, e.g.*, R. Franklin Batolli et al., *Unocal Revisted: Lipton's Influence on Bedrock Takeover Jurisprudence*, 60 BUS. LAW. 1399, 1400-01 (2005); William T. Allen & Leo E. Strine, *When the Existing Economic Order Deserves a Champion: The Enduring Relevance of Martin Lipton's Vision of Corporate Law*, 60 BUS. LAW. 1383, 1384-85 (2005); Gilson, *supra* note 6; Frank H. Easterbrook & Daniel R. Fischel, *Takeover Bids, Defensive Tactics, and Shareholders' Welfare*, 36 BUS. LAW. 1733 (1981); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981) [hereinafter Easterbrook & Fischel, *Proper Role*]. I have adopted the terms "Finance View" and "Institutionalist View" used by Allen & Strine to describe the debate.

[27] *See* Easterbrook & Fischel, *Proper Role*, *supra* note 26, at 1171-81.

[28] *Id.* at 1171-74.

[29] *Id.*

[30] *Id.* at 1175.

[31] Allen & Strine, *supra* note 26, at 1388; Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 104 (1979) [hereinafter Lipton, *Takeover Bids*].

about retaining a worthless minority interest in the successor corporation, will tender regardless of whether the offer fairly represents the intrinsic value of the corporation.[32] Therefore, directors needed to take an active role when faced with hostile bids to protect the wealth-creating value of long-term corporate interests against the coercive pressure for short-term gains.[33]

B. Delaware Weighs In

In the absence of federal government action against the mid-80s takeover frenzy,[34] Delaware largely adopted the Institutionalist View.[35] Its courts acknowledged that fiduciary duties obligate directors to protect corporate policy and effectiveness from a reasonably perceived harm.[36] These duties require directors to consider the threats posed by a hostile bid, including threats to constituencies other than shareholders,[37] as well as the unique threats posed to shareholders by the nature of a hostile bid.[38] Boards can

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[32] Lipton, *Takeover Bids*, *supra* note 31, at 115.

[33] *Id.* at 104.

[34] Lipton, *Pills, Polls*, *supra* note 6, at 1044-45. The SEC filed an *amicus curiae* brief against the validity of the board-adopted poison pill in Moran v. Household, Int'l, Inc., 500 A.2d 1346, 1346 (Del. 1985).

[35] Leo E. Strine, Jr., *Categorical Confusion: Deal Protection Measures in Stock-for-Stock Merger Agreements*, 56 BUS. LAW. 919, 925 (2001) ("[T]he director-centered model won . . . .").

[36] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 953-54 (Del. 1985).

[37] *Id.*

[38] *Id.* at 955-56. These threats include:

> opportunity loss . . . [w]here a hostile offer might deprive target shareholders of the opportunity to select a superior alternative . . .; (ii) structural coercion, . . . the risk that disparate treatment of non-tendering shareholders might distort shareholders' tender decisions; and (iii) substantive coercion, . . . the risk that shareholders will mistakenly accept an underpriced offer because they disbelieve management's representations of intrinsic value.

Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1384 (Del. 1995) (citing Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1153 n.17 (Del.

deploy proportional defensive measures against these reasonably perceived threats under broad statutory grants of power to manage companies' day to day operations.[39]

In one concession to the Finance View, however, the Delaware Supreme Court evinced the fear that directors might act out of the "omnipresent specter" of self-interest inherent in struggles for corporate control.[40] Therefore, it required courts to review directors' use of defensive measures with enhanced scrutiny, placing an initial burden on directors to show good faith and reasonable investigation in their threat assessment, and to show that they used defensive measures proportional to the threat posed.[41]

Under this framework, Delaware permitted boards to unilaterally adopt poison pills.[42] In *Moran v. Household Int'l Inc.*, the target board adopted a poison pill in response to the potential threat of a coercive acquisition, rather than in response to a specific takeover bid.[43] The Delaware Supreme Court concluded that the pill was proportional to a generalized market threat,[44] because it left open the ability

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1990) (quoting Ronald J. Gilson & Renier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247, 267 (1989))).

[39] *Unocal*, 493 A.2d at 955.

[40] *Id.* at 954-55.

[41] *Id.* Once directors meet their burden, courts presume that they acted in the best interests of the corporation on a well-informed and well-intentioned basis. To succeed, plaintiffs must then show that the directors breached their fiduciary duties. Moran v. Household Int'l, Inc., 500 A.2d 1346, 1356 (Del. 1985).

[42] *Moran*, 500 A.2d at 1357. The *Moran* court held that the director's authority to adopt the plan stemmed from its inherent power over corporate affairs, as well as its power to engage in stock-related transactions. *See* DEL. CODE ANN. tit. 8, §§ 141(a), 151, 157 (2007).

[43] *Moran*, 500 A.2d at 1349.

