Note

AN EXAMINATION OF A BOARD OF DIRECTORS' DUTY TO REDEEM THE RIGHTS ISSUED PURSUANT TO A STOCKHOLDER RIGHTS PLAN

I. INTRODUCTION

Litigation concerning shareholder rights plans or, as they are more commonly referred to, "poison pills" has generally focused on issues relating to the validity of the adoption of a poison pill.[1] Recently, attention has focused on whether a board of directors' fiduciary duties to their stockholders obligates them to redeem an outstanding poison pill. In several recent cases hopeful acquirors

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1. *See, e.g.*, Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del.), *aff'g*, 490 A.2d 1059 (Del. Ch. 1985) (upholding poison pill adopted in effort to prevent future takeover attempts rather than to fend off a specific threat). *See* Fogg & Sterling, *Poison Pill Update*, *reprinted in* ACQUISITIONS & MERGERS 1988, at 817, 819 (Practicing Law Institute 1988) (indicating that, in general, courts have sustained the adoption of poison pills and to date more than 600 have been adopted); Richards, Brussard & Williams, *Rights Plans Developments and Recent Litigation*, Nat'l L.J., May 23, 1988, at 28, 32, col. 1 (initial litigation focused only upon the legality of the plan and on a board's adoption of the plan).

A poison pill is designed to deter hostile takeovers by making a takeover prohibitively expensive for a hopeful acquiror. A poison pill consists of a distribution to common stockholders of either preferred stock or rights with redemption and conversion privileges designed to deter hostile takeovers. If poison pill preferred stock is issued, the plan usually provides that it is automatically converted into voting stock of the entity surviving a takeover upon an acquiror obtaining a certain percentage of the target's stock. In the event that a merger is not carried out within a predetermined period of time following the initial acquisition, the holders of the poison pill preferred stock can usually elect to force the target to redeem the stock for the highest price paid for the target's shares in the initial acquisition. Poison pill rights, which are attached to common stock and trade with that stock, achieve the same objectives as poison pill preferred stock. If certain triggering events occur, the rights are activated and detached from the common stock. In the event that a takeover subsequently occurs, the rights entitle their holders to purchase the acquiror's stock at a bargain price. Greene, Dupler & Matlack, *Structural Defenses: Charter, and By-Law Amendments and Poison Pills*, *reprinted in* 1 HOSTILE BATTLES FOR CORPORATE CONTROL 535, 556-57 (Practicing Law Institute 1986). *See* Note, *Poison Pill Rights: Toward a Two-Step Analysis of Directors' Fidelity to Their Fiduciary Duties*, 56 GEO. WASH. L. REV. 373, 374-75 (1988) (describing the general characteristics of a poison pill).

have sought preliminary injunctions requiring a board of directors to redeem the rights issued pursuant to a stockholder rights plan.[2] This note will examine this trend by focusing on how Delaware courts have approached and resolved the question of when a board of directors must redeem or dismantle a poison pill.

A poison pill is a very effective antitakeover maneuver.[3] If a court issues a preliminary injunction requiring the dismantling of a poison pill, it will frustrate a corporation's antitakeover plan.[4] However, the quest for this type of injunctive relief presents formidable obstacles for the hopeful acquiror. First, and most significantly, the test employed by courts to determine the legality of a board's refusal to redeem an outstanding rights plan gives significant deference to a board of directors' decisions.[5] Second, a preliminary injunction requires a court to rule on a voluminous record in a short period of time and predict the facts that will be found at trial while balancing the equities and conveniences of the parties.[6] This process necessarily favors a board of directors, the party opposing the preliminary

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2. Facet Enters., Inc. v. Prospect Group, Inc., No. 9746, slip op. at 16-17 (Del. Ch. Apr. 15, 1988), *reprinted in* 14 DEL. J. CORP. L. 310, 319-20 (1989) (noting that this issue has been addressed in several recent cases including: Southdown, Inc. v. Moore McCormack Resources, Inc., 686 F. Supp. 595 (S.D. Tex. 1988); BNS Inc. v. Koppers Co., 683 F. Supp. 458 (D. Del. 1988); CRTF Corp. v. Federated Dep't Stores, Inc., 683 F. Supp. 422 (S.D.N.Y. 1988)). Acquirors continue to seek these preliminary injunctions. *See In re* Holly Farms Corp. Shareholders Litig., No. 10,350 (Del. Ch. Dec. 30, 1988); MAI Basic Four, Inc. v. Prime Computer, Inc., No. 10,428 (Del. Ch. Dec. 20, 1988); Grand Metro. Pub. Ltd. v. Pillsbury Co., 558 A.2d 1049 (Del. Ch. 1988); City Capital Assocs. Ltd. Partnership v. Interco Inc., 551 A.2d 787 (Del. Ch. 1988); Mills Acquisition Co. v. Macmillan, Inc., No. 10,168 (Del. Ch. Oct. 17, 1988) (revised Oct. 18, 1988), *reprinted in* 14 DEL. J. CORP. L. 772 (1989), *rev'd on other grounds*, 559 A.2d 126 (Del. 1989); Nomad Acquisition Corp. v. Damon Corp., Nos. 10,173 & 10,189 (Del. Ch. Sept. 16, 1988) (revised Sept. 20, 1988), *reprinted in* 14 DEL. J. CORP. L. 814 (1989); Tate & Lyle PLC v. Staley Continental, Inc., No. 9813 (Del. Ch. May 9, 1988), *reprinted in* 14 DEL. J. CORP. L. 418 (1989).

3. *See* P. RICHTER, CORPORATE ANTI-TAKEOVER DEFENSES: THE POISON PILL DEVICE xv-xvi (1987) (describing some of the characteristics which make poison pills effective deterrents to takeover threats).

4. Richards, Brussard & Williams, *supra* note 1, at 33.

5. *See* Pease, *Outside Directors: Their Importance to the Corporation and Protection From Liability*, 12 DEL. J. CORP. L. 25, 63-71 (1987) (discussing the applicable standard). In a takeover context, when analyzing a board's actions, " 'a more flexible, intermediate form of judicial review is appropriate, one that is between the 'powerful' business judgment rule and the 'exacting' requirements of the standard of entire fairness.' " *Id.* at 70 (citation omitted).

6. *See Tate & Lyle PLC*, No. 9813, slip op. at 14, *reprinted in* 14 DEL. J. CORP. L. at 430 (commenting on the voluminous record before the court).

injunction.[7] Finally, a hopeful acquiror's request for injunctive relief is often simply one tactic used in a takeover battle to obtain a negotiating edge.[8] In such a situation, the court, realizing this, will deny the injunction and allow the negotiation to continue without interference from the court.[9] However, as an analysis of several recent decisions will indicate, even in the face of these obstacles, there are situations in which injunctive relief will be granted.

This note will attempt to ascertain when a board will be required to redeem a poison pill. Initially, recent trends with respect to provisions included in poison pills will be discussed. Thereafter, the issue of redemption will be analyzed in depth. Finally, conclusions will be made as to when redemption will be required.

II. THE POISON PILL: BACKGROUND AND RECENT TRENDS

Many consider the poison pill to be the premiere takeover defense.[10] The forms of poison pills have been constantly changing and evolving since their appearance in 1983.[11] However, the basic theory behind the economic poison pill has remained the same.[12] Poison pills make a takeover prohibitively expensive for a potential acquiror thereby encouraging or, more realistically, forcing a potential

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7. A court will not grant a preliminary injunction unless it is fully convinced that it is urgently necessary. *Id.*, slip op. at 13, *reprinted in* 14 DEL. J. CORP. L. at 429. To fully convince a court in a short period of time, based on a voluminous record, is a difficult task. *See id.*, slip op. at 13-14, *reprinted in* 14 DEL. J. CORP. L. at 429-30 (discussing difficulty imposed by time constraints when seeking a preliminary injunction to force the redemption of a poison pill).

8. *See id.*, slip op. at 14, *reprinted in* 14 DEL. J. CORP. L. at 430 (court expressing concern that it was merely a pawn in an emerging takeover battle).

9. *See id.* (indicating that the low price of the tender offer raised "serious concerns as to whether [the] controversy [was] even ripe for consideration").

10. RICHTER, *supra* note 3, at xv, xvii. *See* Note, *Recent Developments in the Use of the Poison Pill Antitakeover Defense: Limiting the Business Judgment Rule*, 31 ST. LOUIS U.L.J. 1083, 1085 (1987) (indicating that poison pills are the favored weapon in the antitakeover arsenal of sophisticated corporate directors).

11. RICHTER, *supra* note 3, at xvi-xviii (discussing the development of the different forms of poison pills). *See* 2 B. FOX & E. FOX, CORPORATE ACQUISITIONS AND MERGERS § 27.07[2][e] (Practicing Law Institute 1988) (indicating that countless variations of poison pills with varying degrees of complexity have been developed).

12. An economic poison pill, measured by increased acquisition costs, is to be differentiated from a noneconomic poison pill such as the super-voting poison pill which is designed to delay a change in control over the target corporation and give the target some time to analyze the situation and prepare other defenses. *See* RICHTER, *supra* note 3, at xvii. *See* Comment, *Shareholder Rights Plans—Do They Render Shareholders Defenseless Against Their Own Management?*, 12 DEL. J. CORP. L. 991, 1004 (1987) (discussing supermajority voting plans).

acquiror to negotiate with the board of directors on the board's terms.[13]

The first poison pills which appeared in 1983 consisted of a dividend distribution of preferred stock which had a redemption value of the highest price paid for the issuer's common or preferred stock within the past several years.[14] After a merger, the preferred stock could be converted into equity securities of the acquiring company.[15] Called the "fair price" poison pill, this version of a pill allowed the shareholders of the pill's issuer to convert their equity securities into equity securities of the acquiror equal in value to the highest price paid for the issuer's equity securities within one or two years.[16] The conversion rights were designed to discourage front-end-loaded, two-tier tender offers[17] by equalizing the price of both tiers.[18] However, the detrimental effect created by this type of pill could be avoided if a potential acquiror could acquire a majority of the target's preferred and common stock.[19]

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13. Richards, Brussard & Williams, *supra* note 1, at 28. If an acquiror lacks the funds to absorb the additional cost associated with a poison pill, he will be "forced" to negotiate with the target's board because they can dismantle the poison pill and, thus, remove the obstacle blocking the takeover. *Id. See* Fleischer & Golden, *Poison Pill*, Nat'l L.J., Feb. 24, 1986, at 17, col. 2 (one of "[t]he effects [of poison pills is] to increase the directors' bargaining power against a raider"). *See also* Fogg & Sterling, *supra* note 1, at 379. Generally, few poison pills make a corporation takeover-proof because:

> [t]he potential acquiror has available a number of strategies that minimize the impact of a poison pill. For example, the acquiring corporation can make a tender offer for shares and rights conditioned on a high minimum in order to reduce the dilutive effects of the plan, or it can use the proxy process either to pass a resolution calling for the redemption of the rights or to gain control of the board and then redeem the rights.