[44] Although the *Moran* court analyzed the board's adoption under enhanced scrutiny, it concluded that the lack of a specific, immediate threat assuaged the fear of self-interest as a motivating factor. *Id.* at 1350. Indeed, in reaffirming *Moran*, the Delaware Supreme Court upheld the adoption of a plan without considering the facts of the adoption. *See* Leonard Loventhal Account v. Hilton Hotels Corp., 780 A.2d 245, 246-47 (Del. 2001).

for shareholders and bidders to run a proxy contest for corporate control.[45] In addition to reviewing the board's decision to adopt the pill, the Court promised that any future use of the pill to fend off a hostile bid would also be reviewed under enhanced scrutiny.[46]

C. The Rise of the Institutional Investor

Although the initial battle over the poison pill ended two decades ago, the war over the distribution of corporate power in the takeover context continues.[47] The poison pill remains at the center of this debate, thanks, in part, to the emergence of active institutional investors.[48] In the 1990s,[49] these institutional investors began to attack the poison pill using their power to amend corporate bylaws.[50] Shareholders sought to include in their companies' proxy statements proposals for bylaw amendments that would require boards to redeem existing pills, and require shareholder approval to adopt new pills.[51]

Stymied by an SEC policy that allows companies to exclude from their proxies certain proposals that would bind

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[45] *Moran*, 500 A.2d at 1356.

[46] *Id.* at 1354.

[47] Martin Lipton, *Twenty-Five Years After Takeover Bids in the Target's Boardroom: Old Battles, New Attacks and the Continuing War*, 60 BUS. LAW. 1369 (2005) [hereinafter Lipton, *Twenty-Five Years After*]. Lipton graciously concludes that Delaware's decisions represented a compromise, due to the application of enhanced scrutiny. *See* Lipton, *Pills, Polls*, *supra* note 6, at 1047. To the extent that Lipton's views have been received and adopted by the courts, others consider him the winner. *See* Allen & Strine, *supra* note 26, at 1390-91.

[48] *See* Lipton, *Twenty-Five Years After*, *supra* note 47, at 1370 & n.2. Lipton worried about "professional investors" twenty-five years ago. *See* Lipton, *Takeover Bids*, *supra* note 31, at 104. At that time, institutional investors owned approximately 37% of the stock market according to the Conference Board. Now, they own more than 60%. John Authers & Francesco Guerrera, *Institutions Increase Equity Stakes*, FIN. TIMES, Jan. 22, 2007, at 27.

[49] Coffee, *supra* note 6, at 610-11.

[50] *See* DEL. CODE ANN. tit. 8, §109(a) (2007).

[51] Coffee, *supra* note 6, at 611.

the company if approved,[52] institutional investors began indirectly exercising power to influence takeover defense policies, drafting their bylaw proposals as recommendations[53] and threatening to withhold votes from incumbent directors who do not honor their wishes.[54] Many companies have redeemed pills on their own or agreed to seek shareholder approval to adopt new pills in response to the pressure.[55] As shareholder votes become more meaningful through gains in proxy access[56] and majority voting requirements in board elections,[57] the likelihood of additional agreements like the one between News Corporation and its shareholders increases.

[52] *See* 17 C.F.R. § 240.14a-8(i)(8) note (2006). Delaware courts have not formally opined on the matter. Last year, the Delaware Chancery Court declined to consider the validity of such a proposal on ripeness grounds. Bebchuk v. CA, Inc., 902 A.2d 737 (2006).

[53] Victor Lewkow & Sarah ten Siethoff, *The Embattled Poison Pill*, 1528 PLI/CORP 599, 603-04 (2006).

[54] *See id.* at 601.

[55] *Id.* at 604.

[56] *See* AFSCME v. Am. Int'l Group, Inc., 462 F.3d 121 (2d Cir. 2005) (permitting a shareholder proposal that allows shareholder-nominated board members to appear in the company's proxy statement). This ruling leaves to the SEC the discretion to change its interpretation of the rule allowing the proposal, but the SEC has taken no action to date. As one former Commissioner opined prior to the decision, however, "whether or not the Commission acts . . . proxy access will be a fact of life . . . in the not-too-distant future." Harvey J. Goldschmid, Speech by SEC Comm'r: Remarks Before the Council of Institutional Investors 2005 Spring Conference (April 11, 2005), *available at* http://www.sec.gov/news/speech/spch041105hjg.htm.

[57] John J. Castellani, Opinion, *Market Risk: Corporations Shouldn't Be Run Like Congress*, WALL ST. J., Jan. 20-21, 2007, at A10 ("More than 70 Business Roundtable companies have adopted a majority voting standard in director elections; and more than 150 companies now require board members to submit their resignation if more than half the votes cast are 'no' or 'withhold.'").

II. ANALYZING THE SHAREHOLDER-APPROVED POISON PILL

When directors and shareholders do reach agreements on takeover defenses, courts should broadly defer to those agreements. Using the analytical framework set out in *Moran*, which calls for reviewing the board's decision-making both at the time it adopts the pill and at the time it uses the pill to defend against a hostile bid,[58] courts should: (1) treat shareholder-approval in an adoption challenge as a ratification of the board's action, and (2) review the board's subsequent use of a shareholder-adopted pill under the business judgment rule.

A. The Shareholder-Approved Poison Pill at Adoption and the Law of Ratification

Courts should treat shareholder approval of a board's decision to adopt a poison pill as ratifying the board's decision. The poison pill approval vote performs a function procedurally similar to a traditional ratification vote and addresses concerns of self-interested dealing that animate both traditional ratification votes and the enhanced scrutiny normally applied to a board's unilateral adoption of the poison pill. Finally, challenges to a ratification vote offer protection against director malfeasance equal to the protection offered by challenges to director actions under *Moran*.

A corporation typically seeks shareholder ratification of interested transactions between the corporation and its officers or directors, such as stock option plans[59] or loans.[60] Delaware law does not require shareholder approval of these transactions, so the vote serves as an independent approval of the transaction in question.[61] Directors inform

[58] Moran v. Household Int'l, Inc., 500 A.2d 1346, 1354 (Del. 1985).

[59] *See* Michelson v. Duncan, 407 A.2d 211 (Del. 1979).

[60] *See* Marciano v. Nakash, 535 A.2d 400 (Del. 1987).

[61] *In re* Wheelabrator Techs., Inc. S'holder Litig., 663 A.2d 1194, 1201 n.4 (Del. Ch. 1995).

shareholders of the material facts of both the transaction itself and the conflict of interest it presents,[62] and with knowledge of all of the key facts, shareholders vote to affirm that the transaction is consistent with their interests.[63] The majority vote of fully informed, disinterested[64] shareholders ensures that the transactions are not voidable,[65] and limits judicial review of the transactions to issues of waste[66] and adequate disclosure.[67]

Similar to ratifications of stock option plans and loans, approval votes for poison pills take place subsequent to the board's decision to adopt the pill, and Delaware law does not otherwise require a board to seek shareholder approval of the decision.[68] By voting for the pill on a fully-informed basis, the shareholders affirm that the potentially conflicted board decision is consistent with their interests.[69] In the case of stock options and loans, Delaware allows this vote to cleanse an actual conflict of interest.[70] A ratifying shareholder vote should similarly cleanse the "specter" of interested action in the takeover context.[71]

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[62] DEL. CODE ANN. tit. 8, §§ 144(a)(2)-(3) (2006).

[63] Lewis v. Vogelstein, 699 A.2d 327, 335 (Del. Ch. 1997).

[64] An interested shareholder vote (as is the case with News Corp.), or a conflict involving a controlling shareholder, muddle Delaware's ratification doctrine considerably. For instance, where a majority of the minority shareholders ratify an interested transaction with a controlling shareholder, the standard of review remains entire fairness, but the burden shifts to the plaintiff. *See* Kahn v. Lynch Commc'n Sys., 638 A.2d 1110 (Del. 1994).

[65] DEL. CODE ANN. tit. 8, § 144(a)(2) (2006).

[66] Marciano v. Nakash, 535 A.2d 400, 405 n.3 (Del. 1987); *Lewis*, 699 A.2d at 336.

[67] *See* Stroud v. Grace, 606 A.2d 75, 84 (Del. 1992).

[68] *See* Leonard Loventhal Account v. Hilton Hotels Corp., 780 A.2d 245, 249 (Del. 2001).

[69] *See Lewis*, 699 A.2d at 335 (addressing the nature of shareholder ratification in general).

[70] *Id.* at 333 ("[The Plan] constitutes self-dealing that would ordinarily require that the directors prove that the grants involved were, in the circumstances, entirely fair to the corporation.") (citing Weinberger v. U.O.P., Inc., 457 A.2d 701 (Del. 1983)).

[71] Moran v. Household Int'l, Inc., 500 A.2d 1346, 1355 (Del. 1985).

B. Challenges to Ratification of the Pill

In addition to cleansing the taint of self-interest from the ratified transaction, shareholder ratification also cures any failure of the board to exercise well-informed business judgment.[72] This curing effect precludes the slim basis currently available under *Moran* to challenge a board's decision to adopt a poison pill,[73] but replaces it with the ability to challenge the adequacy of information provided to the voters.[74] Board proposals requiring a shareholder vote appear in the company's proxy statement, thereby subjecting the vote to both federal and state disclosure requirements.[75] Challenges to these disclosure requirements would likely provide protection against bad actors similar to the protection currently offered by challenges to a board's informed decision-making available under *Moran* and its progeny.[76]

Under *Moran*, enhanced scrutiny requires that directors initially show that they had reasonable grounds for believing that a threat existed and that their response was reasonable in relation to the threat posed.[77] Similarly, challenges to a

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[72] *See* Smith v. Van Gorkom, 488 A.2d 858, 889-90 (Del. 1985).