Id. (citations omitted).

14. RICHTER, *supra* note 3, at xviii. The poison pill was devised by Martin Lipton in 1983. *See* R. GILSON, THE LAW & FINANCE OF CORPORATE ACQUISITIONS 637-39 (1986) (memorandum written by Martin Lipton describing early poison pills).

15. RICHTER, *supra* note 3, at xvi.

16. *Id.*

17. A two-tiered takeover is a two-phased bid for the target's stock. Initially, the acquiror purchases enough shares to obtain a controlling interest; often this necessitates paying a premium over the market price. The second phase generally involves a lower price than that offered on the first tier and includes an exchange of debt securities of the acquiror. The term "front-end-loaded" refers to the higher price offered in the first tier. *Moran*, 490 A.2d at 1067 n.2.

18. GILSON, *supra* note 14, at 639.

19. *Id.* In circumventing the poison pill in this way, the acquiror helps achieve a main objective of the "fair price" poison pill, "the elimination of partial and

By 1984, although still in the early growth stage, poison pills had undergone changes. The pill upheld in *Moran v. Household International, Inc.*[20] is an example. One right, entitling the holder to 1/100 of a share of preferred stock for $100 was issued to common stockholders.[21] The purchase price was prohibitive in view of the then current dividend and trading price.[22] These rights detached and were exercisable upon certain triggering events such as an acquisition of 20% of household's common stock or upon a tender offer for 30% of the common stock.[23] Under a provision known as the "flip-over" provision,[24] if a second-step merger or a consolidation occurred the rights would "flip-over" and the acquiror was required to allow the holders of the rights to purchase shares of the acquiror's common stock at 50% of its market value resulting in immediate and devastating dilution of the acquiror's capital.[25] Significantly, the rights could be redeemed by the target's board of directors for a nominal price prior to the activation of the rights, by triggering the 20% event.[26] Flip-over conversion rights deter two-tiered, front-end-loaded

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front-end loaded tender offers," as well as giving all shareholders reasonable opportunity to receive the full cash bid for their shares, and eliminating bootstrap bids. Bootstrap bids occur where a raider uses his "own securities and the target's assets to finance the takeover." *Id.*

20. 500 A.2d 1346 (Del.), *aff'g*, 490 A.2d 1059 (Del. Ch. 1985). The Delaware Court of Chancery recognized that the rights plan was highly complex. The court found that the plan's "very complexity [was] designed to create uncertainty on the part of a potential acquiror." *Moran*, 490 A.2d at 1066.

21. *Moran*, 490 A.2d at 1066 (because the findings of fact in *Moran* were more thoroughly delineated in the Delaware Court of Chancery opinion than in the Delaware Supreme Court opinion, this note will cite to the court of chancery opinion).

22. *Id.*

23. *Id.*

24. A flip-over provision is defined as:

> [a] provision in a "poison pill" defense which, in the event of the merger or consolidation, obligates the acquiring corporation to honor the redemption or conversion provisions of the "poison pill." The term is usually used to refer to a conversion provision that allows the "poison pill" holder to acquire at a substantial discount the voting equity securities of the acquiring entity. For debt "poison pills," the term refers to a mandatory redemption provision for debt securities that requires the acquiring entity, as successor to the acquired entity, to redeem the debt at a financially ruinous redemption price.

RICHTER, *supra* note 3, at xviii.

25. *Id.*

26. *Id.* The nominal price was $.50 per right. However, it is significant that once triggered by the 20% triggering event, the rights were no longer redeemable. *Id.*

tender offers by subjecting the acquiror to severe dilution of his stock upon the consummation of a merger whereas earlier poison pills attempted to equalize the price on each tier.[27]

One limitation in the use of a flip-over provision alone has been that an acquiror can cross the rights activation threshold and then wait out the duration of the rights plan and execute a second step merger after the term of the rights plan expires.[28] Three types of "flip-in"[29] provisions have been designed to deal with this problem. First, under the self-dealing flip-in provision, if an acquiror engages in activities defined as selfdealing after crossing the rights activation threshold, the rights holders can purchase the acquiror's stock at a 50% discount from the market price.[30] Second, under a percentage based or stock ownership flip-in provision, if an acquiror purchases a certain percentage of the target's common stock, the holders of the rights can purchase the acquiror's stock for 50% of market value.[31]

Finally, under the adverse person flip-in provision, there is no self dealing flip-in provision, but an adverse person flip in is triggered

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27. *See supra* note 19 and accompanying text.

28. *See* Richards, Brussard & Williams, *supra* note 1, at 28. *See also* RICHTER, *supra* note 3, at xvi-xvii (describing limitations of flip-over provisions and circumvention of such limitations by the combination of flip-over provisions with flip-in provisions); Note, *The Poison Pill: A Panacea for the Hostile Corporate Takeover*, 21 J. MARSHALL L. REV. 107, 116-18 (1987) (a poison pill containing both a flip-over and a flip-in provisions will act to deter any under priced coercive tender offer).

29. A flip-in provision has been defined as follows:

> A provision in a "poison pill" defense which, in the event of "self-dealing" by a principal shareholder, a merger in which the issuer of the "poison pill" survives or the sale of a substantial portion of the issuer's assets or earning power, entitled the holders of the "poison pills" to purchase the issuer's voting equity securities at a substantial discount.

RICHTER, *supra* note 3, at xviii.

30. Richards, Brussard & Williams, *supra* note 1, at 28. *See* Fogg & Sterling, *Stockholder Rights Plans: The So-Called "Poison Pill," reprinted in* ACQUISITIONS AND MERGERS 1986: TACTICS, TECHNIQUES, AND RECENT DEVELOPMENTS 365, 375-76 (Practicing Law Institute 1987) (explaining a self-dealing flip-in provision and indicating that it may not be required where adequate protection exists under a state takeover statute); Note, *supra* note 28, at 116-17 n.63 (often "self-dealing" will be defined in the rights plan agreement).

31. Richards, Brussard & Williams, *supra* note 1, at 28. *See* Note, *supra* note 28, at 116-17 (the hopeful acquiror who caused the rights to be activated or, more accurately, separated from the target's common stock is prohibited from exercising his rights under both types of flip-in provisions). *See also* Fogg & Sterling, *supra* note 30, at 376-77 (explaining the percentage-based "flip-in" provision).

if two conditions are met.[32] First, an acquiror must acquire a threshold share of the target's outstanding common stock and second, a majority of outside directors must determine either that the threshold acquisition was intended to cause the target to have to repurchase the stock, or that it was intended to force the target to take action which is likely to have an adverse impact on the target.[33] The recently developed redemption window provision is a short period of time (usually one to three weeks) during which a board of directors could determine whether to redeem the rights after the rights activation threshold had been crossed.[34]

A very recent innovation[35] has been the stockholder vote and the automatic redemption provision. In a poison pill with this provision there is no redemption window; however, redemption of the rights is automatic if a tender offer is consummated that satisfies certain conditions and was approved by the target's stockholders at a stockholders meeting.[36] Generally, the conditions that must be met to satisfy this provision are strict.[37] Several reasons have been ad-

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32. *See* Richards, Brussard & Williams, *supra* note 1, at 29. *See also* Fogg & Sterling, *supra* note 1, at 819-20 (discussing adverse person flip-in).

33. *See* Richards, Brussard & Williams, *supra* note 1, at 29 (discussing adverse person flip-in using Boeing Company's poison pill as an example). *See also* Fogg & Sterling, *supra* note 1, at 819-20 (same).

34. Richards, Brussard & Williams, *supra* note 1, at 28. The major issue here has been whether the adoption of a redemption window provision was done to give a board of directors added flexibility or whether it merely reflected a lack of resolve on the part of the board. If the later were true, the redemption window would have the effect of encouraging a bidder to cross the rights activation threshold to test the board. Generally, the added flexibility under the redemption window has been accepted as outweighing any lack of resolve by the board as the motivation for the provision. *See* Fogg & Sterling, *supra* note 30, at 395-96 (indicating that the added flexibility provided by the redemption window does not eliminate the deterrent effect of a poison pill because there is no guarantee that a board will redeem the rights within the window period).

35. Other recent innovative provisions include "interim safeguard" plans and "value assurance" plans among others. *See* Fogg & Sterling, *supra* note 1, at 822-25 (discussing other recent innovations).

36. *See* Richards, Brussard & Williams, *supra* note 1, at 29. *See also* Fogg & Sterling, *supra* note 1, at 820-21 (discussing shareholder approval provisions).