[73] *See Loventhal*, 780 A.2d at 249 (affirming a board's authority to adopt a poison pill without considering whether the board's decision was adequately informed); *see also Moran*, 500 A.2d at 1356.

[74] Under the law of ratification, a ratified transaction may also be challenged as waste, but such a challenge requires an exchange of corporate assets for an unreasonably low amount of consideration. *See Lewis*, 699 A.2d at 336. One of the advantages of the poison pill is its minimal cost to the corporation. As such, a challenger to the ratification of a poison pill will be unlikely to state a claim on the basis of waste.

[75] The duty of disclosure under Delaware fiduciary law mirrors the federal proxy disclosure standard. *See* Stroud v. Grace, 606 A.2d 75, 84 (Del. 1992) (describing the fiduciary duty to disclose fully and fairly all material information within the board's control when seeking shareholder action) (citing TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)).

[76] It seems highly unlikely that a grossly negligent board would be able to prove that it conducted a fully-informed ratification vote.

[77] *Moran*, 500 A.2d at 1356 (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985)).

ratification vote place the initial burden on the directors relying on the vote to prove that they fully disclosed all material facts relevant to the transaction.[78]

In both instances, the resulting inquiry is fact-specific. Boards adopting defensive measures on a "clear day" against a general market threat of hostile takeover, like the Household board in *Moran*, face less scrutiny than a board adopting a pill against in the midst of a hostile takeover.[79] Similarly, the disclosures necessary to adopt a poison pill in the midst of a takeover battle would likely be far more detailed and extensive than those adopted as a precautionary measure against a generalized market threat.[80]

Although an effective ratification forecloses traditional avenues for challenging a board's adoption, the disclosures necessary to rely on the ratifying vote provide adequate and similar control over director action under the ratification scheme. Delaware courts treat the duty to disclose as arising out of directors' fiduciary duty to the shareholders and thus hold directors to the same standards whether they are acting on shareholders' behalf or communicating with them.[81] Indeed, this disclosure requirement provides the primary reason for treating the shareholder approval as ratification: the board must make its enhanced scrutiny showing to the shareholders themselves. Requiring challenged boards to make this showing again before a judge would be duplicative

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[78] *Stroud*, 606 A.2d at 84.

[79] *Moran*, 500 A.2d at 1350 ("[P]re-planning for the contingency of a hostile takeover might reduce the risk that, under the pressure of a takeover bid, management will fail to exercise reasonable judgment.").

[80] Indeed, under federal proxy law, a board seeking to deploy a pill against an offer it considered unfair could be liable for statements of belief or opinion regarding the takeover. *See* Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991) (holding the board liable for calling an offer price "fair" and "high," when they knew of facts indicating otherwise).

[81] *See* Malone v. Brincat, 722 A.2d 5, 11 (Del. 1998) ("The duty of directors to observe proper disclosure requirements derives from the . . . fiduciary duties of care, loyalty, and good faith."); *see also* Zirn v. VLI Corp., 681 A.2d 1050, 1062 (Del. 1996) ("A good faith erroneous judgment as to . . . required disclosure implicates the duty of care . . . .").

and would amount to second-guessing shareholders' judgment.

C. Reviewing a Board's Decision to Use the Shareholder-Approved Pill to Combat a Takeover Threat

Shareholder approval of a board adopting a poison pill in the midst of a takeover threat ratifies the board's adoption and use of the pill against the threat. The approval of a pill on a "clear day," however, cannot ratify its later use. Ratification requires a fully-informed vote[82] and temporal limitations prevent directors from fully informing shareholders about the future use of a pill at the time of the initial approval vote.

Shareholder approval of a poison pill necessarily contemplates some future use of that pill, however, and obtaining prior approval will be worthless if courts do not give it weight in challenges to the pill's use. Courts should therefore treat the prior shareholder approval as meeting the directors' burden of proof under enhanced scrutiny and immediately apply the business judgment rule. Review of these decisions under the business judgment rule gives meaning to the shareholder approval process. It promotes agreements between boards and shareholders on takeover defenses while remaining consistent with the standard-based case-by-case analysis of Delaware takeover jurisprudence. Fiduciary duties, including the duty to disclose, would adequately protect shareholders against ill-informed or bad-faith board decisions.

Traditionally, courts review a board's use of takeover defenses under the same enhanced scrutiny they apply when the board adopts the defenses.[83] This standard strikes a

[82] Lewis v. Vogelstein, 699 A.2d 327, 336 (Del. Ch. 1997).

[83] *Moran*, 500 A.2d at 1354. The business judgment rule is the "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (citations omitted). Under the business judgment rule, a court performs a rationality review. *See*

balance between preserving a board's authority to act decisively in a battle for corporate control and protecting against possible conflicts of interest.[84] Enhanced scrutiny protects against the possibility of self-interested action by requiring directors to show that they acted in the interest of the corporation before granting the protections of the business judgment rule.[85]

Shareholder approval of the pill entails giving the board the power to use the pill at some point in the future. When asking for the initial approval, the board must explain the plan, the perceived threats that caused them to adopt the plan, and the intended effect of the plan on those threats. Explicit in this description must be the board's discretion over whether to redeem the plan or not when faced with a bid in the future. Approving shareholders affirm that they consider the board's discretionary power in their best interest. To do so, the shareholders must presume that the board will exercise that discretion in the best interest of the corporation. Courts should review directors' use of that discretion under the same assumption.

In addition to affirming that the board's discretion to use the pill aligns with corporate interests, shareholder approval also addresses a structural tension between boards and shareholders in the takeover context. A bidder makes a tender offer to shareholders as owners of their shares. By adopting the pill, the board uses its corporate power to interpose itself between the bidder and the shareholders.[86]

Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (quoting Sinclair Oil Co. v. Levien, 280 A.2d 717, 720 (Del. 1971)). Under the business judgment rule, a board's actions may be challenged as uninformed or in bad faith under a gross negligence standard. *See* Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985).

[84] Stephen M. Bainbridge, *Director Primacy in Corporate Takeovers: Preliminary Reflections*, 55 STAN. L. REV. 791, 815 (2002).

[85] *Unocal*, 493 A.2d at 954-55.

[86] *See* Ronald J. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 845-46 (1981) ("[A defensive measure] causes access to shareholders through a tender offer to be conditioned in the same manner that the corporate statute conditions access to shareholders in a merger or sale of assets.").

Shareholders approving the pill agree that these offers should be routed through the board, and also dampen arguments that analogize tender offers to the type of fundamental decision-making statutorily granted to shareholders.[87] As shareholders agree to give directors discretionary power over these decisions, courts should treat them as they treat other non-fundamental business decisions under the business judgment rule.

Treatment of a pill's use under the business judgment rule balances the understanding reached between shareholders and directors while protecting shareholders against abuses of the poison pill. A board must act on a well-informed basis, in accordance with the corporation's best interests. Ill-informed and bad-faith employment of the poison pill will not be tolerated by the courts.[88] Additionally, the Delaware fiduciary duty of disclosure applies to all board communications with the shareholders, even when they do not seek shareholder action.[89] Board decisions to defend against a hostile takeover will beget public statements directed to the markets, and in those statements, boards will be bound to fully and fairly disclose all facts material to the transaction.[90]

Shareholder approval of a poison pill should confer the protection of the business judgment rule to a board's future decision to use the pill against a hostile takeover. Subjecting the directors' decision to enhanced scrutiny fails to acknowledge the shareholders' choice to confer their trust in the directors and would provide no incentive for boards to seek shareholder approval. Alternately, allowing the approval to act as blanket ratification for all future uses of the pill would be inconsistent with the law of ratification, and with the *Moran* court's promise that pills would be challenged at adoption and when used.[91] Applying the

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[87] *See, e.g.*, DEL CODE ANN. tit. 8, § 251(c) (2006) (requiring shareholders to approve merger agreements).

[88] *See Smith*, 488 A.2d 858.

[89] Malone v. Brincat, 722 A.2d 5, 10-11 (Del. 1998).

[90] *Id.* at 12 n.29.

[91] Moran v. Household Int'l, Inc., 500 A.2d 1346, 1354 (Del. 1985).

business judgment rule grants boards an additional trust from the courts that reflects the trust given to them by their shareholders, while ensuring these important board decisions remain subject to review on a case-by-case basis.

D. Shareholder Approval as a Prescription for a Substantially Stronger Pill

In addition to deferring to shareholder-approved poison pills when they are adopted and used, Delaware courts should give the substantive provisions of these pills wide latitude under the *Unocal* proportionality test. Much of the current doctrine concerns protecting against limits on directors' ability to act on the shareholders' behalf. To the extent that shareholder-approved poison pills reflect agreement between shareholders and directors on those limitations, the agreements should be honored. Additionally, to the extent that proportionality seeks to protect the shareholder vote, an upfront vote to approve the pill provision in question provides the same protection for shareholder rights.

In attempts to "lock up" favored deals, or prevent changes of control through proxy contests, boards have adopted preclusive or coercive measures by contracting with third parties or acting unilaterally to (1) limit the board's statutory power to manage the affairs of the corporation,[92] (2) restrict directors from exercising their fiduciary duties on behalf of the shareholders,[93] or (3) purposefully impair the

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[92] *See* DEL. CODE ANN. tit. 8, § 141(a) (2006) (indicating that limits on the power and duties conferred on the board must be provided in the certificate of incorporation); Carmody v. Toll Bros., 723 A.2d 1180, 1193 (Del. Ch. 1998) (holding that a "dead hand" provision that prevented certain board members from redeeming the pill illegally limited their statutory powers).