37. The acquiror must not have owned more than 1% of the target's outstanding common stock within the previous year, the offer must be a cash offer for 100% of the target's outstanding common stock, the offer must be deemed fair by a nationally-recognized investment banking firm, there must be satisfactory written financing commitments and/or cash, and finally, the offeror must request the board to call a stockholders' meeting and pay one-half of the related expenses. *See* Richards, Brussard & Williams, *supra* note 1, at 29. *See also* Fogg & Sterling, *supra* note 1, at 820-21 (discussing the five stringent conditions).

vanced to explain why this provision has not been widely adopted. First, the conditions may be so stringent that the provision is not useful and second, many companies already have satisfactory poison pills in place and the cost to implement a new poison pill containing this type of provision would outweigh the benefits derived therefrom.[38]

The poison pills discussed above are generally adopted before a specific takeover threat has arisen. In contrast to these plans are pills which contain the "back-end" or "lollipop" provision generally adopted in response to a specific takeover threat.[39] Under such a provision, if an acquiror becomes the beneficial owner of specific percentage of a target's stock or the target is acquired in a non-board-approved merger, the pill's stockholders can "put" their securities to the issuer.[40] The right holder will receive a specified package of securities and/or cash for his poison pill securities.[41] This back-end or lollipop provision is usually adopted after the commencement of a takeover contest because it effectively places a price on the company.[42]

III. A BOARD'S DUTY TO REDEEM THE RIGHTS

The requirement that a board of directors redeem an outstanding poison pill is an important issue because the ultimate effectiveness of a poison pill turns on how long a board can keep it in place. In Delaware, the principles upon which the duty to redeem an outstanding pill have been based are set forth in *Moran v. Household International, Inc.*[43] In *Moran*, the Delaware Court of Chancery, upholding a poison pill, noted that:

> [a] board armed with a Rights Plan of the type now under review will possess a bargaining tool which can be used to extract concessions from an acquiror which it otherwise would not secure, or to deter the acquisition effort entirely. Through its power to redeem the rights before a triggering event occurs the Household Board has assumed a plenary

38. Richards, Brussard & Williams, *supra* note 1, at 29.

39. RICHTER, *supra* note 3, at xvii; Richards, Brussard & Williams, *supra* note 1, at 29.

40. Note, *supra* note 28, at 118. *See* RICHTER, *supra* note 3.

41. Note, *supra* note 28, at 118-19. *See* RICHTER, *supra* note 3, at xvii.

42. RICHTER, *supra* note 3, at xvii. *See* Note, *supra* note 28, at 118 n.71 (citations omitted).

43. 500 A.2d 1346 (Del.), *aff'g*, 490 A.2d 1059 (Del. Ch. 1985).

> negotiating role. It has also taken upon itself the responsibility for assuring that the rights are not triggered in such a fashion as to inflict harm upon the corporation by rendering it acquisition-proof.[44]

In affirming the Delaware Court of Chancery, the Delaware Supreme Court reiterated the court of chancery's statements: "The board does not now have unfettered discretion in refusing to redeem the Rights. The [b]oard has no more discretion in refusing to redeem the Rights than it does in enacting any defensive mechanism."[45]

These statements by the Delaware Court of Chancery and the Delaware Supreme Court make the issue of the duty to redeem seem clear cut: A board's decision not to redeem will be analyzed just as the enactment of any other defensive measure will be analyzed. This involves the application of the business judgment rule.

Under the business judgment rule, if a board of directors is found to have acted in good faith, a court will not substitute its judgment for that of a board of directors and will uphold a board's decisions that are attributable to any rational business purpose.[46] The business judgment rule is a presumption that in making a business decision the directors 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.[47]

Under Delaware law the business judgment rule applies, in a modified form, in the context of a corporate takeover even though there is an inherent potential conflict of interest when a board is deciding what to do in response to a takeover attempt.[43] However,

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44. *Moran*, 490 A.2d at 1083.

45. *Moran*, 500 A.2d at 1354.

46. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

47. *Id.*

48. *Nomad Acquisition Corp.*, Nos. 10,173 & 10,189, slip op. at 12-13, *reprinted in* 14 DEL. J. CORP. L. at 822-23. In a takeover situation, if a takeover ultimately occurs, the current board members stand a good chance of losing their jobs. This situation creates the "omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders . . . ." Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).

In *Unocal*, by using a modified business judgment rule or more accurately, an enhanced duty for a board of directors in a takeover context, the Delaware Supreme Court retreated from the position they took in Pogostin v. Rice, 480 A.2d 619 (Del. 1984); in *Pogostin* the court held that an unmodified business judgment rule applies in the context of a corporate takeover. Pease, *supra* note 5, at 67.

The conflict of interest occurs because the board members stand a good chance of losing their jobs if a hostile takeover occurs. *See id.* and accompanying text.

when faced with this conflict of interest the board is subjected to an "enhanced duty." The board must first show that there were reasonable grounds for believing that there was a threat to corporate policy and effectiveness.[49] This burden is met by showing good faith and reasonable investigation.[50] Second, the board must show that the defensive measures adopted were "reasonable in relation to the threat posed."[51] A board that is composed of a majority of outside independent directors acting in good faith and upon reasonable investigation materially enhances the proof that the board has acted reasonably in response to the threat posed.[52] Once the board makes this initial showing, the burden shifts back to the plaintiff to show that the board breached its fiduciary duties.[53] A plaintiff may meet this burden by offering evidence that the directors acted solely or primarily for the purpose of entrenchment or by showing that the board breached one of its fiduciary duties by perpetrating a fraud, engaging in overreaching, exercising a lack of good faith or by being uninformed.[54]

When a potential acquiror is attempting to force a board to redeem the outstanding rights under a stockholder rights plan, the potential acquiror generally seeks a preliminary injunction forcing the board to redeem those rights.[55] In order to obtain injunctive

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49. *Nomad Acquisition Corp.*, Nos. 10,173 & 10,189, slip op. at 12-13, *reprinted in* 14 DEL. J. CORP. L. at 822-23.

50. *Id.*, slip op. at 13, *reprinted in* 14 DEL. J. CORP. L. at 823.

51. *Id. See* Pease, *supra* note 5, at 67-71. To be able to meet this second prong the directors analysis should include: "(1) inadequacy of price offered; (2) nature and timing of offer; (3) questions of illegality; (4) the impact on constituencies other than shareholders—creditors, customers, employees, and perhaps even the community generally; (5) the risk of nonconsummation; and (6) the quality of the securities being offered in the exchange." *Id.* at 68 (citing *Unocal*, 493 A.2d at 955). However, in an auction situation, maximizing shareholder value is the predominate consideration. *Id.* at 68 n.173 (citing Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986)).

52. *Unocal*, 413 A.2d at 955; *Nomad Acquisition Corp.*, Nos. 10,173 & 10,189, slip op. at 13, *reprinted in* 14 DEL. J. CORP. L. at 823.

53. *Unocal*, 493 A.2d at 958. In other words, the directors are entitled to the presumptions of the business judgment rule. *Id.*

54. *Id.*

55. This type of injunctive relief was sought in Southdown, Inc. v. Moore McCormack Resources, Inc., 686 F. Supp. 595 (S.D. Tex. 1988); BNS Inc. v. Koppers Co., 683 F. Supp. 458 (D. Del. 1988); CRTF Corp. v. Federated Dep't Stores, Inc., 683 F. Supp. 422 (S.D.N.Y. 1988); Nomad Acquisition Corp. v. Damon Corp., Nos. 10,173 & 10,189 (Del. Ch. Sept. 16, 1988) (revised Sept. 20, 1988), *reprinted in* 14 DEL. J. CORP. L. 814 (1989); Tate & Lyle PLC v. Staley

relief requiring redemption, a potential acquiror must show a reasonable probability of success on the merits and that, absent an injunction, it will suffer irreparable harm.[56] Additionally, a plaintiff must also show the harm it will suffer in the absence of an injunction outweighs the harm that the defendant will suffer if the injunction is granted.[57] In seeking a preliminary mandatory injunction, the burden on the plaintiff is even greater because he must show that the legal right sought to be protected is a clearly established one.[58]

IV. RECENT CASES ADDRESSING THE ISSUE OF A BOARD'S DUTY TO REDEEM THE RIGHTS ISSUED PURSUANT TO A STOCKHOLDER RIGHTS PLAN

A. During a Corporate Auction

Forced redemption pursuant to a preliminary injunction has generally been sought in one of two circumstances; either during a

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Continental, Inc., No. 9813 (Del. Ch. May 9, 1988), *reprinted in* 14 DEL. J. CORP. L. 418 (1989); Facet Enters., Inc. v. Prospect Group, Inc., No. 9746 (Del. Ch. Apr. 15, 1988), *reprinted in* 14 DEL. J. CORP. L. 310 (1989).

56. *Nomad Acquisition Corp.*, Nos. 10,173 & 10,189, slip op. at 11, *reprinted in* 14 DEL. J. CORP. L. at 822.

57. *Id. Accord* Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1341 (Del. 1987); *Revlon*, 506 A.2d at 179; Gimbel v. Signal Cos., 316 A.2d 599, 602, 603 (Del. Ch.), *aff'd*, 316 A.2d 619 (Del. 1974).

58. *Nomad Acquisition Corp.*, Nos. 10,173 & 10,189, slip op. at 11, *reprinted in* 14 DEL. J. CORP. L. at 822 (citing David v. Shell Oil Co., No. 7923 (Del. Ch. June 12, 1985)).

> "An application for a preliminary injunction is addressed to the sound discretion of the court, to be guided according to the circumstances of the particular case . . .[.] Substantial and positive injury must always be made to appear to the satisfaction of a court of equity before it will grant an injunction . . .[.] An injunction, being the 'strong arm of equity' should never be granted except in a clear case of irreparable injury, and with full conviction on the part of the court of its urgent necessity.
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> A decision to grant or deny a preliminary injunction, therefore, involves a delicate balancing of all the equities between the parties."

Tate & Lyle PLC, No. 9813, slip op. at 13, *reprinted in* 14 DEL. J. CORP. L. at 429 (citing *Gimbel*, 316 A.2d at 602).

In considering whether a plaintiff has shown a reasonable probability of success on the merits in a rights redemption case a court will give ample consideration to the fact that the ultimate responsibility for managing the business and affairs of a corporation falls on its board of directors. *Nomad Acquisition Corp.*, Nos. 10,173 & 10,189, slip op. at 12, *reprinted in* 14 DEL. J. CORP. L. at 822. In meeting this duty, a board owes fiduciary duties of care and loyalty to the corporation and its stockholders. *Id. See also* Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334 (Del. 1987); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

corporate auction,[59] or when there is no plan to conduct a corporate auction. The cases discussed in the following section involve preliminary injunctions that were sought in contemplation of or during a corporate auction.