[93] Omnicare, Inc. v. NCS Healthcare Inc., 818 A.2d 914, 936 (Del. 2003) ("To the extent that a [merger] contract, or a provision thereof, purports . . . to limit the exercise of fiduciary duties, it is invalid and unenforceable.") (quoting Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 51 (Del. 1993)).

shareholders' ability to vote.[94] Courts find these tactics disproportionate under *Unocal* and its progeny because they preclude stockholders from receiving other offers, preclude a bidder from seeking control by restricting proxy contests, or coerce shareholders into accepting management's preferred alternative.[95]

Chancellor Chandler distinguished these impermissible preclusive measures from the alleged shareholder-director agreement in *Unisuper*,[96] and his argument provides the basis for a stronger poison pill through shareholder approval. In these earlier cases, Chandler observed, Delaware courts struck down contracts and actions as unlawfully limiting directors' powers because the directors agreed to those limitations in favor of third parties or themselves.[97] For example, in *Paramount v. QVC*, a stock option agreement, a "no shop" clause, and a termination fee favored the target board's preferred bidder and prevented the board from negotiating a more favorable deal with other bidders.[98] Similarly, in *Quickturn* and *Toll Brothers*, directors limited a future board's powers in a takeover situation through "delayed hand" and "dead hand" provisions that prevented newly elected board members from redeeming poison pills.[99] Unlike the companies involved in these cases, News Corp. had given up power in favor of its shareholders.

Chandler argued that Section 141(a) of the Delaware General Corporation Law (DGCL) vests managerial power in

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[94] Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 662 (Del. Ch. 1988) (requiring a compelling justification for an action taken with the primary purpose of interfering with the effectiveness of a corporate vote).

[95] Unitrin, Inc. v. Am. Gen. Corp, 651 A.2d 1361, 1387 (Del. 1995).

[96] Unisuper Ltd. v. News Corp., No. 1699-N, 2005 WL 3529317, at *6 (Del. Ch. Dec. 20, 2005).

[97] *Id.*

[98] Paramount v. QVC Network, Inc., 637 A.2d 34, 41-42 (Del. 1994).

[99] *See* Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281, 1292 (Del. 1998) (finding a "delayed hand" provision an illegal restriction on a new board's statutory power to accept a takeover bid); Carmody v. Toll Bros., 723 A.2d 1180, 1193 (Del. Ch. 1998) (finding a "dead hand" provision an illegal restriction on a new board's statutory power to accept a takeover bid).

the board of directors to prevent directors from giving that power away to outside groups or individuals.[100] Between the shareholders and directors, however, section 141(a) merely presents a practical allocation of power to the party better able to manage the company. Therefore, directors can cede power to the shareholders without running afoul of the DGCL because shareholders are the ultimate holders of corporate power.[101] Fiduciary duties also allocate responsibilities based on the relationship between shareholders and directors, requiring that directors act on behalf of the shareholders. These duties act as gap fillers in the incomplete contract between shareholders and directors[102] and the parties to the contract may agree to terms that differ from these gap-fillers.[103]

In Chandler's view, Delaware corporation law, through statutes and common law fiduciary duties, creates a framework for allocating power and responsibility between shareholders and directors. It follows that if shareholders and directors agree that the shareholders' best interests are served by disabling certain managerial duties, then they may permissibly agree to those limitations.

The shareholder approval vote represents a vehicle for such agreements. In *Unisuper*, the board allegedly agreed to cede its ability to adopt a poison pill to the shareholders, but an agreement could just as easily be reached to cede a board's power to redeem the pill, or to restrict some other board power that makes a tender offer more difficult. So long as the parties agree that management of the business and affairs of their corporation excludes certain powers or activities, courts should honor that definition. More practically, when concern emanates from explicit statutory limitations on director power, boards and shareholders can simply comply with section 141(a) by agreeing to move the offending limitation into the company's articles of

[100] *Unisuper*, 2005 WL 3529317, at *6.

[101] *Id.*

[102] *Id.* at *8 (citing FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 92-93 (1998)).

[103] *Id.*

incorporation. Shareholder-approved plans could incorporate supermajority voting requirements, classified board provisions, and perhaps even "dead hand" and "delayed hand" provisions in the articles.[104]

Similarly, a fair and fully-informed shareholder approval vote for the pill should allow shareholders to agree on previously impermissible restrictions on shareholder voting in proxy contests. In *Blasius*, the target board amended corporate bylaws to add and fill two director seats in anticipation of a challenge for control.[105] In striking the offending provision, the court worried about the board's self-interested motivation and whether it had the fiduciary authority to act in such a manner.[106] A shareholder vote for a pill that allowed the board to make such amendments at certain triggering events addresses these concerns by explicitly granting the authority to act and acknowledging, through a fully informed vote, the shareholders' opinion that the directors' discretionary use of that power is in their interest.