In *Facet Enterprises, Inc. v. Prospect Group, Inc.*,[60] Facet Enterprises (Facet) sought a declaratory judgment against a minority shareholder, The Prospect Group, Inc. (Prospect), to determine if the rights plan adopted by Facet's Board of Directors in response to Prospect's cash tender offer for 100% of Facet's common stock was legally valid.[61] In response, Prospect filed an answer alleging that Facet's rights plan was invalid. In addition, Prospect counterclaimed seeking a preliminary injunction to enjoin the implementation of the rights plan.[62] Prospect disclosed in its schedule 13D that it had acquired 7.6% of Facet's outstanding common stock and that it intended to discuss "[c]ertain transactions with Facet's management, including" the possibility of acquiring control of Facet.[63]

Prospect's chairman and Facet's chief executive officer subsequently discussed Prospect's desire to take Facet private in a leveraged buyout.[64] Facet's Board determined that a leveraged buyout to take

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59. A corporate auction involves two or more competitive bidders for the target corporation. It occurs when a corporation's board of directors recognizes that the company is for sale or that its breakup is inevitable. The board's duty in this situation is to maximize the corporation's value for the stockholders' benefit. This duty may include accepting the highest competitive bid. *Revlon*, 506 A.2d at 182.

60. No. 9746 (Del. Ch. Apr. 15, 1988), *reprinted in* 14 DEL. J. CORP. L. 310 (1989).

61. *Id.*, slip op. at 1, *reprinted in* 14 DEL. J. CORP. L. at 312.

62. *Id.*, slip op. at 2, *reprinted in* 14 DEL. J. CORP. L. at 312 (discussing counterclaim as basis for the decision).

63. *Id.*, slip op. at 3, *reprinted in* 14 DEL. J. CORP. L. at 312.

64. *Id.*, slip op. at 3-4, *reprinted in* 14 DEL. J. CORP. L. at 313. During these discussions, Prospect indicated a desire to have Facet's management participate in the acquisition. *Id.*, slip op. at 3, *reprinted in* 14 DEL. J. CORP. L. at 313. A leveraged acquisition is an:

> [a]cquisition of a business in a transaction where the purchaser's equity risk is small in relation to the purchase price and most of the purchase price is provided by borrowings from one or more outside lenders and, in some transactions, in part from the seller in the form of deferred purchase price. The lenders look to the assets and/or the cash flow of the acquired business itself as the source of repayment of the loans, rather than looking to the purchaser, who generally has no legal commitment to invest funds beyond the initial investment.

Benjamin, *Leveraged Acquisitions*, Leveraged Acquisitions and Buyouts 1988, at 9, 11 (Practicing Law Institute 1988).

Facet private would conflict with its long term strategy.[65] Upon Facet's refusal to negotiate with Prospect, Prospect initiated a $26 per share cash tender offer for 100% of Facet's outstanding common stock.[66] This offer was 14% over the highest market price for Facet's stock during the second quarter of 1988.[67]

Facet's Board of Directors retained outside financial and legal advisors that were of high quality.[68] The financial advisors deemed Prospect's offer inadequate and excessively conditional, concluding that Facet's stock was worth $32 per share.[69] Facet's Board then adopted the rights plan at issue, as proposed by its outside legal counsel.[70] In addition to the inadequate price, Facet's Board had two principal fears with respect to Prospect's offer. First, the offer had no assured financing and second, there were insufficient assurances that Prospect would indeed conduct a second step merger at the tender price.[71]

Prospect soon increased its offer to $27.50 per share.[72] Thereafter, Prospect published a supplement to the offer disclosing financing and representing that upon successful completion of the offer, it would seek to merge with Facet, and all nontendering stockholders would receive cash equal to the tender offer price.[73] Significantly, at that time Facet's stock was trading on the market at $30 per share.[74] At the oral argument on the motion for a preliminary injunction requiring Facet to redeem the rights, Facet announced that an auction for Facet was going to be conducted.[75]

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65. Facet Enters., Inc. v. Prospect Group, Inc., No. 9746, slip op. at 4 (Del. Ch. Apr. 15, 1988), *reprinted in* 14 DEL. J. CORP. L. at 313.

66. *Id.* (Prospect's tender offer was made on March 10, 1988).

67. *Id.*

68. *Id.*, slip op. at 4-5, *reprinted in* 14 DEL. J. CORP. L. at 313. The financial advisor was the investment firm of Shearson Lehman Hutton, Inc. and the legal advisors were from the law firm of Fried, Frank, Harris, Shriver & Jacobson. *Id.*

69. *Id.*, slip op. at 6, 7 n.4, *reprinted in* 14 DEL. J. CORP. L. at 314.

70. *Id.*, slip op. at 10, *reprinted in* 14 DEL. J. CORP. L. at 316.

71. *Id.*, slip op. at 7, *reprinted in* 14 DEL. J. CORP. L. at 315. The court noted that "Prospect appeared to reserve the right to propose a second step merger on terms not identical to the cash tender offer." *Id.*

72. *Id.*, slip op. at 10, *reprinted in* 14 DEL. J. CORP. L. at 316.

73. *Id.*, slip op. at 11, *reprinted in* 14 DEL. J. CORP. L. at 316.

74. *Id.*, slip op. at 11, *reprinted in* 14 DEL. J. CORP. L. at 317. The offer price of $27.50 per share was made on March 24, 1988. As of Friday, April 8, 1988, the market price of Facet common stock closed at $30 per share. *Id.*, slip op. at 10-11, *reprinted in* 14 DEL. J. CORP. L. at 316.

75. *Id.*, slip op. at 11, *reprinted in* 14 DEL. J. CORP. L. at 317.

This "eleventh hour" announcement was determined not to be in bad faith by Vice-Chancellor Jacobs.[76]

Commenting on the issue of when a board of directors is obligated as fiduciaries to redeem an outstanding rights plan, Vice-Chancellor Jacobs noted that "[t]he rapidly evolving law [in the rights redemption area] makes any precise legal formulation in this fast moving area a somewhat hazardous endeavor that is best left for another day."[77] The only issue reached by the court was whether, considering the pendency of a proposed auction, a board could decline to redeem a poison pill until the auction had run its course.[78] The court cited *CRTF Corp. v. Federated Department Stores, Inc.*[79] in concluding that Facet's Board did not have to redeem the rights.[80] Although the court noted that the possibility of a street sweep or coercive offer during an auction justified this decision, the real basis for the ruling was that Prospect's offer of $27.50 was below the recent $30 market price.[81] Logically, if Facet's Board could be faulted for accepting a bid below the current market price during an auction, the court could not bring about the same result by granting a preliminary injunction requiring redemption.[82]

Facet stands for the proposition that a board acting in good faith will not be required to redeem a poison pill during an auction situation. The court cited the language used in *CRTF Corp.*[83] to reach the conclusion that "a poison pill rights plan, if properly used, 'provides the directors with a shield to fend off coercive offers and with a gavel to run an auction.' "[84]

This opinion leaves several unanswered questions. The court stated that the board could leave the pill in place until the auction had "reasonably run its course."[85] However, the opinion does not resolve when this event occurs. For instance, what if a bidder announces that it has made its final offer? It could be argued that the

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76. *Id.*, slip op. at 19 n.10, *reprinted in* 14 DEL. J. CORP. L. at 321.
77. *Id.*, slip op. at 17, *reprinted in* 14 DEL. J. CORP. L. at 320.
78. *Id.*
79. 683 F. Supp. 422 (S.D.N.Y. 1988).
80. *Facet Enters., Inc.*, No. 9746, slip op. at 17, *reprinted in* 14 DEL. J. CORP. L. at 320.
81. *Id.*, slip op. at 18, *reprinted in* 14 DEL. J. CORP. L. at 321.
82. *Id.*, slip op. at 18-19, *reprinted in* 14 DEL. J. CORP. L. at 321.
83. 683 F. Supp. at 442.
84. *Facet Enters., Inc.*, No. 9746, slip op. at 17-18, *reprinted in* 14 DEL. J. CORP. L. at 320 (quoting *CRTF Corp.*, 683 F. Supp. at 439).
85. *Id.*, slip op. at 17, *reprinted in* 14 DEL. J. CORP. L. at 320.

pill would no longer be necessary in this situation. The major question remaining unanswered after this opinion is: When has an auction "reasonably run its course?"

CRTF Corp. v. Federated Department Stores, Inc.,[86] which was cited and followed in *Facet*, involved a *Revlon*-type auction for Federated Department Stores between two bidders, CRTF and R.H. Macy & Co. The facts in this case were extensive, however, for the purpose of analysis they can be briefly summarized.

CRTF had made a cash tender offer for all of Federated's outstanding common stock which was deemed grossly inadequate; however, it was increased several times until it reached the mid-$60 range at which point Federated's Board no longer appeared to deem the offer grossly inadequate.[87] Apparently CRTF and Federated were close to an agreement when Macy made a two-tiered tender offer.[88] The last offer that CRTF had on the table and an amended two-tiered tender offer by Macy were deemed "roughly" equivalent in the near term by Federated's financial advisors, but Macy's offer was considered better over the long term.[89]

At this point, CRTF made a "new," two-tiered, all cash offer for 80% of the stock at $75, with the remainder to be purchased in the back-end merger for $44, setting an expiration date for the offer four days later.[90] Macy also amended its offer, increasing the first stage price to be paid by $3.55 per share.[91] CRTF applied for a preliminary injunction to enjoin the use of Federated's poison pill against them.[92] In support of its motion, "CRTF cite[d] language from *Revlon* that it interpret[ed] as requiring a target Board to drop

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86. 683 F. Supp. 422 (S.D.N.Y. 1988).

87. *Id.* at 434.

88. *Id.* "On February 26, Federated and CRTF issued a joint press release [indicating] that they were negotiating a merger at $68 per share, . . . for all shares." *Id.* However, three days later Federated unilaterally issued a press release stating that it would consider another offer (implying the Macy offer). *Id.*

89. *Id.* Federated employed Goldman Sachs & Co., Shearson Lehman Hutton, Inc., and Hellman & Freidman, to present the relative merits of the competing offers. All three advisors opined that Macy's offer was superior to CRTF's, a conclusion with which the outside directors unanimously agreed. *Id.* at 434-35.

90. *Id.* at 435. There was dispute as to whether this constituted a new offer or an amended offer, as this was "relevant with respect to the number of days the offer must be kept open under SEC regulations . . . ." *Id.* As this is irrelevant to the issue of when a board must redeem a rights plan, it will be ignored for purposes of this note.

91. *Id.*

92. *Id.* at 435.

all defensive measures, including Poison Pills, when bidders make relatively similar offers, or when dissolution of the company becomes inevitable."[93] The United States District Court for the Southern District of New York did not agree. The court interpreted language such as ' "[m]arket forces must be allowed to operate freely to bring the target's shareholders the best price available for their equity' "[94] as emphasizing the objective of obtaining the best price rather than interpreting it to mean that it must be obtained by "market forces." Since there was no evidence that Federated's Board had a motive other than to enhance the bidding and maximize the price per share for the benefit of their shareholders, CRTF had not demonstrated a likelihood of success on the issue of the invalidity of the pill as a defensive measure in response to CRTF's two-tiered bid.[95]

The court declined to rule on the legality of a refusal to redeem outstanding rights under a rights plan if a bidder in an auction situation announced unequivocally that it had made its final offer.[96] The court did note, however, that during an auction no offer is ever really final until the auction is over.[97] Similarly, the issue of the validity of selective invocation of the rights at the end of an auction was expressly not reached.[98]

Both *Facet* and *CRTF* were decisions allowing a board to keep a poison pill in place during an auction. However, neither opinion gave a strong indication of exactly how far into an auction a board would be permitted to keep a pill in place. Under *Facet* it might be argued that an auction has reasonably run its course when the bidding is over. But, realistically, as indicated in *CRTF*, the end of the bidding is a difficult point to ascertain in the absence of an announcement to that effect by all the bidders.[99]

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93. *Id.* at 439.

94. *Id.* at 441 (quoting *Revlon*, 506 A.2d at 174).

95. *Id.*

96. *Id.* at 441-42.

97. *Id.* at 442.

98. *Id.* This issue was not yet ripe, as the end of the auction had not yet occurred. *Id.* The court, in passing over the issue, said that it would carefully scrutinize a board's favoring of one bidder over another, taking into consideration conflicts of interest and insider preferences. *Id.*

99. Two recent cases in which injunctions were sought at a point approaching the end of an auction, or at least well into the auction process, have been decided by the court of chancery. *In re* Holly Farms Corp. Shareholders Litig., No. 10,350 (Del. Ch. Dec. 30, 1988); Doskocil Cos. v. Griggy, No. 10,095 (Del. Ch. Oct. 7,

The only case to date in which a Delaware court concluded that an auction was over and required the target's board to redeem its

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1988), *reprinted in* 14 DEL. J. CORP. L. 682 (1989).

Doskocil Cos. illustrates that as long as a board is using a poison pill to facilitate value maximization during an auction by blocking the highest present bid and soliciting additional bids, the pill can remain in place. *Id.*, slip op. at 10-11, *reprinted in* 14 DEL. J. CORP. L. at 689. The only limitation on the use of a poison pill in this situation is that the board must bring the auction to a close on a reasonable schedule. *Id.*, slip op. at 11, *reprinted in* 14 DEL. J. CORP. L. at 689.

Doskocil Cos. involved the battle for Wilson Foods. Doskocil had made several offers for Wilson Foods which were rejected as inadequate. Wilson Foods then entered into an agreement and plan of merger with Soparind Meat Packing Corporation. Pursuant to that agreement, a cash tender offer of $13.50 per share was made. *Id.*, slip op. at 2-4, *reprinted in* 14 DEL. J. CORP. L. at 684-85. The agreement included the dismantling of Wilson Foods' poison pill as it applied to the Soparind offer. However, Doskocil subsequently made a cash tender offer of $14.50 per share. *Id.*, slip op. at 4-5, *reprinted in* 14 DEL. J. CORP. L. at 685-86. The Wilson Board refused to deactivate the pill for this offer. Doskocil sought a preliminary injunction. *Id.*, slip op. at 1, *reprinted in* 14 DEL. J. CORP. L. at 683.

The Delaware Court of Chancery accepted Wilson Foods' argument that the auction was not over. *Id.*, slip op. at 11, *reprinted in* 14 DEL. J. CORP. L. at 689. The Wilson Foods' Board was claiming that they wanted to keep the pill in place to facilitate value maximization for the shareholders. *Id.*, slip op. at 8, *reprinted in* 14 DEL. J. CORP. L. at 687-88. The court allowed the board to refuse to redeem the rights as long as the board was using the pill to carry out their *Revlon* duty of getting the best price per share for the stockholders. *Id.*, slip op. at 11, *reprinted in* 14 DEL. J. CORP. L. at 689.

In re Holly Farms involved the situation of an auction that ended before it began. *See In re Holly Farms Corp. Shareholders Litig.*, No. 10,350, slip op. at 12 (by accepting a stock swap transaction, the board placed the corporation on the auction block and was responsible for ensuring that its *Revlon* duties were met). Both Tyson Foods and ConAgra had expressed interest in acquiring Holly Farms. Holly Farms' Board, however, had determined that it would be in the stockholders' best interests to remain independent. *Id.*, slip op. at 3. The Holly Farms Board adopted a flip-in, flip-over poison pill to facilitate this goal. *Id.*

Within several weeks of the adoption of this poison pill, Holly Farms had received takeover bids from both Tyson Foods and ConAgra. Tyson Foods had made a $54 per share all cash tender offer and ConAgra had offered a stock swap with a nondiscounted nominal value of $57.75 per share. *Id.*, slip op. at 5-6. During a meeting to consider these bids, Holly Farms' Board decided to sell Holly Farms and at the same meeting decided to accept the ConAgra offer. *Id.*, slip op. at 6. Under the ConAgra offer, Holly Farms would remain substantially intact. *Id.*, slip op. at 13.

The Delaware Court of Chancery held that Holly Farms' Board had not carried out its duty under *Revlon* to maximize the value of the company for the shareholders upon the sale of the company. *Id.*, slip op. at 12. The court allowed Holly Farms to keep its poison pill in place while it conducted a *Revlon*-type auction. *Id.*, slip op. at 18. This case thus illustrates that a *Revlon* auction is not over simply because a target's board makes a determination to that effect. The auction only ends when the value of the company has been maximized for the benefit of the shareholders. *Id.*, slip op. at 17.

poison pill is *Mills Acquisition Co. v. Macmillan, Inc.*[100] *Mills Acquisition Co.* involved a complex takeover battle for Macmillan, Inc. The two competing bidders were Maxwell Communications Corp. (MCC) and Kohlberg Kravis Roberts & Co. (KKR).[101] After several rounds of maneuvering and bidding, "final" bids were submitted. KKR's $90.05 per share offer structured as a two tiered leveraged buyout (which had a true value, according to financial advisors, of approximately $89.70 per share) was higher than MCC's $89 per share all cash bid.[102] The KKR bid was accepted although it included a lock up option.[103] Refusing to give in, MCC raised its offer to $90.25 per share all cash.[104] The Macmillan Board rejected this offer claiming that they could not unilaterally abrogate the lock up option entered into under KKR's bid.[105]

The court found that the auction had ended and that the two highest bids were on the table.[106] Since KKR's $90.05 bid was deemed fair, MCC's $90.25 bid also had to be deemed fair.[107] The court held that in such a situation the board could not keep the rights in place.[108] The stockholders had to be given the option of considering a "fair" alternative cash transaction since the auction was over.[109]

In this case, the "end" of the auction was relatively easy to determine, given that the auction was a "blind auction." In other

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100. No. 10,168 (Del. Ch. Oct. 17, 1988) (revised Oct. 18, 1988), *reprinted in* 14 DEL. J. CORP. L. 772 (1989), *rev'd on other grounds*, 559 A.2d 1261 (Del. 1989) (ruling on preliminary injunction enjoining the use of the poison pill was not the subject of the appeal).

101. *Id.*, slip op. at 1, *reprinted in* 14 DEL. J. CORP. L. at 777.

102. *Id.*, slip op. at 12-13, 24-26, *reprinted in* 14 DEL. J. CORP. L. at 782-83, 789-90.

103. *Id.*, slip op. at 26, *reprinted in* 14 DEL. J. CORP. L. at 790-91. This amended offer was conditioned upon the lock-up option to KKR being declared invalid and Macmillan's poison pill rights being made inapplciable to MCC's offer. *Id.*, slip op. at 28, *reprinted in* 14 DEL. J. CORP. L. at 792.

104. *Id.*, slip op. at 27-28, *reprinted in* 14 DEL. J. CORP. L. at 791.

105. *Id.*, slip op. at 28, *reprinted in* 14 DEL. J. CORP. L. at 792.

106. *Id.*, slip op. at 50, *reprinted in* 14 DEL. J. CORP. L. at 803.

107. *Id.*

108. *Id.*

109. *Id. See* Crossen & Blumenthal, *An Anti-Takeover Arsenal That Failed*, Wall St. J., Nov. 4, 1988, at B-1, cols. 5-6 (discussing the many takeover defenses employed by Macmillan's Board). Ultimately, the Macmillan Board recommended to the shareholders that they tender their shares into the MCC offer and KKR withdrew its competing bid. Significantly, the MCC $90.25 offer was 80% higher than the initial price offered when this takeover battle began thus illustrating the usefulness of a poison pill as a value maximization tool, *Id.* at B-1, cols. 3-4.

words, each bidder was required to submit a secret bid on a certain date.[110]

As discussed above, redemption pursuant to a preliminary injunction has generally been sought in one of two situations. The first situation is prior to or during a *Revlon*-type auction. As the decisions in this area indicate, a board will generally not be required to redeem or dismantle a pill before or during an auction because the pill effectively enables a board to carry out their *Revlon* duty of getting the best price per share for the stockholders.[111] However, as seen in *Mills Acquisition Co.*, if two "fair" and final bids are on the table a board may not be permitted to selectively invoke the rights plan to exclude a competitive bid in the absence of evidence to substantiate their position that this would be in the stockholders' best interests.