When directors and shareholders agree on the allocation of corporate power regarding takeover defenses, courts should honor those agreements to the extent that they do not conflict with explicit statutory constraints. The initial shareholder approval vote replaces the traditional reliance on the proxy fight as the avenue for shareholder voice, and courts should honor shareholders' and directors' freedom to fills gaps in their corporate contracts. The natural ability of the two parties to reach agreement on the substantive provisions should provide adequate limitations on the resulting pills.

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[104] Provisions such as a "dead hand" and "delayed hand" may still be out of reach under this interpretation. Section 141(d) may still bar conferring differing powers to different directors except by classification in the articles of incorporation. *See* Gordon, *supra* note 6, at 537.

[105] Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 655-56 (Del. Ch. 1988).

[106] *Id.* at 658.

III. THE *STEEL SEIZURE* MODEL: INTEGRATING THE SHAREHOLDER-APPROVED PILL INTO EXISTING DELAWARE JURISPRUDENCE

By granting broad deference to shareholder-approved poison pills through analysis under Delaware's existing takeover defense standards, Delaware courts can give meaning to shareholders' choices, while leaving in place existing takeover defense jurisprudence.[107] The proposed treatment can be integrated into the existing jurisprudence by applying Justice Jackson's *Steel Seizure* model.[108] In the standard-based case-by-case analysis of the Delaware corporate law, the board's powers are not fixed, but depend on the facts and circumstances of the instances in which they are used, including the existence of shareholder approval and disapproval.[109]

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[107] After the *Unisuper* decision, the company's lawyers crowed that the decision represented a ruling on whether shareholder proposals could limit directors' use of poison pills. Grant & McIntyre, *supra* note 9, at 19. The ruling may not hold such broad implications. Chancellor Chandler's comments, although broad, addressed the allocation of corporate power in the breach of contract setting. Allowing shareholders to unilaterally control directors' power to adopt poison pills represents an additional step, and one that Delaware may not be willing to take. *See* Leonard Loventhal Account v. Hilton Hotels Corp., 780 A.2d 245, 249 (Del. 2001) ("The power recognized in *Moran* would have been meaningless if the rights plan required shareholder approval. Indeed, it is difficult to harmonize *Moran's* basic holding with a contention that questions a Board's prerogative to unilaterally establish a rights plan.").

[108] *See* Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579, 635-639 (1952) (Jackson, J., concurring). The power of invoking separation of powers doctrine lies not in an analogy to directors and shareholders as co-equal branches of corporate governance, but rather, in the practical acknowledgement that like Congress and the President, their powers, both formal and informal, in the corporate governance arena at times overlap.

[109] *Id.* at 635.

A. The Board Acts Pursuant to an Express Authorization of the Shareholders

When shareholders approve the board's adoption of a poison pill, the power conferred by the pill is at its maximum. Delaware courts should give broad deference to boards in challenges to the pill, both at inception and at use.[110]

Existing standards supply the framework for analysis. Shareholder approval is a fact that affects the analysis within that framework. At adoption, shareholder approval acts to ratify the potentially-conflicted activity.[111] When deployment of the pill is challenged, prior approval acts to alleviate the need for enhanced scrutiny. The approval confers both the shareholders' trust in the board's future discretion to use the pill, and of some of the shareholders' statutory power to approve merger transactions.[112] By holding a shareholder vote upfront and contracting over fiduciary duties, the shareholder approval alleviates most of the concerns that animate the *Unocal* proportionality test.

As the President and Congress are still governed by constitutional limitations when they act in concert,[113] the actions of the board are still constrained by Delaware statutory limitations, and by the limitations of the traditional duties of care, good faith, and loyalty. The board must still deploy the pill in a well-informed and well-intentioned manner,[114] and must provide full and fair disclosure when communicating with shareholders regarding their actions.[115]

Allowing shareholders and directors to contract for broader takeover defenses encourages cooperation between

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[110] *See supra* text accompanying notes 59-88.

[111] *Id.*

[112] *Id.*

[113] *Steel Seizure*, 343 U.S. at 636-37 (Jackson, J., concurring).

[114] Leo E. Strine, *The Professorial Bear Hug: The ESB Proposal as a Conscious Effort to Make Delaware Courts Confront the Basic "Just Say No" Question*, 55 STAN. L. REV. 863, 864 (2002).

[115] Malone v. Brincat, 722 A.2d 5, 10 (Del. 1998).

the parties as shareholders gain more influence.[116] The prospect of greater control over corporate destiny gives incentives to boards to seek shareholder approval for their plans. As conferrers of this additional power, institutional investors will have to become more discerning regarding their poison pill voting policies. In a market for these powers, effective boards with attractive long-term plans will succeed in garnering approval, while weak boards may be presented with disapproval.[117]

Indeed, institutional shareholders will have to be very savvy in seeking approval for pill plans: mutual funds own the fastest growing share of institutional stock holdings.[118] Presumably, corporate directors could find useful allies in these fund managers. Activist shareholders setting out to dismantle a firm's poison pill could find that they have provided the directors with even more power.