B. Non-Auction Situation

The following cases involve preliminary injunctions which sought redemption in non-auction situations.[112] In *BNS Inc. v. Koppers*

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110. *Mills Acquisition Co.*, No. 10,168, slip op. at 47-48, *reprinted in* 14 DEL. J. CORP. L. at 802.

111. In *Revlon*, the Delaware Supreme Court held that when a corporation is for sale, the duty of its board of directors changes from the preservation of the corporate entity to the maximization of the company's value for the stockholders' benefit. *Revlon, Inc.*, 506 A.2d at 182.

112. The term "non-auction" situation, as used throughout this note, refers to the situation in which a board of directors is managing the corporation in the long run interests of shareholders, as opposed to the situation in which a board's fiduciary duties require it to manage the corporation to maximize present share value. *See* TW Servs., Inc. v. SWT Acquisition Corp., Nos. 10,427, 10,298, slip op. at 19-25 (Del. Ch. Mar. 2, 1989). In a non-auction context, a board's duty is "to manage the corporation within the law, with due care and in a way intended to maximize the long run interests of shareholders." *Id.*, slip op. at 19.

A critical question is when does this duty to maximize long-term value end and the duty to maximize present share value begin? This second duty, commonly referred to as the "*Revlon* duty," clearly attaches when a board decides to sell the company. *Id.* In *Revlon*, the Delaware Supreme Court stated that the duty attaches "[when] the break up of [a] company [is] inevitable . . . ." *Id.* (quoting *Revlon*, 506 A.2d at 182). No Delaware case has raised and definitively answered this issue. *Id.*, slip op. at 25.

In *TW Services*, this issue was raised by the Delaware Court of Chancery. However, the court did not address this question due to the particular facts presented. *Id.* SWT Acquisition Corp. sought a preliminary injunction requiring TW Services to redeem its flip-in, flip-over poison pill in the face of SWT's $29 per share all cash tender offer. *Id.*, slip op. at 1, 5-6 n.2. Although deemed inadequate by TW's financial advisors, the offer was approximately twice the then current $19 market

Co.,[113] the United States District Court for the District of Delaware denied an acquirors' request for a preliminary injunction which would have required Koppers' Board to redeem the rights under its stockholder rights plan.[114] The sole attack on the Koppers rights plan was that the directors' refusal to redeem the rights in light of the BNS offer was unreasonable.[115] More specifically, BNS argued that its offer did not pose a threat to Koppers and therefore the refusal of the board to redeem the rights was unreasonable considering the offer.[116]

The original BNS offer was $45 per share; it was later increased to $56 per share.[117] Both of these offers were rejected after substantial review and deliberation by the Koppers Board. The rejection of both offers was based on the board's assessment of the value of Kopper's common stock, the advice of competent financial advisors, the possibility of other transactions yielding higher value to the stockholders in the long run, and finally, the likelihood of the failure of the BNS offer.[118]

The district court applied the two part test developed in *Unocal* and *Moran* to determine whether the board's refusal to redeem the poison pill would be upheld. First, the court concluded that the board reasonably perceived a threat to corporate policy after the board

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price. *Id.*, slip op. at 8.

TW's board refused to even consider redemption of its poison pill claiming that the offer was not "bona fide" and that it was merely an invitation to negotiate. *Id.*, slip op. at 10. TW argued that several conditions attached to the offer, namely, a board approval condition and a merger agreement condition, and that these conditions caused the poison pill to have no effect on SWT's ability to purchase shares pursuant to its offer. *Id.*, slip op. at 12-15, 35 n.21. Stated simply, until these conditions to SWT's offer were waived, the poison pill was not blocking the offer. TW's shareholders apparently favored the offer because 88% of them were prepared to tender their shares. *Id.*, slip op. at 24.

However, the court held that TW had acted in good faith and not breached any duty by determining that they would continue to manage the corporation in a long-term mode and not consider placing the corporation in a *Revlon* current share value maximizing mode until presented with a bona fide offer. *Id.*, slip op. at 34, 35 n.21. This holding appears consistent with Delaware case law indicating that a refusal to entertain an offer may be a valid exercise of business judgment. *Pogostin*, 480 A.2d at 627.

113. 683 F. Supp. 458 (D. Del. 1988).

114. *Id.* at 476.

115. *Id.* at 462. BNS conceded that the adoption of the pill was within the power of the Koppers Board. *Id.* at 474.

116. *Id.* at 475.

117. *Id.*

118. *Id.*

conducted a good faith, reasonable investigation.[119] Second, the court held that the response (refusing to redeem the rights) was reasonable in relation to the threat posed.[120] The burden was then shifted back to BNS to show a breach of duty on the part of the directors, which BNS was unable to do.[121] This case illustrates the difficulty faced by an offeror, when a board composed of a majority of independent directors acting on competent legal and financial advice reaches the conclusion that an offer is inadequate and that the pill should not be redeemed, thus effectively blocking the offer.[122]

In *Tate & Lyle PLC v. Staley Continental, Inc.*,[123] the plaintiff, Tate & Lyle PLC, sought a preliminary injunction enjoining the use of several anti-takeover defenses, including a poison pill, by the defendant, Staley Continental, Inc. Staley's Board had adopted a poison pill in April of 1986 in response to their depressed stock value and an active takeover climate.[124] Under the plan, rights were distributed to Staley's shareholders allowing them to purchase $150 worth of Staley common stock for $75 if there was a hostile acquisition of 40% or more of Staley's common stock.[125] The rights could be redeemed for $.05 per share within 15 days of activation.[126] The pill included a flip-over provision, under which each right holder would be able to purchase two shares of the acquiror's common stock for the price of one share, if an acquiror became the beneficial owner of 20% or more of Staley's common stock, and Staley was acquired in a merger or 50% or more of Staley's assets were sold.[127]

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119. *Id.* at 474. Significantly, the court noted that an inadequate offer alone is a threat. *Id.* at 475.

120. *Id.* at 475. A persuasive argument can be made based on this case and others discussed in this note that the refusal to redeem the rights under a rights plan will always be a reasonable response to an inadequate offer. *See supra* notes 60-85, 99 and accompanying text.

121. *Id.* at 476. BNS argued that the Koppers Board was not composed of a majority of disinterested directors because those directors adopted the poison pill without shareholder approval. The court rejected this argument implying that the adoption of a poison pill by a board of directors does not make them "interested." *Id.* at 475.

122. *See* Pease, *supra* note 4, at 35-40 (comprehensive discussion of the value of independent directors).

123. No. 9813 (Del. Ch. May 9, 1988), *reprinted in* 14 DEL. J. CORP. L. 418 (1989).

124. *Id.*, slip op. at 8-9, *reprinted in* 14 DEL. J. CORP. L. at 427.

125. *Id.*, slip op. at 9, *reprinted in* 14 DEL. J. CORP. L. at 427.

126. *Id.*

127. *Id.* By way of example, if the plaintiff in this case acquired 55% of Staley's stock for $32 per share, the rights, when fully exercised, would reduce the Tate & Lyle's interest in Staley to 17.7%. *Id.*

In late 1986 and early 1987 takeover speculation arose.[128] In an effort to discourage takeover speculation Staley encouraged Tate & Lyle to purchase 5%-10% of Staley's common stock and thereby act as a white knight.[129] However, by late 1987, Tate & Lyle began to show a takeover interest in Staley and filed an intention to purchase additional shares as required under the Federal Hart-Scott-Rodino Anti-Trust Act of 1976.[130] In response to this unexpected threat, Staley amended its poison pill in an effort to strengthen its defenses.[131] One of the two amendments reduced the triggering acquisition percentage on the flip-in rights plan from 40% to 20%.[132] Staley's Board received competent legal and financial advice in deciding whether to enact this amendment.[133]

In April of 1988, Tate & Lyle, through a subsidiary, RP Acquisition Co., commenced a $32 per share cash tender offer for a majority of Staley's stock.[134] The day before the offer, Staley's stock traded at slightly over $32 per share and subsequently rose as high as $37.50 per share.[135] In April the tender offer was raised to $35 per share.[136]

In ruling on the application for a preliminary injunction, the court noted initially its concern that it was just a pawn in an emerging takeover battle that would ultimately be resolved in the marketplace.[137] Because this was mentioned in the opinion, it seems clear that the court was very reluctant to interfere in this recently initiated takeover battle. This illustrates the point that often the quest for injunctive relief to force the board to redeem the pill is merely used as a negotiating tactic—especially when sought in the early stages of a battle. It appears clear that when a hopeful acquiror seeks to force

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128. *Id.*, slip op. at 10, *reprinted in* 14 DEL. J. CORP. L. at 427.

129. *Id.* A "white squire" arrangement occurs when a group or corporation that is management friendly as opposed to a potential hostile acquiror is issued or purchases stock in the target. *See* Wander & LeCoque, *Boardroom Jitters: Corporate Control Transactions and Today's Business Judgment Rule*, 42 BUS. LAW. 29, 51 (1986).

130. *Tate & Lyle PLC*, No. 9813, slip op. at 10, *reprinted in* 14 DEL. J. CORP. L. at 428.

131. *Id.*, slip op. at 10-11, *reprinted in* 14 DEL. J. CORP. L. at 428. The court characterized Staley's pre-amendment antitakeover devices as "unusually strong." *Id.*, slip op. at 10, *reprinted in* 14 DEL. J. CORP. L. at 428.

132. *Id.*, slip op. at 11, *reprinted in* 14 DEL. J. CORP. L. at 428.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*, slip op. at 12, *reprinted in* 14 DEL. J. CORP. L. at 428.

137. *Id.*, slip op. at 14, *reprinted in* 14 DEL. J. CORP. L. at 430.

redemption in the early stages of a takeover attempt, the acquiror is fighting a losing battle.[138]

In reaching a decision, the court first held that under *Moran*, the adoption of a poison pill prior to a specific takeover threat is permissible as a balanced response to a climate of potentially coercive tender offer activity.[139] However, the plaintiff argued that the adoption of the pill was designed to ward off, among other things, two-tiered tender offers, bootstrap offers and street sweeps and because none of these was present here, the rights plan should be redeemed as inapplicable to this offer.[140] The court stated in response that a valid purpose for a poison pill is to promote an auction; when the market

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138. This analysis is supported by another recent case. In MAI Basic Four, Inc. v. Prime Computer, Inc., No. 10,428 (Del. Ch. Dec. 20, 1988), a tender offer was made by MAI for Prime Computer on November 15, 1988. *Id.*, slip op. at 2. MAI's motion to force redemption of Prime's poison pill was denied on December 20 due to the short time the offer had been outstanding and the possibility that allowing Prime's Board to keep the pill in place would result in an increase in the offer. *Id.*, slip op. at 13.

The argument that early redemption of a poison pill will almost never be granted assumes that an initial tender offer is relatively low, however, a preemptive bid is a high initial offer which reduces the chance of an auction or defensive measure such as restructuring or management taking the company private. N.Y. Times, Dec. 22, 1988, at D2, col. 1.

This pre-emptive bid strategy was used in a recent battle for control of the Pillsbury Company. Grand Metropolitan PLC made an initial all cash offer of $60 for all shares of Pillsbury on October 4, 1988, conditioned on the redemption of a poison pill which had been adopted by the Pillsbury Board in 1986. Grand Metro. Pub. Ltd. v. Pillsbury Co., 558 A.2d 1049, 1052 n.4 (Del. Ch. 1988) (The subject of this opinion was Grand Metropolitan's renewed motion for a preliminary injunction; It is cited here because it describes the facts of the case more thoroughly than the opinion on the initial motion for a preliminary injunction; The takeover battle involved two motions, the original one decided on November 7, 1988, and the renewed one decided on December 16, 1988).

Pillsbury stock had been trading at $39 per share in late September of 1988. *Id.* On October 17, the Pillsbury Board rejected the $60 offer as inadequate. *Id.* On November 7, the Delaware Court of Chancery denied Grand Metropolitan's initial motion for a preliminary injunction forcing redemption. Grand Metro. PLC v. Pillsbury Co., Nos. 10,319 & 10,323 (Del. Ch. Nov. 7, 1988) (revised Nov. 9, 1988). The court had only a short time to rule on the motion because, at that time, the offer was to expire on November 8. *Id.*, slip op. at 1. The court noted that the Pillsbury Board was composed of a majority of independent directors. *Id.* There was no evidence that they were acting primarily out of their own interests, and the board's financial advisors felt that the offer was inadequate. *Id.* Although the pre-emptive bid failed initially, it later succeeded. *See infra* note 182 (discussing renewed motion for preliminary injunction).

139. *Tate & Lyle PLC*, No. 9813, slip op. at 21, *reprinted in* 14 DEL. J. CORP. L. 434 (1989) (citing *Moran*, 500 A.2d at 1356-57).

140. *Id.*, slip op. at 22, *reprinted in* 14 DEL. J. CORP. L. at 434.

price of a target's stock is greater than the price being offered, the pill allows a board to seek a more realistic offer.[141] Thus, the court reasoned that the plaintiff had not met its burden of showing a reasonable probability of success on the argument that the board's failure to redeem the pill was a breach of any fiduciary duty.[142] Additionally, reduction of the trigger percentage was deemed irrelevant here because the offer was conditioned on a majority of Staley shareholders tendering their shares.[143] Therefore, whether the triggering percentage was 40% or 20% was irrelevant because RP had to acquire 50% of the shares for its offer to become effective.[144]

A significant aspect of this opinion is a comment made by the court indicating its reluctance to grant injunctive relief. The court noted two problems that it was facing in ruling on this preliminary injunction in the context of a takeover battle: a "voluminous record" and the need to make the decision in a "very short time."[145] Because balancing the equities in this situation will be very difficult, a court will be reluctant to force redemption in the absence of considerable and weighty evidence offered by a potential acquiror indicating that immediate relief is absolutely necessary to avoid a clear irreparable injury.[146]

In *Nomad Acquisition Corp. v. Damon Corp.*,[147] Nomad Acquisition Corp. (Nomad) sought a mandatory preliminary injunction to, among other things, require Damon Corp. (Damon) to redeem the rights issued under its poison pill.[148] In April of 1988 Nomad filed a schedule

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141. *Id.* Although superficially this court seemed to base this opinion on the grounds that refusing to redeem the rights could promote an auction, more realistically, this decision was based on the fact that RP Acquisition Company's offer was inadequate as it was below the current market price of Staley's common stock. Moreover, Staley's Board had indicated that they wanted to maintain control of the company by seeking a white knight. *Id.*, slip op. at 22, *reprinted in* 14 DEL. J. CORP. L. at 434-35.

142. *Id.*, slip op. at 23, 25, *reprinted in* 14 DEL. J. CORP. L. at 435, 436.

143. *Id.*, slip op. at 23, *reprinted in* 14 DEL. J. CORP. L. at 435.

144. *Id.*

145. *Id.*, slip op. at 13-14, *reprinted in* 14 DEL. J. CORP. L. at 429-30. The court noted that this problem was often present in any application for a preliminary injunction, regardless of context. *Id.*

146. *Id.*, slip op. at 12-13, *reprinted in* 14 DEL. J. CORP. L. at 429. *See supra* note 138 (discussing the ineffectiveness of an acquiror attempting to obtain a preliminary injunction forcing redemption of a rights plan during the early stages of a takeover effort).

147. Nos. 10,173 & 10,189 (Del. Ch. Sept. 16, 1988), *reprinted in* 14 DEL. J. CORP. L. 814 (1989).

148. *Id.*, slip op. at 4, *reprinted in* 14 DEL. J. CORP. L. at 818.

13D with the Securities and Exchange Commission disclosing its purchase of 9.97% of Damon's outstanding common stock and announcing it was considering seeking control of Damon through a negotiated transaction, tender offer or by other means.[149] In response to this threat, competent legal and financial advisors to the Damon Board recommended a poison pill to protect the shareholder's interests. Damon asserted its advisors represented that a poison pill would force potential acquirors to negotiate with the board ensuring that shareholders would get full value for their stock and discouraging abusive takeover strategies.[150]

Nomad's contention was that the poison pill was used primarily to entrench Damon's management and board and, furthermore, that it was unreasonable in relation to Nomad's asserted interest in Damon.[151] Nomad, consistent with its intent, made a cash tender offer of $24 per share.[152] When the offer was made Damon stock was trading at $18-7/8 per share but subsequently rose to $25-5/8 per share.[153] Damon's financial advisors felt that Damon stock had a true value somewhere in the low to mid $30 range.[154]

In ruling that the Damon Board had shown that it had acted reasonably in refusing to redeem the rights, the court relied on two factors often cited by courts as supporting a board's refusal to redeem an outstanding poison pill. First, Damon's financial advisors had valued Damon stock significantly higher than the Nomad offer.[155] Second, the market price for Damon's stock was higher than the offer price.[156]

The court ruled that it would not order redemption where the "effect of the redemption would negatively impact the shareholders' ability to realize full value for their shares."[157] This is the rule even where the tender offer is for all cash.[158]

For the first time, a Delaware court stated a standard which, if met, will result in a denial of a preliminary injunction forcing redemption of a poison pill. This standard clearly indicates that

149. *Id.*, slip op. at 5, *reprinted in* 14 DEL. J. CORP. L. at 818.
150. *Id.*, slip op. at 5, *reprinted in* 14 DEL. J. CORP. L. at 819.
151. *Id.*, slip op. at 6, *reprinted in* 14 DEL. J. CORP. L. at 819.
152. *Id.*, slip op. at 9, *reprinted in* 14 DEL. J. CORP. L. at 821.
153. *Id.*, slip op. at 9-10, *reprinted in* 14 DEL. J. CORP. L. at 821.
154. *Id.*, slip op. at 8, *reprinted in* 14 DEL. J. CORP. L. at 820.
155. *Id.*, slip op. at 16, *reprinted in* 14 DEL. J. CORP. L. at 824.
156. *Id.*
157. *Id.*
158. *Id.*

redemption will not be ordered in several circumstances. A pill will not have to be redeemed when the market price is greater than the offer. Furthermore, the opinion implies that if competent financial advisors value the corporation's stock in excess of the offer price, the pill need not be removed. If this standard is interpreted broadly it will go a long way toward protecting a board in its good faith decision not to redeem a poison pill in a non-auction situation.

Use of a poison pill to block a takeover in a nonauction situation is different from its use in an auction situation. In each case presented so far a board's refusal to redeem a rights plan in a nonauction situation, effectively blocking a takeover attempt, has been upheld.[159] In this situation if a board is composed of a majority of independent directors who are acting upon competent legal and financial advice, its decision to keep a pill in place to block an offer it deems inadequate will be upheld under the two part *Unocal* test in the absence of a showing by the plaintiff that the board breached one of their fiduciary duties.[160] Necessarily, a courts decision in this type of a case is a fact specific determination.[161]

The use of a poison pill in a nonauction situation may be curtailed by a recent decision, *City Capital Associates Ltd. Partnership v. Interco Inc.*,[162] handed down by the Delaware Court of Chancery. City Capital Associates (CCA) made an initial offer of $64 per share for Interco, Inc.[163] After several amendments the offer reached $74 per share.[164] While the case was pending in the court of chancery, Interco Inc.'s stock was trading at about $70 per share.[165] However, Interco's Board of Directors refused to redeem its poison pill, which effectively blocked the tender offer and chose instead to adopt a restructuring plan.[166]

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159. *See* BNS Inc. v. Koppers Co., 683 F. Supp. 458 (D. Del. 1988); Nomad Acquisition Corp. v. Damon Corp., Nos. 10,173 & 10,189 (Del. Ch. Sept. 16, 1988), *reprinted in* 14 DEL. J. CORP. L. 814 (1989); Tate & Lyle PLC v. Staley Continental, Inc., No. 9813 (Del. Ch. May 9, 1988), *reprinted in* 14 DEL. J. CORP. L. 418 (1989).