B. Directors Act in the Absence of Shareholder Action: The Traditional Model

When the President acts in the absence of congressional action, he relies on his own independent powers.[119] Extending the analogy, directors may still unilaterally adopt a poison pill as they deem necessary to meet reasonably perceived threats to corporate policy and effectiveness.[120] Such adoptions fall under the *Moran/Unocal* model. Courts apply enhanced scrutiny to the adoption and use of such pills, asking whether the board's action was well-informed and proportional to the reasonably perceived threat.[121]

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[116] Gordon, *supra* note 6, at 550-51.

[117] *Id.* Gordon cites examples from the mid-1990s of shareholders adroitly discerning between good and bad takeover defense policies and notes that "we should not assume that shareholders will respond in economically irrational ways." *Id.* at 551.

[118] The Conference Board reported that mutual funds own 23.8% of the U.S. stock market. Authers & Guerrera, *supra* note 48.

[119] *Steel Seizure*, 343 U.S. at 637 (Jackson, J., concurring).

[120] Leonard Loventhal Account v. Hilton Hotels Corp., 780 A.2d 245, 249 (Del. 2001).

[121] Moran v. Household Int'l, Inc., 500 A.2d 1346, 1354 (Del. 1985).

The utility of allowing unilaterally adopted poison pills to exist alongside shareholder adopted pills lies in the advantages conferred by the director's ability to set the course for the corporation and to quickly assess and respond to threats.[122]

C. Boards Acting in Contravention of Shareholders' Wishes: Considering Responses to Shareholder Bylaw Amendments

Under current Delaware law, shareholder bylaw amendments requesting the redemption of poison pills are nonbinding on directors.[123] Corporate responses have varied.[124] Many have ignored shareholder requests, or dismantled existing plans, but adopted a "fiduciary out" that allows them to adopt a plan as they deem necessary.[125]

When directors adopt a pill in contravention of shareholder wishes, their power is at its ebb.[126] This conclusion is practical rather than legal: it reflects the consequences of the shareholders' and the board's actions,

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[122] Indeed, empirical evidence suggests that board-adopted poison pills increase shareholder value. *See* John C. Coates, IV, *Empirical Evidence on Structural Takeover Defense: Where Do We Stand?*, 54 U. MIAMI L. REV. 783 (2000) (finding no evidence that poison pills have detracted from shareholder wealth); GEORGESON INC., MERGERS & ACQUISITIONS, POISON PILLS AND SHAREHOLDER VALUE, 1992-1996 (Nov. 1997) (indicating a premium of 37% for companies with pills and 29% those without). When pills are combined with independent boards, these advantages increase. *See* James Cotter et al., *Independent Boards Enhance Target Shareholder Wealth During Tender Offers*, 23 DIRECTORSHIP 3 (Nov. 1997).

[123] *See* 17 C.F.R. § 240.14a-8(i)(1) (2007). A company may exclude a shareholder proposal from its proxy if it is an improper subject matter for shareholder action under state law. *Moran* holds that the adoption of poison pills is the province of the board of directors in Delaware.

[124] William P. Mills, *Poison Pills are Drawing More Fire: Companies Take Action to Dismantle or Amend Shareholder Rights Plans in Response to Shareholder Complaints*, NAT'L L. J. , Nov. 8, 2004, at S1.

[125] *Id.* Some of these plans require subsequent shareholder ratification; others do not.

[126] *Cf.* Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring).

not the formal distribution of power. Delaware courts should consider the shareholder request among the facts and circumstances during their enhanced scrutiny review. Even if the courts choose not to do so, increases in shareholder access to proxies and majority-vote board elections ensure that boards' decisions to act in contravention of shareholders' wishes will be answerable extra-judicially.

CONCLUSION

Allowing shareholders and directors to contract for broader takeover defenses encourages cooperation between the parties as shareholders gain more influence over the boardroom.[127] The prospect of greater control over corporate destiny gives incentive to boards to seek shareholder approval for their plans. In a market for these powers, effective boards with attractive long-term plans will succeed in garnering approval, while weak boards may be presented with disapproval. Institutional investors will perform the board-monitoring role that proponents of the Finance View advocate. As the power of institutional shareholders increases, their votes will make a real difference in conferring power to worthy boards. These investors will have to become more discerning partners in granting the additional protections that a shareholder-approved poison pill offers. Further, holders of the Institutionalist View can take heart that the traditional protections of the poison pill and director primacy model are still available, alongside the greater protections offered by reaching consensus with shareholders. Returning to Justice Jackson's framework, absent agreement with shareholders, directors may still rely on their own independent powers to adopt defensive measures.[128]

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[127] Gordon, *supra* note 6, at 550-51.

[128] *See Steel Seizure*, 343 U.S. at 637 (1952) (Jackson, J., concurring).