160. *See supra* note 54 and accompanying text.

161. *Mills Acquisition Co.*, No. 10,168, slip op. at 49, *reprinted in* 14 DEL. J. CORP. L. at 803.

162. 551 A.2d 787 (Del. Ch. 1988).

163. *Id.* at 792.

164. *Id.* at 794 (offer was for an acquisition by merger).

165. *Id.* (offer was a cash tender offer).

166. *Id.*

Chancellor Allen held that the Interco Board had violated its duties under *Unocal*.[167] Emphasizing that the value of the restructuring plan was highly debatable, the court held that the refusal to redeem the rights prevented Interco's shareholders from choosing between the restructuring plan and the tender offer.[168]

The court applied the two-prong *Unocal* test to determine whether Interco's Board's actions would be protected under the business judgment rule.[169] The court first noted that an inadequate but non-coercive tender offer can be a threat to shareholder interests.[170] If the court explained that if a board can keep a poison pill in place in this situation, the shareholders will be in a better situation than if the board had to redeem the pill because the board will possess added negotiating power, will have additional time to conduct a *Revlon*-type auction, or will have additional time to develop an alternative to the tender offer such as a restructuring plan, all of which may increase shareholder wealth.[171] However, when a board decides not to conduct an auction and the negotiating is over and an alternative option has been developed, a poison pill will only "preclude the shareholders from exercising a judgment about their own interests that differs from the judgment of the directors . . . ."[172]

The only "threat" in existence, according to the court, was that the Interco Board would be correct in their valuation of the

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167. *Id.* at 800. *See* Labaton, *Ruling Seen Curtailing "Poison Pills,"* N.Y. Times, Nov. 2, 1988 at D-7, col. 1 (indicating that the opinion was "broadly worded").

168. *City Capital Assoc. Ltd. Partnership*, 551 A.2d at 799.

169. *Id.* at 796. The court found 10 facts to be uncontested or uncontestable: First, the value of the restructuring was inherently debatable; second, the Interco Board believes in good faith that the restructuring plan is worth $76 per share; third, the tender offer is for $74 per share; fourth, the Interco Board acted prudently to inform itself of the value of the company; fifth, the board believes in good faith that the tender offer is inadequate; sixth, the poison pill effectively blocks the tender offer; seventh, the Interco shareholders have different liquidity preferences; eighth, a reasonable shareholder could prefer either the tender offer or the restructuring plan; ninth, the tender offer is not coercive because it is for all shares in all cash and contemplates a prompt follow-up merger for the same consideration; tenth, at the present stage the poison pill is only protecting the restructuring plan; it is no longer useful to add negotiating strength or to give the board additional time to develop an alternative plan or conduct an auction. *Id.* at 795-96.

170. *Id.* at 797-98 (citing Doskocil Cos. v. Griggy, No. 10,095 (Del. Ch. Oct. 17, 1988), *reprinted in* 14 DEL. J. CORP. L. 682 (1989); Nomad Acquisition Corp. v. Damon Corp., Nos. 10,173 & 10,189 (Del. Ch. Sept. 16, 1988), *reprinted in* 14 DEL. J. CORP. L. 814 (1989); Facet Enters., Inc. v. Prospect Group, Inc., No. 9746 (Del. Ch. Apr. 15, 1988), *reprinted in* 14 DEL. J. CORP. L. 310 (1989)).

171. *Id.* at 798.

172. *Id.*

restructuring plan and the stockholders would choose the tender offer and thereby be injured.[173] The court further noted that there may be a situation in which a board will be warranted in permanently blocking a noncoercive tender offer with a poison pill.[174] However, in this case, the pill could not be used to block a tender offer which the shareholders might reasonably choose over the board's restructuring plan.[175] In other words, the "threat" at this stage was insufficient to warrant keeping the poison pill in place. Because the plaintiff had shown a reasonable probability of success on the merits and because stockholder choice would result in irreparable injury, the court granted injunctive relief requiring redemption.[176]

An understanding of a possible flaw in this decision can be achieved by comparing it to *Mills Acquisition Co. v. Macmillan, Inc.*[177] In *Mills Acquisition Co.*, the Delaware Court of Chancery held that a board of directors could not preclude shareholder choice at the end of an auction by using a poison pill to block an all cash offer that was slightly higher than a two tiered leveraged buyout which had already been accepted by the board.[178] In *Interco*, as in *Mills Acquisition Co.*, shareholders were given the opportunity to consider a fair alternative cash transaction.[179] The tender offer and restructuring plan were treated like bids during a corporate auction, although no auction was to take place.[180] This necessarily extends the holding in *Mills Acquisition Co.* to non-auction situations.

The holding that it is a breach of fiduciary duty not to permit shareholders to choose between a tender offer (short-term value maximization) and a restructuring plan (long-term value maximization)[181] in a non-auction situation effectively gives shareholders the power to determine that the corporation should be managed to maximize short-term value which is inconsistent with the bedrock

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173. *Id.*

174. *Id.*

175. *Id.* at 799.

176. *Id.* at 799-800.

177. No. 10,168 (Del. Ch. Oct. 17, 1988). *See supra* notes 100-11 and accompanying text (discussing *Mills Acquisition Co.*).

178. *See supra* notes 100-11 and accompanying text.

179. The court stated that "[o]ur cases . . . indicate that in the setting of a noncoercive offer, absent unusual facts, there may come a time when a board's fiduciary duty will require it to redeem the rights and to permit the shareholders to choose." *City Capital Assoc. Ltd. Partnership*, 551 A.2d at 798.

180. *See City Capital Assoc. Ltd. Partnership*, 551 A.2d at 801-03.

181. *See id.* at 759 (restructuring plan intended to achieve best value for shareholders).

principal of Delaware corporate law that the directors determine how the corporation should be managed.[182]

In *MAI Basic Four, Inc. v. Prime Computer, Inc.*,[183] the Delaware Court of Chancery attempted to define the parameters of the *Interco* decision. The court emphasized that *Interco* involved unique facts. Redemption of the poison pill was sought at the end of a long takeover battle.[184] The only purpose that the pill was serving was to protect the Interco Board's restructuring plan and at least half of the board members had economic interests in the restructuring plan.[185] The court did clearly state that *Interco* "hold[s] that anti-takeover devices cannot be used merely to defeat a hostile tender offer which is neither coercive, inadequate, nor a threat to the corporation."[186]

V. CONCLUSION

When is a board of directors obligated by its fiduciary duties to its stockholders to redeem an outstanding poison pill? A board is not required to redeem the rights simply because it is faced with a

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182. *See* DEL. CODE ANN. tit. 8, § 141(a) (1983). *See also supra* note 112 (in non-auction context, board manages corporation to maximize long run shareholder value).

In the battle for Pillsbury Company, the Delaware Court of Chancery's decision on Grand Metropolitan's renewed motion for a preliminary injunction appears to suffer from a similar flaw in reasoning. *See supra* note 138 (discussing initial motion for preliminary injunction).

In a lengthy opinion handed down on December 16, 1988, the Delaware Court of Chancery granted Grand Metropolitan's renewed motion for a preliminary injunction forcing redemption. *Grand Metro. Pub. Ltd.*, 558 A.2d at 1060. By the date of the argument of the motion, the offer had been raised to $63 per share. *Id.* at 1052 n.4. The only possible threat arising from this offer was that it was inadequate. *Id.* at 1058. However, there was substantial evidence, according to the court, that the offer was fair and possibly generous. *Id.* at 1057. No competitive bids had been solicited. *Id.* Pillsbury contended that its long-term strategy would produce greater long-term value for the stockholders than the $63 tender offer. *Id.* Thus, the $63 offer was inadequate and, therefore, posed a threat to the stockholders. However, the low estimate of long run value was $68 per share. *Id.* Under these circumstances, the court held that the Pillsbury Board's failure to redeem the poison pill violated fiduciary duties owed by them to the stockholders. *Id.* at 1060. The stockholders thus had the right to choose between an arguably generous all cash tender offer and the board's long-term plan. In reaching this decision, the court may have misapplied *Unocal* because, although the court found that a majority of disinterested directors had acted in good faith and after reasonable investigation, the court concluded that the board could not show that they reasonably perceived a threat.

183. No. 10,428 (Del. Ch. Dec. 20, 1988).

184. *Id.*, slip op. at 8-9.

185. *Id.*, slip op. at 9.

186. *Id.*

noncoercive all cash tender offer. If an offer is deemed inadequate by a board composed of a majority of independent directors acting upon competent legal and financial advice, a pill can be used to block that offer. However, several Delaware Court of Chancery decisions indicate that there may be situations in which a board will be required to redeem a poison pill in the face of a noncoercive offer in order to permit the shareholders to choose between the noncoercive offer and a restructuring plan or other transaction that does not involve a change in control. It should be remembered that this appears to be inconsistent with, or maybe more accurately an extension of, Delaware law. The Delaware Supreme Court has not yet addressed this issue.

If a board decides to conduct an auction, it may keep the pill in place until the auction has reasonably run its course. This will enable the shareholders to receive maximum value for their shares. Stated differently, in an auction situation, even if an offer is deemed adequate, a pill can be kept in place to promote the continuation of the auction. Moreover, a target's board may be able to keep a pill in place to favor one bidder over another if the board believes in good faith that this would advance the shareholders' interests. However, if a board has been able to obtain two very close bids, shareholders may have the right to choose between the bids at the close of the auction, in which case a poison pill cannot be used to block one of the offers.

A showing of bad faith or a violation of one of the other fiduciary duties, such as acting from an entrenchment motive, will result in the granting of a preliminary injunction requiring redemption. Ultimately, whether redemption is required depends on the particular facts of a case; therefore, there may be situations in which the general rules stated above will not be determinative of whether a particular poison pill should be redeemed.

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